

Chino, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

HARRY BOERSMA DAIRY,)	
)	
Respondent,)	Case Nos. 80-CE-95-SD
)	80-CE-100-SD
and)	80-CE-20-SD
)	
JUAN MANUEL MUNOZ and)	
DAIRYEMPLOYEESUNION, LOCAL 17,)	
CHRISTIAN LABOR ASSOCIATION)	8 ALRB No. 34
)	
Charging Party.)	
)	

ERRATUM

The Decision in the above-captioned matter is hereby amended to delete pages 3 and 4, and to substitute therefore the attached pages 3 and 4.

Dated: June 18, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

The employees' refusal to follow instructions was particularly important, according to Respondent, because it was believed that their improper milking technique was causing a serious outbreak of mastitis. Although Harry Boersma testified that Hurtado was also milking improperly, Respondent argues that Hurtado quit. Finally, Respondent contends that Lopez was fired because he failed to prime the cows to check for mastitis before milking them, and thereby caused a high bacteria count in the milk received by the dairy and an exacerbation of the mastitis problem.

Respondent's alleged concern over the mastitis problem is discredited by the lack of evidence that the workers were actually responsible for the higher incidence of mastitis. Expert testimony indicated that mastitis was more common during the wet winter months, that virtually every dairy has some incidence of mastitis, and that a number of factors, other than milking technique, contributed to the spread of the disease. The strength of Respondent's assertion is further diminished by its inconsistent treatment of Hurtado. Finally, there was no showing that Lopez, who had fifteen years of experience milking cows, caused any significant contamination of the milk, especially in view of the dairy association representative's testimony that, during the period in question, all of Respondent's milk had acceptable levels of penicillin.

Weighing the timing of the discharges, the fact that every employee who expressed support for the Christian Labor Association (CLA) was subsequently discharged, and Respondent's unlawful interrogation, surveillance, and other anti-union conduct

against Respondent's legitimate concern over the mastitis problem, we are convinced that Respondent would not have discharged employees Mercado, Hurtado, Munoz, and Lopez but for their support for the CLA. Accordingly, we conclude that Respondent thereby violated section 1153(c) and (a) of the Agricultural Labor Relations Act.

Our remedial Order will require Respondent, inter alia, to reinstate all four employees with backpay. We recognize that Respondent's dairy operation is small and, at the time of the hearing, required only two full-time milkers and one relief milker. In complying with our remedial Order to reinstate the discriminatees Respondent shall first reinstate Hurtado and Mercado and assign any available relief work to Munoz, and thereafter reinstate Lopez when and if an appropriate vacancy occurs.

ORDER

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

1. Cease and desist from:

(a) Practicing surveillance of employees' union activities.

(b) Interrogating employees about their membership in any union or involvement in union activities.

(c) 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 union or concerted activity protected by section 1152 of the Act.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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CHRISTIAN LABOR ASSOCIATION,)	
)	
Charging Party.)	
)	

DECISION AND ORDER

On October 12, 1981, Administrative Law Officer (ALO) Ron Greenberg issued the attached Decision in this proceeding. Respondent timely filed exceptions and a supporting brief and General Counsel thereafter filed an answering brief.

Pursuant to provisions of Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the ALO's rulings, findings, and conclusions and to adopt his recommended Order, as modified herein.

Respondent excepts to the ALO's finding that it engaged in unlawful interrogation, arguing, inter alia, that the ALO relied too heavily on a statement by Harry Boersma in September 1980 that he did not want a union. We find this exception to be without merit. It is clear that the ALO's finding is based on Boersma's November

1980 questioning of Jose Hurtado as to why Hurtado joined the Union, and not the September statement.

We agree with the ALO that Respondent engaged in unlawful surveillance of its employees on the day of the election. We find that in the context of the interrogation and threatening of Hurtado and the benefits granted shortly before the election, Respondent's unusually close supervision on election day tended to interfere with the employees' free exercise of their rights guaranteed under Labor Code section 1152. Merzoian Brothers Farm Management Co., Inc. (July 29, 1977) 3 ALRB No. 62.

Finally, we agree with the ALO that the timing of the discharges and Respondent's other unlawful conduct establish a prima facie case that the employees' union activity was a motivating factor in Respondent's decision to discharge Jose Hurtado, Jose Mercado, Juan Manuel Munoz, and Jesus Lopez. On this showing, the burden shifted to Respondent to produce evidence that it would have discharged the employees even in the absence of their union activity. Had Respondent failed to produce evidence of a legitimate and substantial business justification, a violation would be established on the basis of the aforesaid prima facie case. Upon Respondent's production of a lawful basis for the discharges, the ultimate burden of proof is on the General Counsel to show, by a preponderance of the evidence, that Respondent would not have discharged the employees but for their union activities. Martori Brothers Distributors (Mar. 1, 1982) 8 ALRB No. 15.

Respondent contends that Mercado and Munoz were discharged for refusing to follow instructions on proper milking technique.

The employees' refusal to follow instructions was particularly important, according to Respondent, because it was believed that their improper milking technique was causing a serious outbreak of mastitis. Although Harry Boersma testified that Hurtado was also milking improperly, Respondent argues that Hurtado quit. Finally, Respondent contends that Lopez was fired because he failed to prime the cows to check for mastitis before milking them, and thereby caused a high bacteria count in the milk received by the dairy.

Respondent's alleged concern over the mastitis problem is discredited by the lack of evidence that the workers were actually responsible for the higher incidence of mastitis. Expert testimony indicated that mastitis was more common during the wet winter months, that virtually every dairy has some incidence of mastitis, and that a number of factors, other than milking technique, contributed to the spread of the disease. The strength of Respondent's assertion is further diminished by its inconsistent treatment of Hurtado. Finally, there was no showing that Lopez, who had fifteen years of experience milking cows, caused any significant contamination of the milk, especially in view of the dairy association representative's testimony that, during the period in question, all of Respondent's milk had acceptable levels of bacteria and penicillin.

Weighing the timing of the discharges, the fact that every employee who expressed support for the UFW was subsequently discharged, and Respondent's unlawful interrogation, surveillance, and other anti-union conduct against Respondent's legitimate concern

over the mastitis problem, we are convinced that Respondent would not have discharged employees Mercado, Hurtado, Munoz, and Lopez but for their support for the UFW. Accordingly, we conclude that Respondent thereby violated section 1153(c) and (a) of the Agricultural Labor Relations Act.

Our remedial Order will require Respondent, inter alia, to reinstate all four employees with backpay. We recognize that Respondent's dairy operation is small and, at the time of the hearing, required only two full-time milkers and one relief milker. In complying with our remedial Order to reinstate the discriminattees, Respondent shall first reinstate Hurtado and Mercado and assign any available relief work to Munoz, and thereafter reinstate Lopez when and if an appropriate vacancy occurs.

ORDER

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

1. Cease and desist from:

(a) Practicing surveillance of employees' union activities.

(b) Interrogating employees about their membership in any union or involvement in union activities.

(c) 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 union or concerted activity protected by section 1152 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employees 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) Offer immediate full-time employment in their former or substantially equivalent jobs to Jose Hurtado and Jose Mercado and immediate employment as a regular relief milker to Juan Manuel Munoz, and immediately inform Jesus Lopez that he is entitled to reinstatement to a position for which he is qualified when the next vacancy occurs, in each case without any prejudice to the employee's seniority or other rights or privileges.

(b) Make whole Juan Manuel Munoz, Jose Mercado, Jose Hurtado, and Jesus Lopez for all losses 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 and copying, all payroll 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 September 1980 until the date on which the said Notice is mailed.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the time(s) 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 all of 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 management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act.

(h) Notify the Regional Director in writing, within 30 days after the issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically

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thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: May 13, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN C. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego 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 practicing surveillance, interrogating employees and discharging four employees because of their union activities. 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 farmworkers 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 exercise of your right to act together with other workers to help and protect one another.

WE WILL NOT practice surveillance or interrogate employees about their union activities.

SPECIFICALLY, the Board found that it was unlawful for us to discharge Juan Manuel Munoz, Jose Mercado, Jose Hurtado, and Jesus Lopez. WE WILL NOT hereafter discharge or refuse to rehire any employees for engaging in union activities.

WE WILL reinstate Juan Manuel Munoz, Jose Mercado, Jose Hurtado and Jesus Lopez 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:

HARRY BOERSMA DAIRY

By: _____
(Representative) (Title)

If you have any questions 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 1350 Front Street, Room 2062, San Diego, California. The telephone number is (714) 237-7119.

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

Harry Boersma Dairy (CDA)

8 ALRB No. 34
Case Nos. 80-CE-95-SD
80-CE-100-SD
81-CE-20-SD

ALO DECISION

The ALO found that Respondent violated sections 1153(a) and (c) of the Act by interrogating and threatening employees prior to a representation election, and by discharging four employees who had expressed support for the Union.

BOARD DECISION

The Board upheld the ALO's rulings, findings, conclusions, and recommended remedy with minor clarifications.

11/19/77

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

HARRY BOERSMA DAIRY,)
)
 Respondent,)
)
 and)
)
 JUAN MANUEL MUNOZ and)
 DAIRY EMPLOYEES UNION,)
 LOCAL 17, CHRISTIAN)
 LABOR ASSOCIATION,)
)
 Charging Party.)

Case Nos. 80-CE-95-SD
80-CE-100-SD
81-CD-20-SD



APPEARANCES:

Gloria Barrios of El Centro,
for the General Counsel

Carl L. Samuel, Reed and
Samuel, Sacramento, for
the Respondent

Ben Sybesma, Bernie Vender
Wiede, Dairy Employees Union,
Local 17, Christian Labor
Association, Chino, for the
Charging Party

DECISION

STATEMENT OF THE CASE

RON GREENBERG, Administrative Law Officer: This case was heard by me in Pomona, California, on May 26 and 27, 1981. The complaint was issued and properly served on the parties on March 18, 1981, and it alleges violations of Section 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter

"the Act") by Respondent, Harry Boersma Dairy. The complaint is based on charges filed on December 1, 1980,^{1/} December 15, 1980, and April 2, 1981 by Juan Manuel Munoz and Dairy Employees Union, Local 17, Christian Labor Association (hereinafter "the Union").

In its Answer, filed on March 30, 1981, Respondent denies the commission of any unfair labor practices. By way of affirmative defense, Respondent raises its right to freedom of speech under the First and Fourteenth Amendments to the U.S. Constitution and under the California Constitution. As a second affirmative defense, Respondent raises its right to make business decisions and discharge employees for cause.^{2/} An amended Complaint and Order Consolidating Cases issued and were duly served on all parties on June 1, 1981.

All parties were given full opportunity to participate in the hearing, and after the close thereof, the General Counsel and Respondent each filed a brief^{3/} in support of its respective position.

Upon the entire record, including my observation of the

^{1/}Unless otherwise stated, all dates refer to 1980.

^{2/}I find no merit in either affirmative defense. Both defenses raised have been considered in the body of the Decision.

^{3/}Attorney Samuel attempted to provide the ALO with additional records attached to his brief following the close of the record in the hearing. General Counsel moved to strike the inclusion of any of those documents in the record. Because they were tendered outside of the normal hearing process, I did not consider them in reaching my decision. General Counsel's motion to strike is hereby granted.

the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Harry Boersma Dairy is owned and operated by Harry Boersma. It is engaged in agriculture in San Bernardino County, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The Union is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The amended complaint alleges that Respondent violated Section 1153(a) of the Act by engaging in acts of surveillance and interrogations which interfered with the rights of its employees to organize and participate freely in the election. The complaint further alleges that Respondent violated Sections 1153(a) and (c) of the Act by discriminatorily discharging employees Juan Manuel Munoz, Jose G. Hurtado, Jose Mercado, and Jesus Lopez because of their union activities.

A. Background

Harry Boersma, a dairyman for twenty years, is currently the sole proprietor of Harry Boersma Dairy. In October, he owned approximately 320 milking cows. At that time, he had

two milkers working for him--Jose Mercado and Jose Hurtado. Hurtado, who had three years milking experience, began to work for Boersma at the end of January, 1980. Mercado, who had worked seven years as a milker, began in August, 1980.

Mercado testified that on his first day, Boersma showed him the barn, and introduced him to Hurtado. He did not, however, demonstrate how he wanted the cows milked or treated.

Both milkers worked at the dairy eleven hours a day. Boersma testified that he supervised the workers on a day-to-day basis.

B. Health Problems at the Dairy

1. Mastitis

Mastitis is an infection of the cow's udder. It can be treated with an antibiotic, but the treated milk cannot be sold. For a milker to know if a cow has mastitis, he must prime the cow, that is, milk the cow a little by hand. If the cow has mastitis, a watery-type milk or a cheese-like bacteria will drop out on the ground. The milker must then mark the cow with orange chalk, so that no other milker will accidentally milk the infected udder.

Boersma testified that he taught his workers how to treat the cows with antibiotics. He kept the medicine in the barn and replaced it when it ran out. He never made use of a veterinarian for the problem.

In October, according to Boersma, an average of three out of forty cows had mastitis. After the representation election

in November, the number increased to twelve out of forty. By the time of the hearing, only five of the forty cows had mastitis.

Rudy Haringa, Boersma's neighbor, confirmed this number of cows with mastitis, also claiming that he saw a large amount of garget (milk chunks) on the floor of the barn. Garget is another symptom of mastitis.

In Boersma's opinion, Mercado was not removing the milking units in time, and not properly treating the cows, thus causing the mastitis outbreak. Miguel Escalante, Boersma's artificial inseminator, testified that the mastitis problem grew worse in November and December, and that the cows had an unacceptable amount of mastitis. Escalante, who worked with Dr. Blackmer, the head of the Mastitis Prevention Center, worked at Boersma's dairy everyday in 1980. In his opinion, the milkers were primarily responsible for the mastitis. He testified that the workers did not milk the cows properly, consistently arrived late to work, and did not dip their milking machines in iodine.

Hurtado, on the other hand, testified that when he left the dairy, only two out of all the cows he took care of had mastitis. Also, several times Boersma waited two or three days before replacing the medicine (penicillin). Munoz, the relief milker, confirmed this, adding that the cows had less mastitis when he left than when he began. Boersma, however, contended that he always replaced medicine immediately. Mercado

explained that he received no training from Boersma in how to treat the cows.

Mastitis causes more problems in the winter. Boersma claims that the weather in the winter of 1980 was favorable. Furthermore, one mastitic cow can infect other cows. Mastitis can also be spread by a milker's hand. According to Hurtado, Boesma did not provide gloves, and did not instruct milkers to wash their hands.

Escalante testified that older cows are more susceptible to mastitis. Mercado claimed that many of Boersma's cows that suffered from mastitis were fairly old.

2. Penicillin

Penicillin was used by the Boersma dairy in treating the mastitis problem.

The Health Department oversees the quality of a dairy's milk by taking samples once a month. In addition, the creamery samples the milk every day to check for penicillin. The creamery first uses a Delvo-test, which can locate antibiotics. If the Delvo turns out positive, a disc-assay is run to see if the quantity of antibiotics in the milk is sufficiently large to prevent sale, as certain consumers would have allergic reactions.

If the test is positive, the creamery will not pick up milk from the offending dairy until the milk tests clear. Milk that cannot be sold, often goes to a calf ranch.^{4/}

^{4/}The logic of giving milk with penicillin to calves is unclear to the ALO.

On November 5, the creamery picked up milk from the Boersma Dairy, mixing it into a tanker with milk from four other dairies. A Delvo-test determined that the milk from Boersma contained penicillin. On November 6, Bob Fear from the creamery called Boersma to inform him of the contamination. The milk was sufficiently diluted, however, so that it still could be sold.

C. The Representation Election

In 1960, Boersma and his one employee (at that time) joined the Dairy Employees Union of the Christian Labor Association. After fifteen years, the employee quit the dairy. Boersma then hired two new workers who did not join the union.

On November 10, Hurtado, Mercado, and Munoz signed Union authorization cards at the office of the Christian Labor Association. Hurtado testified that this was the first time he went to the union. That day, Ben Sybesma, business agent for the union, informed Boersma that the workers had joined the union. He also served Boersma's wife with a petition for certification.

Two days later, Boersma, when asked for a list of workers, submitted the names of Hurtado and Mercado to David Ortiz from the A.L.R.B. Ortiz said that he did not need Munoz's name, since his name did not appear on the payroll. Boersma testified that he also spoke with Sybesma about Munoz and the election. Sybesma did not remember the conversation.

A week after the notice of election was issued, Carl Samuel,

Boersma's attorney, warned Boersma not to say anything to the workers about the union. According to Boersma, about this time, he asked Hurtado why he joined the union. Hurtado replied that he wanted insurance. Boersma noted that he could have obtained insurance for the workers. Boersma testified that he said nothing else to the workers about the union.

Mercado testified, however, that in September, Boersma stated that he did not want a union. Hurtado testified that after his conversation with Boersma about insurance, Boersma mentioned several times that he did not want Hurtado to take the Union to the dairy, and that he did not like other people telling him how to run his business. Furthermore, according to Hurtado, Boersma promised, about three days before the election, that if Hurtado voted against the union, he would give Hurtado good insurance, better wages, and would fire Mercado when the automatic machines were installed.

On November 17, Sybesma came to the dairy to check on the election. He discussed with Boersma whether Munoz should vote. According to Sybesma, Boersma claimed that he fired Munoz once, but that his milkers continued to use him as a relief. Boersma was "sorry he didn't make [the discharge] stick."

That morning, before the election, Boersma paid Hurtado \$950 instead of the usual \$900. Hurtado explained that Boersma overpaid him by one hundred dollars. He felt that Boersma was encouraging him to vote against the union. Boersma told Hurtado that he overpaid him because he wanted to. On the

following payday, Hurtado again received \$950 dollars. But he worked one additional day in that pay period and thought he might have borrowed some money from Boersma.

The milkers voted 3 - 0 for the union. The day of the election, according to Mercado, Boersma observed and supervised the milkers closer than usual. Deviating from his practice of rarely being present, he stood around watching the milkers do their milking that day.

Before the election, there was a telephone in the barn. Boersma knew that the workers used it, and never instructed the workers otherwise. He did complain if they talked on the phone and left the milking machines hanging. According to Boersma, the milkers answered the phone whenever it rang. Boersma's wife frequently picked up the other line to make a call and heard the workers talking. Boersma also testified that his phone bill contained strange long distance phone calls. His wife had the phone removed on the day of the election, but had it replaced several days later. Boersma could not remember when this occurred.

Mercado testified that he only used the phone when his family was sick, and that Boersma had given him permission to do so. Both Mercado and Hurtado testified that they never heard anybody on the line talking from the house, and never answered the phone when it rang.

D. The Discharges

1. Munoz

Boersma told the milkers that if they needed a day off, they could bring a friend who knew how to milk. Mercado testified that when he first wanted a day off, Boersma recommended Juan Munoz. Boersma denied this, claiming he first saw Munoz as a relief milker for Mercado at the end of August.

Munoz first worked at the Boersma Dairy for several days in 1979 and 1980 as a relief for his brothers and for a friend. Later that year, according to Munoz, Hurtado hired him as a relief in the presence of Boersma. From that point, he worked approximately two days a week. Usually, the milkers would tell Boersma how many hours Munoz worked, and Boersma would pay Munoz by check. Other times, the milkers paid Munoz with cash.

Munoz only spoke Spanish, and Boersma communicated to him through Hurtado or Mercado.

In late October, according to Boersma, Mercado complained that Munoz did not milk correctly. Boersma himself told the milkers approximately three times that Munoz was not working satisfactorily. Munoz claimed that Boersma never complained or gave instructions to him directly or through other workers, and that Hurtado and Mercado approved of his work. Mercado and Hurtado corroborated this testimony.

Boersma testified that in October, he instructed the milkers that they could no longer use Munoz as a relief. He believed Munoz was leaving the milking machines on the cows,

thus causing mastitis. Munoz denied that Boersma fired him at that time. Hurtado also does not remember the discharge.

Boersma testified that Munoz milked the morning and night of November 17, as well as the morning and evening of November 18. Boersma allowed Munoz to continue working when he saw him. Boersma did not know whether Munoz had worked any other days in November, but Boersma suspected that he was responsible for milking a cow treated with penicillin.

Munoz testified that he did not work on November 17, the day of the election, but did work the day after. On the 18th, Boersma told Munoz through Hurtado that he could no longer work at the dairy.

2. Hurtado and Mercado

According to Boersma, Mercado worked satisfactorily before the election. Once, though, when Mercado milked a cow without priming, Boersma approached him to complain, and Mercado became angry. Boersma testified that after the election, Mercado's work "went to pot." He left machines hanging, and did not pay attention to the milking. Boersma complained to Mercado several times.

Boersma testified that even before the election, Hurtado was late quite frequently. After the election, Hurtado arrived at work late nearly every day.

Boersma explained that before the election, he walked through the barn every day to observe the workers. Also, he watched the workers through a window in the milk house.

Mercado testified that Boersma never complained about his work until the day of the election, when he asked the milkers to work faster and more efficiently. According to Mercado, before the election, Boersma came into the barn to observe only once or twice a week. Mercado also testified that production had increased by the time he was fired.

Hurtado verified that Boersma rarely supervised before the election. Hurtado also testified that Boersma never corrected his work, and that he was late only once, by five minutes.

On November 26, Boersma gave Mercado a written warning, claiming he was one hour late to work on November 24. Mercado testified that he was late only once, by about thirty minutes. Two days later, Boersma gave a written warning to Hurtado, accusing him of arriving at work twenty minutes late, and failing to mark cows treated with penicillin. Both workers refused to sign the warning notices.

On December 10, Boersma fired Mercado. He explained to Mercado that he felt the worker had too many sick cows.

Later that morning, according to Boersma, Hurtado questioned him about Mercado's firing, asking Boersma also to discharge him. Boersma refused. Hurtado then quit. Boersma asked his neighbor, Rudy Haringa, to witness Hurtado's quitting. At first, Boersma testified that Hurtado repeated the statement "I quit" in front of Haringa. On cross examination, though, Boersma stated that Hurtado merely answered yes when asked whether he quit. Haringa confirmed the latter testimony.

Hurtado, however, denied that he ever quit. He testified that no one else was present when Boersma fired him, telling him that he had too many sick cows.

3. Lopez

Jesus Lopez was hired on December 20, and worked until February 27, 1981.

About February 1, according to Boersma, he discovered a high bacteria count. He told the milkers to check the cows and to solve the bacteria problem. He noted that at that time, Lopez did not follow his instructions on how to milk the cows. Lopez testified at first that neither Boersma nor Rafael De La Rosa, the other milker, ever gave instructions on milking or priming a cow. During cross examination, however, he claimed that he milked the cows exactly as Boersma taught him.

Boersma testified that De La Rosa informed him on February 26 that Lopez intended to join the union. According to Boersma, De La Rosa also complained about Lopez's work. Boersma testified that he then observed Lopez's work from the front of the barn. He told Lopez to prime the cows, but Lopez paid no attention. On the morning of the 27th, he again observed Lopez through the little window in the barn. He already had decided to fire Lopez and had written up his final paycheck.

He fired Lopez that morning. De La Rosa and Lopez's cousin also were present. However, according to Boersma, they were not close enough to hear. Boersma testified that Lopez hit him when he fired him.

Lopez's testimony differed substantially from Boersma's. He stated that on February 26, he suggested to De La Rosa that they both join the union. At 5:00 in the morning on February 27, Boersma gave Lopez a check and told him he could go. Lopez requested a written statement from Boersma, giving him permission to go to the doctor. He explained that a cow had kicked him on February 23, and that he had not felt well since then.

Lopez testified that he stayed at the dairy after the discharge, because he did not have a car. Fifteen minutes later, Boersma warned Lopez that if he did not leave, he would get his rifle. Boersma then pushed him and demanded that he leave his property. Lopez pushed Boersma back, but claimed not to have hit him.^{5/}

ANALYSIS AND CONCLUSIONS

Section 1153(a) of the Act makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce employees in the exercise of their right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and . . . the right to refrain from any or all such activities." Section 1153(c) makes it an unfair labor practice to discriminate "in regard to hiring or tenure of

^{5/}Later in his testimony, Lopez stated that there was "confusion," and that he actually worked a full day on the 27th.

employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Further, Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended in 29 U.S.C. Section 151, et seq. (hereinafter the "NLRA").

I. Interrogation and Surveillance

The N.L.R.B. determined in Blue Flash Express Inc., 109 N.L.R.B. 591, 593, 34 L.R.R.M. 1394, 1386 (1954), that interrogation which "reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act" is an unfair labor practice. The A.L.R.B. confirmed the unlawfulness of coercive interrogation in Maggio-Tostado, Inc., 3 A.L.R.B. No. 33 (1977):

Interrogation which is otherwise unlawful is not made lawful because it is conducted in a friendly or courteous manner. It is the fact of and not the manner of interrogation which interferes with or coerces the employee in the exercise of her rights. The fact that the interrogation may be of an isolated nature is also not controlling.

(citations omitted) Id. at 20. The Board in Maggio-Tostado relied on a four-part test in finding that the employer unlawfully interrogated an employee. The Board determined that an employer could lawfully interrogate an employee only if:

- (a) the purpose of the questioning was legitimate;
- (b) the employer communicated to the employees its purpose in questioning them;
- (c) the employer had assured the employees that no reprisals would take place; and

(d) the questioning took place in a background free from employer hostility to union organization.

Id. at 21.

Boersma himself admits that he asked Hurtado why he joined the union. This question, taken in context with Boersma's preceding and subsequent threatening statements, indicates Boersma's intent to coerce and intimidate Hurtado.

The interrogation does not satisfy the four-pronged Maggio-Tostado test, which would have made the interrogation lawful. In the first place, the purpose of the questioning was not legitimate. Hurtado's reasons for joining the union could have no relation to any business interest of Boersma. The case is analogous to Florida Steel Corp., 215 N.L.R.B. 97, 97, 88, L.R.R.M. 1266, 1267 (1974), where a supervisor asked if an employee seriously supported a union. The Board held that "the employer had no legitimate reason for the interrogation and that it was strictly concerned with [the employee's] union activity." Boersma had no "legitimate reason" for asking about Hurtado's union support.

Boersma did not communicate to Hurtado the reason for his question and certainly did not assure that no reprisals would occur. Taking into account Mercado's testimony that Boersma did not want a union, Hurtado might well have feared a reprisal, and Boersma took no action to allay that fear.

Considering Boersma's anti-union statements, including his subsequent threat to fire Mercado and concurrent promise to

increase Hurtado's salary, Boersma's interrogation served to coerce and threaten Hurtado to vote against the union, thus violating section 1153(a) of the Act.

Surveillance of union activities by the employer, "whether frankly open or carefully concealed," also violates section 1153(a) by interfering with the section 1152 rights of agricultural employees to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (N.L.R.B. v. Collins & Aikman, 146 F.2d 454, 455 (4th Cir. 1944)).

According to the milkers, Boersma began to supervise very closely during and after the election. Such sudden close supervision must have convinced the workers that Boersma intended to discharge workers who displayed any signs of supporting the union. As in Dumas, Inc., 169 N.L.R.B. 892, 896-97, 67 L.R.R.M. 1559 (1968), the activity by Boersma constituted "open and calculated surveillance conducted from an elected position, from which [he] could observe as well as make visibly obvious to the employees . . . [his] presence and the message [his] surveillance plainly carried." Boersma's supervision plainly carried the message that he did not want his workers to support the union.

The suddenness of the surveillance also indicates coercive intent. In a similar case, where surveillance began two days after the announcement that certain employees were union organizers, the Board held: "[s]uch intense and constant

supervision was totally unprecedented and unexplained . . . we find that these visits had the purpose and effect of harassing and intimidating the employees because of their union activities" (Florida Steel Corp., 215 N.L.R.B. at 98, 88 L.R.R.M. at 1268). Boersma's surveillance on the day of the representation election intimidated employees in an attempt to coerce them to vote against the union, thus violating Section 1153(a) of the Act.

II. The Discharges

In dual motivation discharge cases, the N.L.R.B. recently has developed a rule^{6/} to determine whether discharges are unfair labor practices due to anti-union motivation. The Board introduced the two-part test in Wright Line, 105 L.R.R.M. 1169, 1175 (1980):

First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The General Counsel clearly has made a prima facie showing of anti-union motivation. The actions of Harry Boersma displayed a disregard for the rights of his employees and his negative feelings for the union.

Munoz, Mercado, and Hurtado all were discharged within a

^{6/}This test has been adopted by the California Supreme Court in Martori Brothers Distributors v. A.L.R.B., 29 C.3d 721 (1981), and by the Board in Nishi Greenhouse, 7 A.L.R.B. No. 18 (1981).

month following the election of the union. With these discharges, Boersma decimated the entire dairy bargaining unit. The timing of these discharges, so closely following a successful election, points to anti-union animus as a motivating factor.

Jesus Lopez was fired one day following his showing of support for the union. Once Boersma learned that Lopez wanted to join the union, he disposed of him. In three short months, Boersma discharged every union supporter at the dairy.

The N.L.R.B. ruled in Russ Togs, Inc., 253 N.L.R.B. #99, at 2 n.2, 106 L.R.R.M. 1067 (1980), that interrogation, harassment, and surveillance of employees evidences anti-union animus, sufficient to satisfy the Wright Line motivating factor test. Boersma interrogated and threatened Hurtado, attempting to convince him to vote against the union. He also engaged in acts of surveillance. He offered Hurtado a raise in pay for not supporting the union, and paid him nearly \$100 extra on the day of the election as an anti-union incentive.

The General Counsel thus has established a prima facie case of anti-union animus as a motivating factor, shifting the burden of proof to Respondent. Respondent, however, did not demonstrate that the discharges would have occurred even in the absence of the union election.

Boersma contended that he fired Mercado and Munoz because his cows became infected with mastitis. However, the evidence regarding the number of sick cows was in conflict. All three

workers testified that very few cows suffered from mastitis during their employment. Furthermore, Boersma never proved that the milkers caused the mastitis. Even Boersma's expert witness agreed that mastitis also can be caused by old age, damp winter weather, and unclean barn conditions. Hurtado also testified that Boersma often failed to replenish medicine when it ran out. I find that Boersma failed to establish a causal connection between the mastitis and the workers' methods of milking.

Boersma also claimed to have fired only Mercado and Munoz, not Hurtado. Boersma, though, could not explain why he would fire two out of three workers when cows from each worker allegedly suffered from the same disease. Furthermore, Boersma testified that Hurtado was late to work nearly every day, and talked on the phone while working. Yet Boersma claims to have fired only Mercado and Munoz. Why would Boersma not have fired Hurtado for engaging in the same or worse behavior than the workers he discharged? This discrepancy demonstrates a lack of credibility in Boersma's testimony regarding Hurtado quitting, pointing to the more logical explanation which coincides with Hurtado's testimony, that he was discharged along with Mercado.

Lopez' discharge is subject to similar scrutiny, considering that discharge occurred merely one day after Boersma discovered Lopez' desire to join the union. The timing of the discharge indicates that Lopez was fired for supporting the union.

Respondent thus did not sustain its burden of showing that the discharges would have occurred in the absence of the union activity and election. I therefore find that Lopez, Munoz, Mercado, and Hurtado were discriminatorily discharged in violation of Section 1153(c) and (a) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 1153(a) and (c) of the Act, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Juan Manuel Munoz on November 20, 1980, Jose Mercado and Jose Hurtado on December 10, 1980, and Jesus Lopez on February 27, 1981, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former or substantially equivalent jobs. I shall further recommend that Respondent make them whole in accordance with the formula stated in J & L Farms, 6 A.L.R.B. No. 43 (1980).

I shall also recommend that Respondent post a Notice in English and Spanish on its premises, such Notice being attached hereto and labelled "Appendix."

Upon the basis of the entire record, the findings of facts and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, and representatives, shall;

1. Cease and desist from:

(a) Practicing surveillance of employees' union activities.

(b) Interrogating employees about their membership in the union or involvement in union activities.

(c) 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 union or concerted activity protected by Section 1152 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employees 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 Juan Manuel Munoz, Jose Mercado, Jose Hurtado, and Jesus Lopez full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

(b) Make whole Juan Manuel Munoz, Jose Mercado, Jose Hurtado, and Jesus Lopez for any loss of pay or 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, 6 A.L.R.B. No. 43 (1980), 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 and 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 September 1980 until the date on which the said Notice is mailed.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the time(s) 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 management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act.

(h) Notify the Regional Director in writing, within 30 days after the 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: October 12, 1981

Agricultural Labor Relations Board

by

A handwritten signature in cursive script, appearing to read "Ron Greenberg", is written over a solid horizontal line.

Ron Greenberg
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego 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 practicing surveillance, interrogating employees and discharging four employees because of their union activities. 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 farmworkers 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.

WE WILL NOT practice surveillance or interrogate employees about their union activities.

SPECIFICALLY, the Board found that it was unlawful for us to discharge Juan Manuel Munoz, Jose Mercado, Jose Hurtado, and Jesus Lopez. WE WILL NOT hereafter discharge or refuse to rehire any employees for engaging in union activities.

WE WILL reinstate Juan Manuel Munoz, Jose Mercado, Jose Hurtado and Jesus Lopez 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:

HARRY BOERSMA DAIRY

By:

_____ Title)

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

DO NOT REMOVE OR MUTILATE