Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KOPHAMMER FARMS, Respondent, and GUADALUPE (LUPE) CORTEZ, Charging Party.	)	Case No. 80-CE-31-D 8 ALRB No. 21

ERRATUM

The citation which appears in footnote No. 4 on page 4 of the Decision is hereby corrected to read as follows: Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307.

Dated: April 6, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KOPHAMMER FARMS, Respondent, and GUADALUPE (LUPE) CQRTEZ, Charging Party.	)	Case No. 80-CE-31-D 8 ALRB No. 21

DECISION AND ORDER

On October 14, 1980, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, General Counsel timely filed exceptions and a brief in support thereof, and Respondent filed a brief in response to General Counsel's exceptions.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.[1/]

The Board has considered the record and the ALO's Decision in light of the exceptions and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent that they are consistent herewith.[2/]

[1/] Board Member McCarthy did not participate in this Decision.

[2/] At the close of General Counsel's case, Respondent moved to dismiss on the ground that General Counsel did not meet his burden of proof that there had been a violation of section 1153(a), pursuant to 8 California Administrative Code section 20242(a).

[fn. 2 cont. on p. 2]

The Complaint alleged that Respondent violated section 1153(a) of the Act by discharging a crew of agricultural employees, supplied by a labor contractor, because of their protected concerted activity, i.e., protesting that they were sprayed with toxic pesticides during the course of a crop-dusting operation. In his Decision, the ALO concluded that Respondent did not violate the Act by its discharge of the crew.

Although Respondent's primary agricultural activity is the production and packing of onions, Respondent also grows lettuce as a fill-in crop. The lettuce is jointly produced by Respondent and the Garin Company of Salinas, who share the costs and profits of the lettuce operation. Respondent contracted with labor contractor Roy Ramirez to provide workers to thin and weed the lettuce crop.

On March 8, 1980, the crew members, some of whom were permanent employees of Respondent and others of whom were workers

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[fn. 2 cont.]

The ALO reserved ruling on the motion until after the hearing and included his affirmative ruling in his Decision. He cited section 20242(b) which governs "Motions During Hearing" and provides that:

> The administrative law officer shall rule on all motions orally on the record, unless he or she reserves ruling until after the close of the hearing, in which case the ruling shall be in writing, with reasons stated, and shall be served on all parties.

The Board has always read section 20242 (b) as contemplating that post-hearing rulings on motions will be incorporated in the ALO's Decision, thus exceptions thereto would be filed in accordance with section 20282(a). Furthermore, section 20242 (c) is clearly applicable only to rulings made during the course of the hearing and interim appeals therefrom to the Board, a situation not present here.

supplied by labor contractor Ramirez, were thinning lettuce. That afternoon, the lettuce field was sprayed by a crop-dusting plane piloted by Arthur Tregenza.

The Concerted Activity

Immediately after the field was sprayed by Tregenza, the employees protested to Respondent's field supervisor, Carlos Garcia, claiming that they had been sprayed during the course of the crop-dusting operation.[3/] They refused to re-enter the fields to work the remainder of the day and requested that they be paid for a full day's work. The following work day, employees Cortez and Esparza complained to Garcia of headaches and stomach distress. We find that the aforesaid protests and the work stoppage were clearly concerted activities, protected under section 1153 (a) of the Act. As the workers' protests and refusals to work were directed to supervisor Garcia, we find that Respondent had knowledge of the protected concerted activities. Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13.

The Discharge

On March 10, supervisor Garcia discharged the crew,

[3/] There is a conflict in testimony between Tregenza, who testified that none of the discharged pesticide came into contact with the workers, and the General Counsel's witnesses, who testified that they were directly sprayed while leaving the field and while they were outside the field. We find it unnecessary to resolve this matter as Respondent does not challenge the uncontroverted testimony of the General Counsel's witnesses that they engaged in the concerted protest discussed above. We note, however, Tregenza's testimony that he did not inform Respondent of his intention to spray the field prior to doing so, as required by section 3094 of Title 3, California Administrative Code. In view of Tregenza's failure to give the required notice, it appears likely that the employees were caught unaware by the spraying and that the pesticide fell on some of them.

allegedly for poor work. We must now examine whether General Counsel has met his burden of establishing a prima facie case that protected concerted activity was a basis for Respondent's decision to discharge the employees on March 10. To overcome a prima facie case, Respondent must show that it would have reached the same decision absent the employees' protected activities. Nishi Greenhouse (Aug. 5, 1971) 7 ALRB No. 18; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].

Several factors lead us to conclude that General Counsel has met his burden of establishing that the employees' protected concerted activities were a basis for Respondent's decision to discharge them. First is the timing and abruptness of the discharge, two working days or less after the workers engaged in protected activities. Moreover, Respondent neither warned nor reprimanded any of the workers about their alleged poor work prior to their discharge. Indeed, the uncontradicted testimony of the employees indicates that they had been commended by supervisor Garcia for their work just two days prior to their discharge. Finally, employee Cortez testified that a week after the crew was discharged, foreman Mendoza told her that "[labor contractor] Ramirez had said that he was going to give him [Respondent] a crew, but without the people who had complained about the spraying."[4/] Respondent did not call Garcia, Mendoza, or Ramirez

[4/]We find this statement to be attributable to Respondent under Vista Verde Farms v. ALRB (1979) 96 Cal.App.3d 658. The employees could reasonably believe that this statement was uttered on behalf of Respondent, who was to receive the workers selected by

[fn. 4 cont. on p. 5]

as a witness to rebut this testimony.

In his Decision, the ALO found that Respondent established that it would have discharged the crew absent their protected concerted activities. The theory underlying that finding is that Soliz, a field representative of the Garin Company, discharged the crew for poor work. Soliz testified that he had no knowledge of the crop-dusting incident, or of the workers' protected activity. The ALO reasoned that as Soliz had no knowledge of the employees' protected activity he could not have discharged the crew for that reason. Our reading of the record, however, reveals a fatal flaw in that analysis. Soliz testified that he was not solely responsible for the decision to discharge the crew, but that the decision was jointly made by him and Respondent's supervisor Garcia. After that decision was made, according to Soliz, it was Garcia who informed the crew of the discharge. Even assuming that Soliz had no knowledge of the employees' protected activity, it is undisputed that Garcia had such knowledge. To the extent, therefore, that the ALO's Decision hinges upon the finding that Soliz alone discharged the workers, it fails to reflect the record evidence, which indicates that Garcia participated in the decision to discharge the employees in

(fn. 4 cont.)

contractor Ramirez. The fact that Ramirez was not providing workers for Respondent at that time is irrelevant, as Respondent's relationship with the labor contractor was ongoing. Respondent objected to the introduction of this statement into the record on hearsay grounds. The ALO allowed the statement for the limited purpose of showing animus. We consider this statement to be admissible as an admission of a party. See Witkin, California Evidence Code (2d Ed. 1966) pp. 467-478.

the crew and then discharged them.

We must now determine whether Respondent has established that its reason for discharging the crew was not the crew's protected activities but was instead their allegedly unsatisfactory work. Soliz testified that the employees' "job was not being done well." The ALO credits this testimony[5/] on the grounds that Soliz was a disinterested and credible witness because he has no "stake in the matter." Contrary to the ALO, we find that Soliz and his employer, Garin, have a significant stake in the matter. As a joint venture, the Garin Company would share, along with Respondent, in any exposure to liability arising out of Respondent's dealings with the employees in this case. Under their joint-venture agreement, pest control is Garin[1]s responsibility. Thus, Garin would be exposed to any civil or criminal liabilities or penalties arising out of the crop-dusting incident.

Soliz' testimony, however, is inconsistent and contradicts, in at least one respect, testimony given by Maurice Kophammer, who was also credited by the ALO. According to Soliz, Kophammer arrived at the field just after the crew was discharged, but elected not to enter the field as he could "see through the

[5/] We will not disturb an ALO's credibility resolutions unless the clear preponderance of all of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; El Paso Natural Gas Co. (197TJ 193 NLBB 333 [78 LRRM 1250]; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1331]. In a case such as this, where the clear preponderance of all the relevant evidence convinces us that the ALO's credibility resolutions are incorrect, the importance of the demeanor factor is greatly diminished and we substitute our own credibility findings for those of the ALO. See W. T. Grant Co. (1974) 214 NLRB 698 [88 LRRM 1059]; Gold Standard Enterprises, Inc. (1978) 234 NLRB 618 [97 LRRM 1423].

rows how it looks." Kophammer, on the other hand, testified that he entered the field "[t]o see what [Soliz and Garcia] were unhappy about."

Soliz testified at one point that he alone decided to discharge the crew. However, as indicated above, he had earlier testified that the decision to discharge the crew was made jointly with Garcia. In view of these discrepancies in testimony, and in view of the significant "stake" Soliz and his employer, Garin, share in this matter, we decline to credit his testimony in general, and in particular his testimony regarding the quality of the crew's work performance.

Kophammer also testified that the employees' work performance was poor and introduced photographs purportedly depicting the condition of the field caused by the alleged discriminatees. These pictures, however, were taken days after the crew had been discharged. Kophammer admitted that another crew had thinned and hoed the field between the time the workers were discharged and the time the photographs were taken. This admission deprives these photographs of probative value.

Kophammer's testimony, as mentioned above, does not withstand careful scrutiny. Soliz testified that Kophammer did not enter the field to observe the condition of the crop when the crew was discharged. Kophammer's testimony to the contrary was self-serving, for the value of his alleged observations made at some distance from where the employees had been working would be less than if he had entered the field. Kophammer's testimony was also inconsistent with that of the pilot, Tregenza. Kophammer

testified that Tregenza notified Garcia before the crop dusting. Tregenza, however, admitted that he did not contact Respondent prior to the crop-dusting operation.

In addition to these conflicts and inconsistencies in the testimony of Respondent's witnesses, other factors cast doubt upon the business justification Respondent has put forward as justification for the discharges. As discussed above, no warning or reprimands were issued to the workers prior to the discharge. Furthermore, the uncontradicted testimony of the employees indicates that they had been commended by supervisor Garcia for their work just two days prior to their discharge. More important is Respondent's failure to call supervisor Garcia as its witness, although he was present during the crop-dusting incident and was the person to whom the workers directed their protected concerted activity, and he participated in the decision to discharge the crew two days later. Respondent's failure to call Garcia, who for all the above reasons would have been a key witness, warrants an adverse inference. L. B. Foster Co. (1967) 168 NLRB 83 [60 LRRM 1280]. See also United States v. Interstate Circuit (1939) 306 U.S. 203. California Evidence Code section 412.

In conclusion, we find that the General Counsel has met his burden of establishing that the workers' protected concerted activities were the basis for Respondent's decision to discharge them. We further find that the testimony of Respondent's witnesses is insufficient to persuade us that it discharged these employees for unsatisfactory work performance or any other legitimate business reason. We conclude, therefore, that

Respondent violated section 1153(a) of the Act by discharging the employees.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Kophammer Farms, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Immediately offer to the employees supplied by labor contractor Roy Ramirez to work at Respondent's lettuce fields, who were discharged on or about March 10, 1980, full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole the workers supplied by labor contractor Roy Ramirez to work at Respondent's lettuce fields

who were discharged on or about March 10, 1980, for any loss of pay and other economic losses they have suffered as a result of their discharge, reimbursement to be made according to the formula stated in J & L Farms (Aug.12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from March 10, 1980, until the date on which the said Notice is mailed.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for a period of 60 days, the period and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 18, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging Ramirez' lettuce crew on or about March 10, 1980. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farm workers these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to discharge labor contractor Ramirez' lettuce crew because they participated in a concerted protest over pesticide spray on or about March 8, 1980.

WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate all of the employee members of labor contractor Ramirez' crew to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their discharge.

Dated: KOPHAMMER FARMS, INC.

By: By: _____
(Representative) (Title]

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is 805/725-5770.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Kophammer Farms

8 ALRB No. 21
Case No. 80-CE-1-D

ALO DECISION

The ALO concluded that Respondent did not violate section 1153(a) of the Act by discharging a crew of agricultural employees supplied by a labor contractor. The ALO found that Respondent discharged the crew members for unsatisfactory work performance, and not because of their protected concerted protest about being sprayed with toxic pesticides during the course of a crop-dusting operation.

BOARD DECISION

The Board reversed the ALO's rulings, findings, conclusions, and recommendations. The Board found that General Counsel met his burden of establishing that the employees' protected concerted activities were a basis for Respondent's decision to discharge them. The Board also found Respondent's witnesses' testimony insufficient to establish that it discharged the employees for unsatisfactory work performance.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

KOPHAMMER FARMS Respondent	)	
and	)	Case No, 80-CE-31-D
GUADALUPE (LUPE) CORTEZ Charging Party	)	

APPEARANCES:

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For the Respondent

John Moore
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Fresno, California

For the General Counsel

DECISION

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: The above-captioned case was heard before me in Bakersfield, California, on 25" May 15, 1980. Complaint issued April 17, 1980, alleging that Respondent violated §1153(a) of the Agricultural Labor Relations Act (Act) by discharging the crew of Teodoro Mendoza because of the I crew's concerted opposition to being sprayed with a pesticide, The complaint was based upon a charge filed by Guadalupe Cortez on

March 11, 1980. The charge and the complaint were duly served upon Respondent. A timely answer was filed by Respondent denying any violation of the statute.

All parties were given full opportunity to participate in the hearing. Respondent and General Counsel filed post-hearing briefs in support of their respective positions.

Upon the entire record, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

A. Jurisdictional Facts

Kophamer Farms is engaged in agriculture in Kern County, California, and is an agricultural employer within the meaning of §1140.4(c) of the Act.[1/]

At all times material Guadalupe Cortez was an agricultural employee within the meaning of §1140.4(b) of the Act.

B. Respondent's Operations

Kophamer Farms is primarily engaged in the raising and harvesting of onions. Since 1974 it has grown lettuce as a back-up crop pursuant to an arrangement with Garin Company. Garin supervises and controls the manner in which the lettuce is grown, and Respondent performs the necessary work, either through its own employees or through persons supplied by a labor contractor. One of the job functions performed by Respondent is the second thinning, known in the trade as "doubling." Doubling is the process of thinning by removing one of two heads which are growing as twin plants.

Respondent utilizes the services of AFC Incorporated to provide proper application of insecticides for the lettuce crop. AFC inspects the crop at least once a week to check for pests, mildew and fungi. Both Kophamer and Garin rely upon AFC regarding the timing and type of pesticide to be sprayed.

Garin maintains an area manager in the Maricopa area to insure that the lettuce is grown in accordance with its wishes.

C. The Events Of March 8, 1980

On March 8 the field in which the Charging Party and a crew supplied by labor contractor Ramirez were working was sprayed with pesticide. Customarily the Kophamer foreman receives prior notice from the crop dusting company that a field is to be sprayed. Such was not the case here. Although spraying had been

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1/The Company name is spelled Kophammer in the formal papers. It La spelled with one "m" by Respondent. The latter spelling is used herein.

ordered, weather conditions precluded spraying before Saturday. The weather broke on Saturday and it was sprayed that afternoon.

The plane approached the field about 2:30 p.m. The day was warm and calm with some haze and a wind drift from the north. As the pilot approached the field, he observed there were people at work, so he circled for about five minutes to apprise the workers the field was to be sprayed. When the workers did not leave the field, the pilot made a spraying pass over the adjacent field in a further attempt to alert them. When the workers observed this pass, they left the field and went to their cars. The pilot testified credibly that the warning pass was made about 200 feet from the edge of the field in which the crew was working.2/ When the workers left the field, Tregenza began spraying. He did not spray the area near where the workers cars were located. The passes are made at an altitude of 100 to 600 feet Tregenza testified that the spray mechanism functions in such a way that there is no spray trail once the shut-off valve is closed. Tregenza also testified credibly (and consistently with common sense) that a field is not sprayed when occupied by workers.

The Charging Party testified that the plane was spraying as it approached the field and that the workers continued to work until the plane was right above them. "Then we began to say that he was spraying us, that it was poison. Then we, the workers, went out, and the foreman went with us." This testimony is not credited. It is unlikely that experienced field workers would remain in a field when they knew the field was to be sprayed, particularly when no orders were given not to leave. Moreover, Charging Party's version of the events is contradicted by Esparza, a fellow worker. 3/

When, the workers got to the edge of the field, Carlos Garcia, Kophamer's foreman, asked what was going on. The Charging Party stated that the workers were being sprayed and that it was dangerous. Garcia asked whether they were going to return to work. Charging Party said they were not. Garcia said they should go home. Cortez said the workers would have to be paid for a full eight hours. Garcia said that was a matter for the labor contractor. Nothing further was said.4/

2/Testimony of the pilot, Arthur Tregenza, Jr. General Counsel's witness, Felix Esparza, also testified that the crew left the field when they saw the plane coming because they knew the field was to be sprayed.

3/Since there is no evidence the workers were disobeying any order in leaving the field, resolution of the issue presented herein does not rest upon the credibility of Charging Party's testimony on this point.

4/This account is based upon the uncorroborated testimony of Cortez. Garcia did not testify. Cortez's account of conversation with Garcia is credited.

Work resumed the following Monday. Cortez told Garcia and Mendoza, the labor contractor's foreman, that Felix Esparza was ill. She suggested that perhaps it was because of the spraying. There is no evidence of illness among any of the other crew members. Cortez did not request any medical treatment for Esparza.

Esparza testified that he was ill for 15 days, describing his symptoms as severe headaches and an upset stomach. The onset of the headaches was the same day as the spraying; the upset stomach followed the next day. Lack of funds prevented Esparza from getting medical attention,

On Tuesday, March 11, Alonzo Solis, Garin's area manager, visited the Kophamer field for the first time since doubling began. He and Garcia arrived about the same time. They went into the field to inspect the work which had been done on Saturday and Monday, as well as what had been done that morning. Solis was dissatisfied with all the work. The crew was removing an entire double plant rather than chopping away one of the two plants; thus, the space between plants was 20 inches or more rather than 10 to 12 inches. He told Garcia that such work could not continue; that it would be better to get rid of the crew.5/ Garcia agreed and relayed the decision to the crew. The crew completed the lines on which they were working. Solis estimated that 12% to 15% of the crop was lost as the result of completely removing doubles.6/

Kophamer arrived shortly after the crew had been terminated. Garcia and Solis told him the crew was taking out entire plants and that Solis was disturbed by this. Kophamer did not disagree with or object to Solis[1] decision. Garin tells Respondent what they want done and how to treat the field. Solis pointed out to him places where the crew left wide spaces and took out entire plants.

The first notice Respondent received regarding any crew dissatisfaction with having been terminated was when Kophamer was served with the charge filed by Cortez, Following receipt of the charge Kophamer visited the field for the purpose of photographing the work. The pictures were introduced by the General Counsel and tend to corroborate the testimony of Solis and Kophamer regarding the removal of entire plants.

Cortez testified that when Garcia told them their work was bad, crew members said they were doing the work in the manner they had been instructed.

5/Solis was dissatisfied with the work done by the crews on Saturday and Monday as well as that done on Tuesday, It was Kophamer's view that only the Tuesday work was bad.

6/Solis had not previously worked with Ramirez, his foreman, Mendoza, or with Garcia,

DISCUSSION AND ANALYSIS

The question for decision is why the lettuce thinning crew was discharged on Tuesday, March 11, 1980. Respondent contends the cause was the failure properly to perform doubling work. General Counsel contends the discharge occurred because the crew engaged in protected concerted activity the preceding Saturday in the form of a work stoppage and a demand for a minimum day's pay, coupled with further protected activity the day before the discharge.

Unquestionably, if the workers' conduct on Saturday and Monday was protected concerted activity and if they were fired because of such activity, Respondent violated §1153 (a). If the crew was terminated for the quality of their work, there is no violation of the Act. Assuming arguendo that the crew's action of, Saturday was protected concerted activity, we turn to the evidence to ascertain whether that activity was the reason for the crew's discharge.

There is no evidence that Kophamer's foreman, Garcia, manifested any dissatisfaction when the crew left the field when the plane began to spray. He made no attempt to get them back to the field; he threatened no reprisals if they failed to return when spraying ceased; he merely told them to go home. Nor did he argue with or object to Charging Party's assertion that the workers must be paid an eight-hour minimum for the day. Rather, he stated that the labor contractor was the one to speak to regarding the wage question. In short, Garcia saw nothing unusual in the crew leaving the field under the circumstances or in the demand for eight hours' pay. Nothing in the record supports even a speculation that Garcia expected workers to remain at work while the spraying occurred or that he expected their immediate reentry once the plane departed. It is also apparent that Garcia was unconcerned about the demand for eight hours' pay; he regarded I that as a question which concerned the labor contractor and not him. Thus, there is nothing in Respondent's Saturday conduct warranting an inference that the workers' Saturday conduct was a reason for their termination on the following Tuesday. Since the General Counsel has the burden of proving that the discharges occurred because workers engaged in conduct protected by §1152, the failure to provide evidence sufficient to warrant such an inference requires dismissal of the complaint.

The General Counsel (G.C.) argues this case as if a violation of §1153 (c) were alleged. Thus, he says that protected activity occurred on Saturday followed by a crew termination on Tuesday, thereby establishing a prima facie case. Step 2 in the G.C.'s analysis is that these facts shift the burden to Respondent to show that the discharges were motivated by reasons other than those proscribed by the statute. The G.C. then concludes that Respondent failed to dispel the inference the discharges were motivated by a desire to interfere with, restrain, or coerce employees in the exercise of their §1152 rights; ergo §1153 (a) was violated.

It is unnecessary to resort to the conventional discriminatory discharge analysis in determining whether a discharge violates §1153(a). Union animus need not be established, employer knowledge of union activity need not be proved, nor even a discriminatory act. All that needs be proved is that the conduct giving rise to the discharge was protected activity.

Respondent says the crew was discharged for poor work; the General Counsel makes no contention that performance of poor work is protected activity. Rather, the G.C. argues the work was performed as directed by Garcia and was properly performed; thus, the discharge occurred because the crew engaged in concerted activity the previous Saturday, i.e., the poor work explanation was pretextual.

We turn to examine this argument. It is apparent from the relationship between Garin Company and Kophamer that Garin has final control over the lettuce crop. Garin tells Respondent how it wishes the crop grown, and Respondent provides the necessary services, including the labor force. Garin maintains an area manager to protect its interests regarding crops grown on its account.

It is undisputed that Tuesday was the first day the Garin area manager checked the work being done by the Ramirez crew.7/ Solis testified credibly that he was dissatisfied with the total job done by the crew. He then told Kophamer's foreman the crew should be terminated. The foreman did not challenge this decision and proceeded to terminate the crew.

There is no evidence that Solis was aware of the events of the previous Saturday when he told Garcia" [w] e were going to have to let the bunch go." Garin is not a respondent in the present proceedings. Solis' testimony regarding the estimated crop loss resulting from the improper doubling stands unchallenged. His testimony regarding the manner in which the work was being performed is consistent with that of Maurice Kophamer and also consistent with photographs of the work admitted into evidence.8/

The General Counsel presented testimony from four workers, each of whom denied any work was performed in the manner illustrated in the pictures and as testified to by Solis and Kophamer. The workers' testimony is unconvincing. Were it to be credited, it would be necessary to conclude that Maurice Kophamer fabricated the photographs and Solis lied. Kophamer's

7/Solis had not been present at the outset of doubling because he had told Garcia not to begin the operation until Tuesday and was unaware work had begun.

8/Kophamer testified it was only the Tuesday work which was unsatisfactory, while Solis was dissatisfied with the total job; a difference in view irrelevant for purposes of the instant case.

testimony was straightforward, even to the point of volunteering that it was only the work done on Tuesday which he regarded as bad. Additionally, the manner in which he sought to cooperate with the investigation, further convince me of his credibility, With respect to Solis, he has no stake in the matter, and there is no reason to conclude he fabricated his testimony regarding what he observed.

Solis was unaware of the instructions given the crew regarding doubling. He conceded it would have been unfair to terminate them if they were working in conformity with the instructions they received. This concession does not help the General Counsel. It does not follow, even if one accepts the Solis view that a discharge for following erroneous instructions would not be for just cause, that the discharge violated §1153(a), particularly when Solis was unaware of Saturday's §1152 activity. Moreover, the General Counsel's witnesses testified they were instructed to leave only a 10-12 inch space between plants. Credited testimony establishes that 20-24 inch spaces were being left.

Since I have concluded that the Ramirez crew was terminated for poor work, it is unnecessary to determine whether the crew's conduct on Saturday was protected concerted activity, or whether Cortez's statement on Monday that Esparza's illness may have resulted from spraying was protected by §1152.

At the close of the General Counsel's case in chief, Respondent moved to dismiss the complaint. The motion was taken under submission. Respondent renewed its motion in conjunction with its post-hearing brief. Pursuant to the provision of 8 Cal. Admin. Code §20242(b), Respondent's motion to dismiss the complaint is granted.

ORDER

The complaint is dismissed in its entirety.

Dated: October 14, 1980

AGRICULTURAL LABOR RELATIONS BOARD

By: 

Robert LeProhn
Administrative Law Officer