Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SEARS - SCHUMAN COMPANY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 80-CE-47-SAL 8 ALRB No. 43

DECISION AND ORDER

On February 1, 1982, Administrative Law Officer (ALO) Norman I. Lustig issued the attached Decision in this proceeding. The Charging Party timely filed exceptions and a supporting brief.

Pursuant to provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated 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 brief and has decided to affirm the ALO's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

By authority of the Labor Code section 1160.3, the

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Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: June 16, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Sears - Schuman Company, Inc. (UFW)

8 ALRB No. 43
80-CE-47-SAL

ALO DECISION

The complaint alleges that Respondent discriminatorily refused to rehire Ramon Velasquez in March 1980. The ALO found that Velasquez' union activity was minimal and the General Counsel failed to prove company knowledge thereof by a preponderance of the evidence. Further, the ALO stated that the facts in the case by the Board setting aside an election at Respondent, 6 ALRB No. 39, did not indicate any anti-union animus.

While noting that the method of discharge was "at least negligent" and the result of "administrative ineptitude," the ALO concluded that there was insufficient evidence to sustain a finding of a causal connection between Velasquez' union activity and Respondent's 1980 refusal to rehire him. The Board cannot impose its own business judgment for that of Respondent. On the basis of no prima facie case being established, the ALO recommended that the complaint be dismissed.

BOARD DECISION

The Board affirmed the ALO's rulings, findings, and conclusions and adopted his recommended Order.

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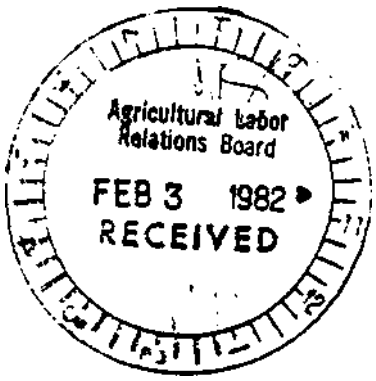
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	)	
SEARS-SCHUMAN COMPANY,	)	
Respondent,	)	
and	)	Case No. 80-CE-47-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party	)	

Jose H. Lopez, Norman K. Sato, and James Flynn, Salinas, for the General Counsel

Terence R. O'Connor
Grower-Shipper Vegetable Association,
Salinas, for the Respondent (under protest)

No appearance for the Charging Party

DECISION

STATEMENT OF THE CASE

NORMAN I. LUSTIG, Administrative Law Officer: This case was heard before me on November 23,24 and 25, 1981 in Salinas, California. The Complaint in this matter, alleging violations of Section 1153(a) and (c) of the Agricultural Labor Relations Act ("Act"), Labor Code Section 1140 et seq, by Sears-Schuman Company ("Sears") issued on February 11, 1981. The complaint is based upon a charge filed on May 9, 1980, by the United Farm Workers of America, AFL-CIO ("United Farm Workers"). Copies of the charge were duly served upon the Respondent.

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

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Sears, I make the following :

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Basic Issue

Did the Respondent commit an unfair labor practice against Ramon Velasquez by virtue of its refusal to rehire him as a tractor driver for the 1980 growing season in the Salinas Valley?

The Administrative Law Officer finds that no unfair labor practice was committed.

II. Jurisdiction

A. Sears was, at all times relevant to the events complained of, a corporation engaged in agriculture in Monterey and Santa Cruz Counties, and was an agricultural employer within the meaning of Section 1140.4(c) of the Act.

B. Ramon Velasquez was, at all times relevant to the events complained of, an agricultural employee within the meaning of Section 1140.4(b) of the Act.

C. John McPike, Pete Cernokus, Tony Salcido, and Gilbert Banuelos were, at all times relevant to the events complained of, supervisors within the meaning of Section 1140.4(j) of the Act.

D. The United Farm Workers is a labor organization within the meaning of Section 1140.4(f) of the Act.

E. As noted, Sears-Schuman Company was, at all relevant times up to and including the refusal to rehire Mr. Velasquez in March, 1980, an agricultural employer. At some time after

March, 1980, Sears-Schuman sold its physical assets and ceased doing business as an on-going concern, although the corporate entity apparently was not dissolved. Identifiable former Sears equipment, former supervisory and hourly employees, including all witnesses, other than Ramon Velasquez, and former leased fields all would up in the ownership, employment, and/or control of a single entity, but the General Counsel made no claim in this proceeding that the latter entity is a successor employer to Sears, or that Sears had any remaining assets or identity other than as a corporate shell.

Terence R. O'Connor of the Grower-Shipper Vegetable Association had served as attorney for Sears during all relevant events through the failure to rehire Mr. Velasquez in 1980, and acted in the interest of Sears up until the time of the hearing, while disclaiming representative status on the ground that no client existed to represent. At the inception of the hearing, Mr. O'Connor moved to be relieved as counsel for Sears on the ground that no Respondent exists. That motion was denied upon the grounds that Mr. O'Connor could not represent to the Administrative Law Officer that Sears did not then exist as a corporation de jure; that the motion to be relieved was inappropriately late since Mr. O'Connor had long been aware of the dispersion of the assets of Sears and its apparent demise as an on-going organization during the pendency of this matter; and that Mr. O'Connor had investigated the allegations during the

active life of Sears and was familiar with the facts and the witnesses. Mr. O'Connor thereafter during the hearing appealed the ruling of the Administrative Law Officer to the Board, and that appeal was denied. Notwithstanding his motion to be relieved as counsel for Sears, Mr. O'Connor performed both fully and competently.

III. The Alleged Unfair Labor Practices

The Complaint alleges that Sears, acting through the supervisors named above failed to rehire Ramon Velasquez as a tractor driver because of his activities in support of the United Farm Workers and by doing so:

A. Interfered with, restrained and coerced, and interfered with its employees in the exercise of their rights guaranteed in Section 1152 of the Act, and thereby did engage in unfair labor practices affecting agriculture within the meaning of Section 1153(a) and Section 1140.4(a) of the Act.

B. Discriminated in regard to the hire, tenure, or other conditions or terms of employment to discourage its employees from engaging in protected concerted activities, and thereby did engage in unfair labor practices affecting agriculture within the meaning of Section 1153(c) and Section 1140.4(a) of the Act.

IV. The Operative Facts

Ramon Velasquez was hired as a tractor driver by Sears for the first time in April, 1979. He previously had worked as a tractor driver in Arbuckle, California for more than 10 years.

On August 1, 1979, as reported in Sears-Schuman Company, Inc. 6 ALRB No. 39, a representation election was held at Sears, the union alternatives being the United Farm Workers (Intervenor) and the Independent Union of Agricultural workers (Petitioner). Neither union received a majority of the ballots, and a run-off election was held on August 20, 1979. The Independent Union received a majority in the run-off, but the result was set aside by the Agricultural Labor Relations Board for reasons not directly related to this charge.

Although Mr. Velasquez was described by two of his former Sears co-workers as the leading employee advocate for the UFW in the election period, his own description was very substantially more modest, centering upon two discrete events. Mr. Velasquez himself gave conflicting testimony as to the extent of his initiation of, and participation in, discussions of the positive merits of UFW representation. The Administrative Law Officer finds that Mr. Velasquez' activities for the UFW were minimal, based upon the conflicting evidence given both by him and by other witnesses as to events, times and content of statements. Further, there was no evidence adduced, despite unfulfilled offers of proof, that the employer was particularly aware of any union related activities of Mr. Velasquez, with the possible exception of the incidents below. In so finding, the Administrative Law Officer takes notice of the fact that the UFW received over 50 of the approximately 120 ballots cast for both of the competing unions in each of the two elections,

and Mr. Velasquez' conduct was not, again excepting the following events, distinctive so as to mark him alone among the UFW supporters.

The earlier of the two specific events concerning Mr. Velasquez consisted of a visit, observed by a foreman, of two UFW organizers to Mr. Velasquez prior to the first election when Mr. Velasquez was performing tractor work alone. The foreman, who was, by Mr. Velasquez account, almost 500 feet away, came up to Mr. Velasquez after the organizers left, and asked about their identity. Mr. Velasquez replied that the organizers were friends, and the foreman departed in the same direction that the organizers had taken, toward the highway. There was no showing of any comparable events, if these events had any particular significance, with respect to other employees, or other times. Similarly, no evidence was adduced that the company, through its foreman or otherwise, ever established the identity of Mr. Velasquez' visitors, or indicated that it was concerned later.

The second incident related to an event which occurred between the two elections. Mr. Velasquez was speaking with several other Sears employees at the camp about the UFW prior to the beginning of a work day. Two foreman were nearby, but not closer than 30 feet. The foremen were appropriately present to give work assignments to the workers. At the conclusion of the conversation, Mr. Velasquez yelled words to the effect of "this time the Chavez union will win." Others also yelled. The two foremen turned at the sound of the yelling and looked at the group. There was no evidence adduced

that the foremen appeared to understand the yells, or directly reacted to them other than by turning at the sound, or specifically noted the presence of Mr. Velasquez.

At some time within one month prior to August 16, 1979, Mr. Velasquez, while driving in a field with which he was not familiar, hit part of an irrigation line. The impact resulted in damage to a tractor pulled and driven implement called a Howard Rotovator, to the extent of approximately one thousand dollars in replacement parts, exclusive of labor. There was conflicting testimony as to whether Mr. Velasquez was at fault in the accident.

At the hearing, the former General Manager of Sears claimed that Mr. Velasquez had also damaged the rotovator, negligently, on a prior occasion, resulting in parts repair costs of $900, exclusive of labor. Mr. Velasquez vehemently denied that any such incident occurred, and the Administrative Law Officer, impressed with Mr. Velasquez' candor (to his general detriment) in other aspects of his testimony, credits that denial. The Administrative Law Officer also noted that the parts invoice for the alleged prior occasion (Respondent's One) carries parts numbers in a different series from the parts invoices relating to the conceded irrigation pipe incident, and that the General Manager was somewhat equivocal as to whether any other Sears vehicle would have required parts from the particular dealer involved.

The former Sears manager also testified that Mr. Velasquez' driving was generally deficient in that he did not cultivate

to all of the edges of the fields, thereby losing the income from land more expensive to farm in the Salinas Valley as compared to the Central Valley. Significantly, Mr. Ramo, Mr. Velasquez' former co-worker, testified that Mr. Velasquez was a good driver, but that his driving methods differed somewhat from the methods used by a long-time Sears employee such as Mr. Ramo. The Administrative Law Officer finds, given the accident, driving technique, and Mr. Velasquez' short tenure, that it was not unreasonable for Sears to determine that Mr. Velasquez was a marginal employee.

In October, 1979, Mr. Velasquez received information that his wife was ill in Mexico. He asked the foreman, who was a temporary replacement for his regular foreman, for permission to leave for the balance of the season. The permission was granted, with the apparent understanding between Mr. Velasquez and the temporary foreman that Mr. Velasquez was to return at the beginning of the next season, in 1980.

Mr. Velasquez returned in 1980, and contacted Mr. Cernokus, his regular foreman. Mr. Cernokus first had Mr. Velasquez inquire as to the availability of irrigator work, and then twice stalled him off for a period of days. Thereafter, Mr. Cernokus sent Mr. Velasquez to the Sears manager, who referred him back to Mr. Cernokus with the implication that Mr. Velasquez would not be rehired. Mr. Cernokus then confirmed that implication. At least one tractor driver hired roughly contemporaneously with the 1980 events, had never worked for Sears in the past.

Sears did not, according to the evidence, honor any form of seniority in hiring or in employment, after the expiration in the past of a labor agreement with the Teamsters. Even General Counsel's witness Eusebio Ramo agreed upon that point. However, it was clear that, barring some additional factor such as poor performance, tractor drivers were normally rehired by Sears from year to year in the relevant time frame.

Finally, aside from the facts described above, and those contained in the Board's decision in 6 ALRB No. 39, the Administrative Law Officer fails to discern any facts which would support a finding of anti-union animus on the part of Sears. Specifically, no other Sears employee is claimed to have been adversely affected by support for the UFW. The ALO does not regard the cited decision as indicating anti-union animus by Sears.

V. Discussion of Issues and Conclusion

This case has been an extremely thin one throughout, hovering upon the brink of failure to establish a prima facie case. Establishment of a prima facie case in a situation of discriminatorydischarge in violation of Section 1153(c) and (a) of the Act requires proof by a preponderance of the evidence that the employee was engaged in union activity, that the respondent had knowledge of the employee's union activity, and that there was some connection or causal relationship between the union activity and the discharge. Jackson Perkins Rose Co. 5 ALRB No. 20.

The Administrative Law Officer did not grant the Respondent's motion to dismiss following the presentation of the General Counsel's case. However, upon review of the transcript, it is the opinion of the Administrative Law Officer that a prima facie case is lacking. As indicated above, while Mr. Velasquez did engage in some union activity, his degree of involvement was sufficiently small and inconspicuous so as to raise overwhelming doubt as to whether his activity was sufficiently distinctive to constitute an element of a prima facie case (compare George Lucas & Sons, 4 ALRB No. 86). More importantly for the non-establishment of a prima facie case, is the absence of any indication that the employer was aware of Mr. Velasquez' union activity. The Administrative Law Officer cannot find a preponderance of evidence of employer awareness based solely upon (1) one instance of passive in-field contact by UFW organizers, observed by a foreman at a distance of 150 meters, at a time at which such contact of employees must have been frequent, and the foreman's subsequent question (misquoted in the General Counsel's brief) as to the identity of individuals who crossed a field to speak to a lone tractor driver; and (2) Mr. Velasquez' undistinguished and apparently indistinguishable participation in a group of shouting employees, who drew the apparent attention of two foremen at least ten meters (not feet, as misstated in the General Counsel's brief) away, only when the shouts occurred.

The Administrative Law Officer is also unable to find any connection or causal relationship between Mr. Velasquez' activities and the failure to rehire. The timing of the failure, approximately seven months after the activities, does not indicate any relationship. The non-rehire procedure, while insensitive and very arguably callous toward Mr. Velasquez, does not in and of itself indicate any relationship Mr. Velasquez shouted a pro-UFW phrase in the midst of a group of UFW supporters, but no alleged discriminatory action was taken against any other individual in the group. The Administrative Law Officer finds no causality with any of the activities advanced.

Even if a prima facie case had been demonstrated, no liability of the Respondent can be found. There are, of course, two troubling sequences of events in this matter. The first is the combination of damage to the Rotavator/irrigation pipe and of contemporaneously untransmitted criticisms of Mr. Velasquez' driving technique. The second is the manner in which Mr. Velasquez was allowed to return to a non-existent job without forewarning that he would not be rehired, under circumstances in which notice to him would have been easy, and the apparent game-playing when Mr. Velasquez appeared.

Although Nishi Greenhouse, 7 ALRB No. 18, and its Wright Line predecessor and follower are not strictly applicable here.

they provide a useful analysis framework. Under that framework, the Respondent has the burden either of proof or, at least, of going forward, once the prima facie case is made. To meet that burden, the Respondent indicated that Mr. Velasquez damaged equipment, and that his driving did not conform with the standards desired by the employer. While Mr. Velasquez strongly indicated his belief that the equipment damage did not result from his negligence, the Administrative Law Officer does not regard the point as critical even if Mr. Velasquez' unsupported claim that the irrigation line was totally hidden is to be believed. While the application of the rule is harsh, the Administrative Law Officer cannot hold as a matter of law that an agricultural employer cannot apply a strict liability standard to a relatively newly employed driver, who had had many years of driving experience, and who had damaged equipment. That decision is a business decision of the employer, and in the absence of a labor agreement which provides some form of "just cause" protection to an employee, does not appear to be legally assailable in and of itself. The General Counsel, thereafter the recipient of the procedural (Wright Line I) or substantive (Wright Line II) burden, failed to introduce any evidence indicating that Sears normally excused non-negligent damage, and otherwise failed to refute the Respondent's defense. With respect to the defense of inappropriate driving methods, buttressed somewhat by the General Counsel's own witness, Mr. Ramo, no refutation was offered.

Mr. Velasquez' treatment upon his return, and additionally, the at least negligent failure to inform him of prospective non-rehire, appears to be oblique to the prima facie case in that it is primarily procedural rather than substantive. The Administrative Law Officer detects a number of possible explanations of Mr. Velasquez' treatment upon his return, some of them offered by the parties. In summary, the General Counsel offers that the treatment was itself intentionally discriminatory because of union activity, and the Respondent offers that it resulted from a combination of administrative ineptitude and distaste for communicating an adverse personnel decision. Although not specifically raised by the respondent, the referral of Mr. Velasquez for employment as an irrigator could as easily have been an attempt by the employer's representative to keep Mr. Velasquez on the payroll in some capacity as it could have been planned harassment of Mr. Velasquez. The Administrative Law Officer, while regarding the overall non-rehiring treatment of Mr. Velasquez as extremely poor in the human sense, cannot, however, find any preponderance of evidence that any of the treatment was other than inept, and cannot find a violation of the Act with respect to it. The Administrative Law Officer notes that the Board has otherwise not considered inept termination treatment to constitute discriminatory motivation. See C.J. Maggio, 6 ALRB No. 62.

VI. Dismissal

Having found that the Respondent did not violate the Act, I recommend that the complaint be dismissed in its entirety.

Dated: February 1, 1982
at San Francisco, California

Norman I. Lusting
Administrative Law Officer