Livingston, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| FOSTER POULTRY FARMS,<br><br>Respondent,<br><br>and<br><br>WAREHOUSING, PROCESSING AND ALLIED WORKERS' UNION, LOCAL 6, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,<br><br>Charging Party. | ) | Case No. 80-CE-24-F<br><br>8 ALRB No. 51 |

DECISION AND ORDER

On September 29, 1981, Administrative Law Officer (ALO) Stuart A. Wein 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 (ALRB or 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 briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent that they are consistent therewith.

The complaint alleges that Respondent violated sections

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

1153(c) and (d) of the Agricultural Labor Relations Act (Act) by discharging employee Edwin Lyons, Jr. (Lyons) because of his union activities on behalf of the Teamsters Union and on behalf of the Warehousing, Processing and Allied Workers' Union, Local 6 (Local 6) and because he gave testimony at an ALRB unfair labor practice hearing against Respondent in Case No, 78-CE-4-F et al.

Background

Foster Poultry Farms (Foster) is a family-owned poultry operation located in Merced and Stanislaus Counties. It is the largest poultry operation in the western United States and includes a feed mill, processing plant, 12 breeder ranches, and an administrative complex. On a typical day, there are 20 million live chickens at the ranches and 400,000 others are processed at Respondent's facilities. At times material herein, Respondent had approximately 2,000 non-agricultural employees and 1,300 agricultural employees. Most of the incidents herein pertain to the feed mill and maintenance mechanic Lyons who worked there and was discharged on August 18, 1980.

Lyons was hired as a mechanic on December 16, 1976, at Respondent's feed mill. In December 1977 the Teamsters Union conducted an organizational drive among Respondent's employees. During the course of the campaign, Lyons passed out authorization cards. Subsequently, when the Teamsters signed a jurisdictional pact with the United Farm Workers of America, AFL-CIO (UFW), the employees were referred to Local 6 of the Longshoremen's Union. In early 1978, Local 6 held four or five membership meetings and Lyons, who was the coordinator of Local 6's employee-organizing committee,

continued to pass out authorization cards among Respondent's employees. On at least one occasion he put a notice announcing a Local 6 meeting on his pickup truck and parked it conspicuously in Respondent's employee parking lot. Subsequently, Local 6 filed a petition for an election which was dismissed by the National Labor Relations Board (NLRB) on the basis of its lack of jurisdiction over agricultural employees. Six employees filed separate unfair labor practice charges with the ALRB in March and April 1978, alleging that Respondent had engaged in unlawful interrogations, surveillance, threats, and discriminatory transfers, demotions, and discharges during the organizational drive. A consolidated complaint covering all six charges was issued and a hearing held in November and December 1978, and February 1979. Lyons, who was available for extra daytime duties since he usually worked on the swing shift, from 4 p.m. to 12 a.m., assisted the ALRB trial counsel in the preparation of the case and testified against Respondent at the hearing.

In February 1979, Ben Kirby succeeded Bob Stinson as supervisor of Respondent's maintenance mechanics, including Lyons. In May 1979, Lyons asked Respondent to approve for posting on its premises a notice announcing an educational meeting for employees, to be conducted by ALRB agents in Turlock on May 15, 1979. On June 11, 1979, Lyons was given a company form on which to choose a gift from Respondent in recognition of his three years of service. Lyons returned the form to Respondent with the following notation: "I wouldn't want anything that would remind me of Foster Farms, thereby the company may keep my award." As a result, Personnel

Director Oilar decided to have a talk with Lyons on June 14, 1979. At that meeting, Lyons told Oilar that Respondent had "credibility problems" and gave as an example the fact that its truckers were not being paid double time on Sundays as promised. Oilar made notes of the conversation and placed the notes in Lyons' personnel file.

About two weeks after that meeting, Lyons began receiving disciplinary warnings. Respondent had a specific procedure for discipline and termination of employees (set forth in its company manual) which included a four-step progressive disciplinary process: 1. oral warning; 2. written warning; 3. suspension; 4. termination. It was Respondent's practice to note oral warnings in the employee's personnel file. Both oral and written warnings could be removed, or purged, from the employee's file at his or her supervisor's discretion. It was company policy to give the employee a copy of any warning notice in his or her file.

Supervisor Kirby testified that prior to July 1979 he had given Lyons an oral warning and subsequently had removed it from his file. Lyons claimed he received no warnings or discipline, oral or written, prior to July 1979.

On July 2, 1979, Kirby gave Lyons a warning for leaving a safety lock on equipment when he left for the day. Respondent produced a written warning assertedly given to Lyons for that infraction of the rules. Lyons admitted his error, but claimed that Kirby told him that it was an oral warning and would be removed after 90 days if he did not commit any further safety violations. Lyons claimed he did not see a copy of the warning at the time.

Kirby testified that he gave Lyons another written warnir

on November 8, 1979, for his failure to unplug a wet corn leg elevator the night before. Respondent produced the written warning at hearing and Kirby testified that he discussed the matter and the warning with Lyons at the time. Lyons claimed that Kirby first discussed the incident with him some two weeks later in the context of another disciplinary matter. Lyons denied that he was ever given either of the two previous written warnings, claiming that he first saw them when the General Counsel obtained his personnel file from Respondent in preparation for the hearing.

On November 21, 1979, Lyons heard that one of Respondent's supervisors was advising employees not to attend union meetings. Lyons called Personnel Director Oilar and left a message that he wanted to speak to him. That evening Oilar visited the feed mill during Lyons' shift. After they discussed the matter, Oilar told Lyons that Kirby wanted to speak to him. Lyons went to Kirby's office and Kirby told Lyons that on two recent occasions he had violated a company rule that the supervisor is to be called if machinery is inoperable for more than one hour. After they discussed the one-hour rule, Kirby gave Lyons a disciplinary memo that was a "Final Warning" calling for three days' suspension. The two occasions listed were November 16 and November 19. The warning indicated that the "next offense will result in discharge."

Lyons testified that this was the first written disciplinary notice he had received. He claimed that he was unaware of the one-hour rule and was operating on a two-hour rule that he had learned from his prior supervisor, Stinson, and that the mill had not been down more than two hours. When he asked Kirby for

verification of the one-hour rule, Kirby produced a log book for July 1979 in which the one-hour rule was stated at the bottom of a page. Lyons told Kirby that he thought he had been on vacation at the time and that no one had ever notified him about the rule. Lyons told Kirby that the log was a poor way to communicate policies to him.

On November 24, 1979, when Lyons returned from the suspension, he had another discussion with Kirby. According to Lyons, that was the first time he heard that there had been a problem with the wet corn leg elevator on November 7, 1979.

On March 19, 1980, we issued our Decision and Order in Foster Poultry Farms 6 ALRB No. 15, in which we concluded that Respondent had engaged in unlawful interrogation, threats, and surveillance, and one discriminatory discharge. On June 24, 1980, Lyons received a generally favorable evaluation from Respondent. In late June or early July, the remedial Notice to Employees in 6 ALRB No. 15 was read to Respondent's employees. When Lyons became aware of the ALRB Decision, he contacted Local 6 to see about reinstituting an organizational drive among Respondent's agricultural employees. Local 6 had earlier told the employees to await the results of the ALRB unfair labor practice proceedings. Towards the end of July, Lyons had lunch with an organizer and the business agent of Local 6 at a restaurant in Turlock. Lyons saw one of his former supervisors, Jim Osmer, who was also at the restaurant for lunch. In this Board's prior Decision, supra, we found that Osmer engaged in unlawful interrogations and threats.

Lyons and the Local 6 officials agreed to schedule an

employee meeting for August 5, Lyons contacted employees individually and posted a notice announcing the meeting in building "A" on August 4. Building "A" sits on the other side of a parking lot, approximately 200 feet from the feed mill. About 75 employees work in building "A" which houses Respondent's administrative offices. The meeting took place on August 5 and the employees decided to have another meeting August 24.

At the beginning of Lyons' shift on August 15, 1980, Kirby called him into his office. Kirby told him that there had been a problem with the fat-unloading system and suspended him for three days. When Lyons returned to work the following Monday, he went to see Kirby before his shift began at 4 p.m. Kirby told him he was terminated. Lyons tried to explain what had happened with the fat filter, but Kirby indicated that it was too late.

Respondent feeds its chickens food produced in its feed mill, which operates 24 hours a day. Fat is sprayed onto the feed as a food supplement. The fat was usually delivered by truck, put in underground storage tanks, and later pumped into the feed mill. In early August, Kirby instituted a new procedure whereby the fat which arrived by rail car (tankers) was to be pumped directly into the feed mill.

All mechanics 'carried and utilized a "Preventive Maintenance Program" (PMP) which consisted of checklists of items for them to do and to note on their respective shifts. Starting August 6, 1980, a new PMP form was distributed. The checklist for the new Fat System, which consisted of nine items, was set forth in the upper left corner of the sheet to indicate its priority, according

to Kirby. Number 3 of the Fat System checklist is: "clean ALL filters and place filters in service." There are two filters between the rail car and the pump.

According to Kirby, the fat in a rail car was pumped out and the rail car emptied on August 13 at 5:30 p.m. Lyons was responsible for disconnecting it and, in accordance with the checklist, cleaning all filters. Apparently, he cleaned only one. When the next full rail car was hooked up to the pump on the morning of August 15th, the lines between the car and the pump became plugged.

Lyons testified that the new fat system checklist applied to connecting full rail cars to the pump, and was not for disconnecting empty rail cars. He stated that on August 13 he switched from the used to the unused filter and cleaned the used one, which was all that was required when disconnecting the empty rail car. Lyons claimed that that was the first rail car he had disconnected, and that if the new checklist applied to disconnecting, no one had ever explained that to him. Kirby claimed that Lyons knew the procedure because he had explained it to him and that Lyons had disconnected a rail car before. Lyons' personnel file contained a memo summarizing Lyons' disciplinary problems. It includes a notation that on August 2, 1980, Lyons failed to disconnect the fat system according to procedure and that he was instructed on procedure and "full understanding was achieved."

Analysis

If the General Counsel establishes that union activity or other protected concerted activity was a basis for an employer's decision to discharge an employee, the employer, to overcome the

prima facie case, must show that it would have discharged the employee even if the employee had not engaged in the activity. (Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].)

We find that the General Counsel has established a prima facie case of discrimination. In addition to a history of union activity beginning in 1977, Lyons engaged in protected concerted and union activity shortly before his discharge. This included contacting Local 6, meeting with union agents, and posting notices for and attending a union meeting. We find Respondent's knowledge of Lyons' activity can be inferred from the record, particularly in light of the fact that Lyons saw one of his prior supervisors, who was still employed by Respondent, while he was meeting with the union agents at a local restaurant. The timing of Lyons' discharge, less than two weeks after he posted a union notice in Respondent's main office and attended a union meeting, also suggests employer knowledge and we so find.

We now turn to the issue of whether Respondent established that, by discharging Lyons, it was merely implementing in a non-discriminatory fashion its own progressive disciplinary procedure.

The ALO found the discrepancies regarding the number of warnings received by Lyons "not material" and found that both Lyons and Kirby were "reasonably credible." Because the issue in "mixed motive" cases is the employer's true motivation, direct evidence is usually lacking and it is necessary to examine closely the events preceding the discharge to see whether they shed light on this critical issue. The burden is on Respondent to produce sufficient

evidence to establish that it discharged Lyons for reasons unrelated to his union activity. (Nishi Greenhouse, supra, 7 ALRB No. 18.)

We find that the number of warnings actually received by Lyons is material, especially in the light of Lyons' testimony that he was not properly instructed in some of the procedures which he allegedly violated and did not receive notice of three of the disciplinary notations in his file. We find that Respondent has failed to meet its burden in establishing that it would have discharged Lyons on August 18, 1980, notwithstanding his union activities. Contrary to our dissenting colleague, we find Lyons' testimony to be more credible regarding the authenticity of his disciplinary record.[2/] We base this finding on contradictions between Kirby's testimony and documentary evidence, "missing" evidence and critical blanks found in Respondent's records, and logical inferences drawn from the record as a whole. (El Rancho Market (1978) 235 NLRB No. 61.)

Two written warnings were received into evidence purporting to show disciplinary actions against Lyons prior to his November 21, 1979 suspension. Kirby testified that he discussed both with Lyons and gave him copies at the time of the incidents, in accordance with Respondent's policy. Lyons claimed that the first warning was given

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[2/]Although the Board will usually defer to the ALO's credibility findings, that general rule is not operative here, where the ALO failed to make such findings. (NLRB v. Jackson Maintenance Corporation (2nd Cir. 1960) 283 F.2d 569.) We do not consider the ALO's reference to Lyons' "somewhat inconsistent" explanation forthe fat pluggage to be a credibility finding nor do we find that the record reflects any inconsistency in Lyons' explanation.

to him orally and that Kirby told him the written notation of that warning would be removed from his personnel file in 90 days. Lyons also testified that he was never disciplined regarding the second incident and .that he never received a copy of the second notice. Lyons testified that he had no knowledge that either notice was in his personnel file until the ALRB hearing in this matter. Other than Kirby saying so, there is no further proof as to whether the two warnings had in fact been served upon Lyons.

Documentary evidence leads us to conclude that Lyons' testimony regarding his disciplinary record and whether he received the two disputed warnings is more likely true. A memo in Lyons' file summarizes his disciplinary record.[3/] It includes a notation stating that Lyons was notified August 2 for failing to properly disconnect the fat system according to Kirby's new procedure and instructed as to that procedure at the time of the reprimand. Lyons did not work on August 2, and Kirby testified that the new Preventive Maintenance Procedure was not initiated until August 5 and he explained its importance to Lyons on August 6. As Respondent did not testify about any such incident nor attempt to explain this inconsistency in dates, it is reasonable to find that the document in question was prepared to "prove" that Lyons had been instructed as to the proper usage' of the new fat system prior to his discharge for failing to follow that procedure, and we so find.

In addition, a taped conversation between Lyons and Kirby indicates that Lyons was not disciplined at the time of the wet corn

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[3/]GCX 3c, 3d.

leg elevator incident. The taped conversation occurred November 24 1979, when Lyons returned from his three-day suspension. In the course of that conversation, Kirby brought up the incident of the wet corn leg to explain what he meant by the language "disruptive actions toward your fellow workers" in the suspension warning they were discussing. While we are not condoning the surreptitious use of tapes by any party in the labor relations setting, the tape recording casts doubt on Kirby's testimony and his statement in the earlier warning note that the warning was discussed with and served on Lyons the day after the incident. The incident occurred two weeks prior to the taped conversation.[4/] Consequently, it appears that Lyons did not receive a disciplinary warning regarding the wet corn leg incident.

Further, a critical piece of evidence, the log book which" would show who hooked up the rail car on August 15, is suspiciously blank.[5/] For no other day in the two and one half month period for which the log was introduced, is there a blank entry.

Respondent's justification for the three day suspension in November 1979 is weak. The warning states that the discipline is

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[4/]Our dissenting colleague claims that the tape, rather than casting doubt on Kirby's testimony, casts doubt on Lyons' credibility. Member McCarthy implies that Lyons is responsible for the 40 second blank on the tape and that all inferences must therefore be made against him. Respondent was given the actual tapes to make its own copies prior to the hearing. The tapes were admitted into evidence without objection by Respondent. Testimony was taken regarding the conversation. Neither party chose to submit a transcription into evidence. The parties' attorneys acknowledged that there were some blanks on the tapes. Given these circumstances, it is improper to make inferences against any party due to the condition of the tape. This finding is based on the content of the tape.

[5/]RX 1 p. 52.

the result of a failure by Lyons, on two occasions, November 16th and 19th, to comply with procedures and notify management when machinery is down more than one hour. The one-hour rule was communicated to the employees on the bottom page of the log book in July 1979. The specific section of the log was not introduced into evidence. Lyons was on vacation at the time of the entry in the log. While Lyons skimmed the log upon his return, he apparently missed it. Lyons was operating under a two-hour rule that he understood from his prior supervisor and so told Kirby.

We have examined an excerpt from the log book, covering a period of two and a half months which was received into evidence, and have compared it with Respondent's compilation of policies and procedures, entitled "Maintenance Department Instruction and Communication."[6/] Lyons and Kirby testified that each document therein was discussed with the affected employees and posted for three to six months. We find, as Lyons testified, that Respondent's usual practice was to post notices of new or changed procedures, such as the one-hour rule, and to discuss them with the affected employees and not to merely place them in the log. The one-hour rule was never discussed with Lyons.

Even if the new rule had been adequately communicated to Lyons, his violation of the rule is not all that clear. There was no testimony that the downtime of machinery was in excess of one hour on November 16, 1979. As to the November 19 incident, Lyons testified that the machine was down between 10-11 p.m. and that he

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[6/]GCX 5.

notified the employee who came on duty at midnight of the fact, and that employee, in turn, contacted Kirby. Respondent presented no evidence that the machine was down longer than as indicated by Lyons. Thus, it appears that the suspension was either unwarranted, or unduly harsh.[7/]

We find Respondent's account of the events that precipitated Lyons' discharge unconvincing. Although Kirby claims to have communicated to Lyons that the "PMP" applied to disconnecting rail cars, we credit Lyons' testimony that it was not explained to him for the following reasons: Kirby's testimony regarding when he explained the system is evasive; we have previously found untrustworthy Respondent's notation in Lyons' file that on August 2 he was reprimanded for and instructed in the proper procedure for the new fat system; employer witnesses testified that Kirby personally explained the system to the dayshift and told them to pass it on, but none did so; procedures were not easily communicated to Lyons on the swing shift; Respondent's checklist for the new system, on its face, applies only to connecting full rail cars, not disconnecting empty ones; and, there is a pattern of not communicating new rules or procedures to Lyons.

Even if the new procedure (PMP) had been explained to Lyons and it required 'that all filters be cleaned when hooking up and disconnecting rail cars, we are persuaded that Respondent's

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[7/]We would not find the suspension, by itself discriminatory even if it were unwarranted. It is the suspension, in combination with Respondent's apparent fabrication of disciplinary warnings in Lyons' file and exaggeration of his mistakes, that we find is evidence of a discriminatory motive for his subsequent discharge.

discharge of Lyons was discriminatory. Even if Lyons, by not cleaning both filters on August 13th, is responsible for the plugged filter on August 15th, another employee is similarly at fault for not checking and cleaning both filters prior to connecting the new rail car that day. The PMP required that all filters be cleaned prior to hooking up a full rail car. The employee who hooked up the rail car on August 15th just prior to the discovery of the plugged filter was not disciplined. Respondent's evasiveness concerning the identity of that employee casts further doubt upon its claim that Lyons was disciplined in a nondiscriminatory manner.

Kirby testified that the midnight shift employee hooked up the new rail car on August 15, but that employee, Carson, denied that he hooked up the rail car. Carson stated that when he left at 8 a.m., no rail car was in position or hooked up. The log for the graveyard shift confirms that no rail car was hooked up at that time.[8/] The log for the dayshift is blank and Kirby's explanation for the glaring omission is unconvincing.[9/] Lyons' PMP checklists were retained by Foster to substantiate his discharge, but the PMP checklists for the other employees were destroyed.

Furthermore, plugged filters in the new fat system was a frequent problem. After Lyons was discharged, Foster purchased an agitator to place in the rail cars which eliminated the problem.

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[8/]RX 1, p. 51.

[9/]Kirby claimed that "for one reason or another" none of the four men on dayshift wrote in the log that day and alluded to the fact that they were busy and dirty. As we noted previously, no other shift in a two and one half month period was left blank. We find it extremely unlikely that the four day shift employees were exceptionally busy, dirty, or irresponsible that particular day.

Based on all the evidence,[10] we find that Respondent fabricated some of the entries in Lyons' disciplinary file in order to create a plausible basis for discharging him and to create "proof" that Respondent followed its own disciplinary procedure.[11] We draw negative inferences from the fact that Respondent falsified records in Lyons' disciplinary file. (Milco, Inc. (1966) 159 NLRB 812, 816-821 [63 LRRM 1471] petn. for enforcement granted (2nd Cir. 1968) [67 LRRM 2202].) In that case, the NLRB found that the most plausible explanation for two subsequently manufactured warnings was that the employer, in order to mask the discriminatory nature of a discharge, fabricated the warnings to make it appear that the discharge was for good cause and according to company procedure. Like the NLRB, we will not condone such methods. (See also King Radio Corporation, Inc. (1967) 166 NLRB 649.)

In conclusion, we find that Respondent failed to rebut the General Counsel's prima facie case that Lyons was discriminatorily discharged.[12] Contrary to our dissenting colleague, we find the timing strongly suggests a discriminatory motive. The eight month interim and good work evaluation which occurred between Lyons' "Final Warning" and his discharge is explained by the fact that there

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[10]Member Perry does not rely on the tape to find that Lyons was discriminatorily discharged. He is not persuaded that the tape is trustworthy evidence and finds that the other grounds cited sufficiently support the majority decision.

[11]In Foster Poultry Farms, Inc., supra, 6 ALRB No. 15 we found a discharge to be discriminatory, in part, because Foster did not follow its own disciplinary procedure.

[12]We dismiss the allegation that Foster discharged Lyons because of his testimony at the prior ALRB hearing as we find the timing too remote.

was no union or organizational activity at Respondent's during that period. Lyons was indisputably a skilled and valuable employee. There was no reason for Respondent to terminate him as long as he was not organizing. Kirby's testimony that Lyons was not fired 'although there was a weekly basis for doing so during the first half of 1980 supports our theory that Lyons was disciplined by Respondent only when he threatened to or did organize Respondent's employees. That the eight month hiatus was broken by Respondent discharging Lyons about three weeks after he began organizing for Local 6 strongly supports our finding of discriminatory motive.

ORDER

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

1. Cease and desist from:

(a) Discharging 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 union activity or other protected concerted activity protected by section 1152 of the Act.

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

(a) Immediately offer Edwin Lyons, Jr., full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other employment rights or privileges.

(b) Expunge from the personnel file of Edwin Lyons, Jr.,

all disciplinary records for the period from July 1, 1979, through August 18, 1980.

(c) Make whole Edwin Lyons, Jr., for all losses of pay and other economic losses he has suffered as a result of his discharge, reimbursement to be made according to established Board precedent, plus interest thereon computed at a rate of seven percent per annum.

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

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

(f) 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 August 13, 1980, until the date on which the said Notice is mailed.

(g) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and places(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.

(h) 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. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(i) 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: July 23, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

MEMBER MCCARTHY, Dissenting:

I would affirm the ALO's proposed decision for the reasons stated therein.

In reversing the ALO's Decision, the majority rests its conclusion that the discharge was pretextual largely on making credibility findings adverse to Kirby. Such findings are unwarranted.

While the ALO found both Kirby and Lyons to be reasonably credible witnesses, his specific findings, as applied to the issues in this case, favored Kirby and indicated that Lyons' credibility was questionable.[1/] Regarding the matter of cleaning the fat filters, for example, the ALO noted a seeming inconsistency between the explanation which Lyons originally gave to Kirby as to the

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[1/]The ALO's findings crediting Kirby, based in part on his observation of Kirby's demeanor as a witness, should not be disturbed as there is no clear preponderance of the evidence that they are incorrect. (Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].)

fat filter problems of August 13 and the explanation he offered during his testimony at the hearing.

Other aspects of Lyons' testimony also suggest shifting explanations. For example, when Kirby stated to Lyons that Lyons' animosities toward the Company carried over into his work, Lyons responded, "That is possible, yes." Lyons also testified, however, that he "wasn't telling the truth" to Kirby when he made that comment. Lyons offered the explanation that although he did not agree with Kirby, he lied because he did not want to start an argument. (R.T. June 16, 1981, proceedings, p. 103.) Yet Lyons also testified that he could stand up for himself when he felt he was right. Certainly Lyons' gratuitous and provocative written response to Respondent's offer of a service award, that he "would not want anything to remind [him] of Foster Farms" does not sugges[4] a timid employee who shrinks from confrontation with supervisors. While clearly capable of speaking his mind, Lyons' dealings with his supervisor were not always open and forthright, however. Lyons not only surreptitiously taped his November 1979 and August 1980 conversations with Kirby but did so on other occasions also. Lyons' glib explanation for doing so was, "It just happened that the tape recorder was on me at the time." (R.T. June 16, 1981, proceedings, p. 101.)

In contrast to Lyons' calculating and devious dealing with management representatives, Kirby presented a more credible character. The ALO specifically credited Kirby's disavowal of discriminatory motivation on the central and critical issue in the case, i.e., whether Kirby concoted a pretext to discharge Lyons.

In addition, the ALO found that supervisor Kirby, in deciding to terminate Lyons, sincerely believed that, in view of Lyons' unsatisfactory employment history, further disciplinary action would be futile.

As noted, the majority decision to reverse the ALO rests heavily on its finding Kirby not credible, based in part on a finding that Kirby padded Lyons' disciplinary file. One such alleged fabrication concerns Lyons' suspension in November 1979. Based on an analysis of the surreptitiously recorded tape of a conversation between Kirby and Lyons, the majority finds that Kirby was discussing with Lyons for the first time a work problem which Kirby claims to have discussed with him earlier, and hence undermines Kirby's credibility as a witness. To the contrary, I would find that this tape casts further doubt upon Lyons' testimony and does nothing to rehabilitate it. On the surreptitious recording, which was presumably under Lyons' control until he submitted it to the General Counsel in support of his charges, there is an unexplained 40-second blank space immediately preceding the critical conversation which purportedly shows Kirby had not previously discussed the earlier incident with Lyons.

Beyond this, the tape, although admitted into evidence, deserves little or no evidentiary weight.[2/]

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[2/]While neither party objected to admitting the tape, neither was on notice of how it would be utilized by the majority. Discussions surrounding admission of the tapes indicated that the tapes were to be considered for the substance of the conversations. Respondent was not on notice that the tapes would be considered probative as to whether Kirby had had a previous discussion with Lyons about a particular work problem.

(American Aggregate (1961) 130 NLRB 1397 [47 LRRM 1517]; WIX Corp. (1963) 140 NLRB 924 [52 LRRM 1145].) Barely audible in many places, its poor quality was acknowledged by both parties; that was part of the reason why no official transcript of the tape recording was ever made. Moreover, the 40-second gap raises serious questions as to whether the tape was later edited.

Finally, the majority seizes upon the messiness of Respondent's application of its disciplinary procedure as strong evidence of its unlawful intention. I would affirm the ALO's placement of this evidence into its proper perspective. Although this may be the critical issue in whether a termination was for "just cause," it is but one factor in determining whether there was discrimination because of union activities. While the origin, explicitness and communication of many items in Lyons' disciplinary file are cloudy, it is clear and undisputed that in late November 1979, Lyons was suspended for failing to follow instructions and at that time was issued a written final warning.

Approximately nine months later, on August 13, Lyons failed to properly maintain and clean a fat filter. Although Lyons had entered notations in the log book indicating that the lines had been cleaned, there was in fact a blockage in the lines.

Kirby, who was concerned about problems in implementation of the new tank fat system, had stressed that he wanted thoroughness on system procedures and posted a notice to that effect on August 8. As the ALO noted, Kirby related two instances in which he had already criticized Lyons' work in relation to the fat system.

Given Kirby's concern about implementation of the system in view of initial maintenance problems, his decision to recommend Lyons' discharge seems appropriate. Kirby testified that he had discussed communication and procedure problems with Lyons on numerous occasions since the November 1979 final warning. The August 13 problem, in the context of Kirby's concerns, was the final straw. Kirby testified that he believed that further discipline would not help. (The ALO specifically credited Kirby on this key point.)

In contrast to the strong business justification for Lyons' discharge, which is amply detailed by the ALO, I would add that in my view, the General Counsel's case is too weak to establish a violation. First, it was not proven that Respondent was aware of Lyons' union activities at any time after mid-1979. Respondent knew of Lyons' early 1978 organizing activities and of his participating in ALRB hearings in late 1978. Personnel Director Oilar testified that he was generally aware of Lyons' participation in union activities," but not beyond the ALRB Hearings. The majority notes an incident in July 1980 in which Lyons, who was in a local restaurant with two union business agents, saw a former supervisor. There is no evidence that the former supervisor saw Lyons and the business agents, or even that he knew Lyons' companions were union agents. This Board has been reluctant to accept the "small plant" doctrine as a basis for inferring an employer's knowledge of union activity, and certainly no corollary "small restaurant" doctrine is appropriate here.

Regarding the union organizational meetings, even

assuming Respondent knew of the notice of a meeting, Lyons ' name did not appear on the notice. The announcement of the second organizational meeting, which was scheduled for "next Sunday," referring to August 25, was more likely distributed by Lyons five or more days after his August 13 termination (i.e., during the week of August 18-24, and referring to August 25 as "next Sunday"), rather than on August 11, as he testified. If he distributed the notice before August 18, the "next Sunday" reference makes no sense.

Finally, the timing of the discharge does not warrant an inference of unlawful motive. If, as the majority suggests, the August 1980 termination was merely the culmination of a scheme; originating in mid-1979 or earlier, to terminate a disliked union activist, why did Respondent wait approximately eight months afte. issuing Lyons' final warning before discharging him? It is more consistent with the majority's theory that Respondent would have proceeded to terminate Lyons on a pretext soon after November 1979 while his work was the subject of strong and regular criticism. However, instead of being fired, Lyons continued to work. Despite continuing communication problems, he received a generally favorable evaluation in June 1980, an action inconsistent with what would be expected of an employer searching for a plausible excuse or pretext for discharging an employee. Only after that evaluation did Kirby's problems with the new fat system arise. Lyons was discharged when Kirby determined that he was responsible for the blockage in the fat system, not before and not after. Although the discharge occurred two weeks or more after Lyons met with the

Union agents, there is no evidence that Respondent had knowledge of that meeting or of Lyons' involvement in the organizational meeting which preceded his discharge. Viewed in proper perspective, the timing of the discharge supports Respondent's performance-related explanation for Lyons' discharge rather than the majority's findings and conclusions. I would dismiss the allegation as to discriminatory discharge.

Dated: July 23, 1982

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which 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 employee, Edwin Lyons, Jr. because of his 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 other farm workers in California 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 about 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 and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT hereafter discharge, refuse to hire, or in any other way discriminate against, any agricultural employee because he or she has engaged in union activities or other protected concerted activities, or otherwise utilized their rights under the Act.

WE WILL offer reinstatement to Edwin Lyons, Jr. to his former or substantially equivalent job without loss of seniority or other privileges, and we will reimburse him for any pay or other money he has lost because we discharged him, plus interest computed at seven percent per annum.

Dated: July 23, 1982 FOSTER POULTRY FARMS, INC.

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 1685 "E" Street, Fresno, California 93706. The telephone number is (209) 445-5591.

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

Foster Poultry Farms (ILWU, Local 6) 8 ALRB No. 51
80-CE-24-F

ALO DECISION

The Complaint alleges that Respondent discriminatorily discharged Edwin Lyons, Jr. because of his union activities and because he testified against Respondent in a prior ALRB hearing. The evidence taken at the hearing established that Lyons was a maintenance mechanic at Respondent's poultry operation. Lyons was involved in an organizational drive during 1977-1978 by the Teamsters, and by the Warehousing, Processing, and Allied Workers Union, Local 6. As a result, an election petition was filed with the NLRB but dismissed by them for lack of jurisdiction over agricultural employees. In 1980 Lyons was involved in a second organizational drive by Local 6.

Lyons began receiving disciplinary actions in July of 1979, including oral and written reprimands, and a three day suspension. The number and nature of the warnings and whether Lyons received notice of them were in dispute. On August 18, 1980, Lyons was discharged by Respondent who claimed Lyons failed to follow a procedure regarding cleaning the fat filters at the feed mill.

The ALO found there to be a prima facie case of discrimination. After analyzing nine separate factors to determine the real reason for the discharge, the ALO concluded that it was more probable that Lyons was discharged for failure to follow procedures, poor attitude, and inability to communicate than that Respondent discharged him for his union activities. The ALO recommended that the Board dismiss the complaint in its entirety.

BOARD DECISION

The Board did not adopt the ALO's recommended Order and found, instead, that the discharge of Lyons was discriminatory.

The Board credited Lyons testimony over that of his supervisor, noting that the ALO failed to make credibility resolutions. The Board based this finding on contradictions between the supervisor's testimony and documentary evidence, critical "missing" evidence in Respondent's records, and logical inferences from the record as a whole. The Board found that Respondent did not notify Lyons of some of the disciplinary notations in his file and fabricated other disciplinary documents in order to create a plausible basis for discharging him and to create "proof" that Respondent followed its own disciplinary procedure. Negative inferences were drawn from the finding of falsified records. The Board found that the timing of the discharge, less than three weeks after Lyons began the second organizational drive for Local 6, further supported their finding of discrimination.

Reviewing some of the events in Lyons' disciplinary record, the Board concluded that the discipline meted out was either unwarranted or unduly harsh, and was evidence of a discriminatory motive. The Board found that Respondent's account of the incident that precipitated the discharge was unconvincing. They found that the procedure that Lyons did not follow had not been communicated 'to him and that, even if it had been communicated, another employee who similarly breached the procedure was never disciplined.

Member McCarthy dissented; he would affirm the ALO's proposed decision. In his dissent, McCarthy argued that the majority's credibility resolution in favor of Lyons and adverse to the supervisor was unwarranted. He further contested the reliance, in the majority opinion, on the use of a taped conversation on the basis that the tape was a surreptitious recording, had blank spaces, and was inaudible in part.

Member McCarthy would have found Respondent's business reason, the failure of Lyons to follow the new procedure, to be the real reason for the discharge. In addition, McCarthy noted that the prima facie case was too weak to support a violation because there was no proof of knowledge by Respondent of Lyons' union activity in 1980 and the hiatus of eight months between Lyons' next to last disciplinary action and his discharge argued against a discriminatory intent.

(Acting Chairman Perry, in a footnote to the majority opinion, stated that he did not find the tape to be trustworthy and did not rely upon it to find discrimination.)

* * *



* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARDS

In the Matter of:

FOSTER POULTRY FARMS,

Respondent,

and

WAREHOUSING, PROCESSING & ALLIED WORKERS UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,

Charging Party.

Case No. 80-CE-24-F

John Patrick Moore, Esq.
of Fresno, California
for the General Counsel

Jay V. Jory, Esq.
Thomas, Snell, Jamison, Russell,
Williamson & Asperger of Fresno, California
for the Respondent
William J. Carder, Esq.
of San Francisco, California
for the Charging Party

## DECISION

## STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer:

This case was heard by me on June 16, 17, 18, and 19, 1981 in Modesto, California.

The complaint, dated 24 April 1981, was based on one charge filed by the WAREHOUSING, PROCESSING & ALLIED WORKERS UNION LOCAL

6 (hereafter the "Longshoremen" or "union") on or about 23 September 1980. The charge was duly served on the Respondent FOSTER POULTRY FARMS on 22 September 1980.

The complaint alleges that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the "Act") relating to the termination of employee Edwin ("Ed") Lyons, Jr.

The General Counsel, Respondent, and Charging Party (Intervenor) were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs after the close of the hearing.

Based on the entire record, including my observations of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the General Counsel and by the Respondent, I make the following:

## FINDINGS

### I. Jurisdiction:

Respondent FOSTER POULTRY FARMS is an employer engaged in agricultural operations -- specifically the production of poultry with headquarters in Stanislaus County, California, as was admitted by Respondent. Accordingly, I find that the Respondent is an agricultural employer within the meaning of Section 1140.4(.c) of the Act.

As there was no real dispute over these issues, I also find that WAREHOUSING, PROCESSING & ALLIED WORKERS UNION LOCAL b,

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION is a labor organization within the meaning of Section 1140.4(f) of the Act, and that Ed Lyons was at all relevant times an agricultural employee within the meaning of Section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practices:

The General Counsel's complaint charges that Respondent violated Sections 1153(a), (c), and (d) of the Act by discharging Edwin Lyons, Jr. from his position as maintenance mechanic at the feed mill on August 18, 1980, because of the latter's union activities, and because of his testmony at an ALRB hearing against Respondent in Case Nos. 78-CE-4F, et al. (Foster Poultry Farms, 6 ALRB No. 15 (1980)).

The Respondent denied that it violated the Act in any respect. Rather, it contended that Mr. Lyons was terminated for failure to follow procedures and for lack of communication. Specifically, Lyons was charged with (1) "failure to comply with specific instructions and procedures regarding mill maintenance"; and (2) "unwillingness or inability to share reliable information as to the exact mechanical condition of the mill with the succeeding shifts and management". (General Counsel Exhibit #3-C).

III. Background:

Respondent is a large family-owned poultry company with operations in Merced and Stanislaus Counties. The birds are

bred to produce eggs and chicks at 12 breeder ranches located at a radius of 30-35 miles from the Livingston processing plant. The eggs are taken to one of four hatcheries for incubation and hatching. The baby chicks are debeaked, vaccinated at the hatchery, and then taken to one of 67 fryer ranches in the same area. The baby chicks stay on the fryer ranches approximately 56 days when they are picked up by the live-haul department and transported in trucks to the processing plant in Livingston. The birds are killed and processed into two forms-- whole body and cut-up. On any given date, in excess of 20 million chickens are alive on the various ranches, with some 400,000 birds per day processed at the Livingston facility.

All of the food for the chickens to eat comes from the feed mill -- located within the Collier Road complex (north of Livingston), which is the headquarters for Respondent's agricultural operations and the locus of the alleged unfair labor practices. Between 1200 and 1300 employees are involved in the agricultural operations of Respondent -- breeder, hatchery, fryer, live haul, feed mill, production services, and corporate plant. Some 2200 are employed at the Livingston processing plant under a collective bargaining agreement with the Butchers' Union. Approximately 60 employees are located at the feed mill. A few hundred feet away within the complex, some 75 administrative personnel work at "Building A". The remainder of the agricultural employees work either at adjacent Building B or out on the various ranches.

The alleged unfair labor practices occurred on August 15, 1980, when feed mill maintenance mechanic Edwin Lyons, Jr. was notified that he had been suspended, and ultimately terminated on August 18,1980, for "failure to follow procedures and incomplete maintenance assignments". Thecharges stem from Lyons' alleged failure to clean both filters of the "fat system" on or about August 13, 1980 which resulted in loss of time, materials, and production goals. (See General Counsel Exhibit #9). The key company personnel in this decision were Mr. Lyon's immediate supervisor Ben Kirby, the latter's supervisor (feed mill manager), Jake Kramer, personnel manager Bob Meroney, and director of personnel Cliff Oilar.

IV- Facts:

Ed Lyons was hired as a maintenance mechanic at Respondent's feed mill on 16 December 1976. In December, 1977, Mr. Lyons passed out authorization cards (for the Teamsters Union) to his fellow workers at the feed mill and informed both his immediate supervisor Ken Stinson, and feed mill manager Jake Kramer of his actions. When the Longshoremen's Union commenced organizational activity at Respondent's premises shortly thereafter (early 1978), Mr. Lyons continued to pass out cards and to speak to co-workers about the merits of unionization. He promoted the four or five organizational meetings that were held in early 1978, but the NLRB turned down the Longshoremen's petition for election.

Consequently, the union began to organize in other divisions within the Collier Road complex in anticipation of petitioning for election with the ALRB. On one occasion, Mr. Lyons placed a sign on the back of his pick-up truck announcing that there was a union meeting where employees of Respondent's Collier Road complex could attend, giving time and place. Mr. Lyons was named coordinator of the employees' organizing committee, but the active organizing drive ceased when several people were fired and brought charges against Respondent. Foster Poultry Farms, 6 ALRB No. 15 (1980). Lyons assisted the ALRB field examiner in contacting witnesses, and also testified at the hearing in September, 1978. Present at this hearing were, inter alia, personnel director Cliff Oilar, Nick Perino from personnel, and Respondent's counsel.

In May, 1979, Mr. Lyons posted a notice (General Counsel Exhibit No. 6) of an ALRB meeting with agricultural employees in the Turlock-Modesto area. He requested permission from supervisor John Willis (Receiving Department) to post the notice on the company bulletin board, which was approved after Mr. Willis consulted with feed mill manager Jake Kramer.

In June, 1979, Mr. Lyons received an "accessory selection form" (General Counsel Exhibit #3-11) from his supervisor Ben Kirby to allow him (Lyons) to select some gift from the company for his three years of service. Mr. Lyons read the form, and made the following notation at the top: "I wouldn't want anything that would remind me of Foster Farms, thereby the

company may keep my award". Lyons initialed the document, and returned it to Mr. Kirby. A few days later, personnel director Cliff Oilar contacted Mr. Lyons at the feed mill to discuss the latter's rejection of the company gift. According to Lyons, Oilar stated that he thought that "things had improved" over the past year and one-half and that he (Oilar) was surprised at Lyons' comment. Lyons replied that the workers did not have enough input into company policy, giving an example of truck drivers allegedly not receiving overtime pay as promised. Oilar stated that he would "check out" this complaint, and later told Lyons that the truck drivers were getting the overtime promised. Prior to this date, Mr. Lyons testified that he was not the subject of any disciplinary action, receiving raises in March, June, and November 1977, November 1978, and November 1979.

In July 1979, Mr. Lyons received a warning for failing to follow electrical safety lockout procedure (leaving his "lockout" on an electrical switch thus rendering certain machinery inoperable). Although Lyons conceded the disciplinary action, he in denied having received the written memorialization of that action until preparation for the instant hearing.

In November 1979, Mr. Lyons went to speak with personnel director Oilar regarding his (Lyons) conversation with another employee who had allegedly been warned not to attend a union meeting. At the end of the conversation, Oilar told Lyons that supervisor Kirby wished to speak with him. Kirby proceeded to discipline Lyons for failure to follow company policy --

specifically, the failure to notify the supervisor after feed mill production had been "down" for longer than one hour (on two occasions), and for poor attitude and work habits which resulted in Mr. Lyons leaving work for others. A written warning was placed in Mr. Lyons' file for the "attitude problem" (November 8, 1979), and a written "final" warning and three-day suspension, were invoked for the failure to communicate with management (incidents of November 16, 1979, and November 19, 1979. This final warning which was presented to Mr. Lyons upon his return from suspension or or about 24 November 1979 indicated that Mr. Lyons' next offense would result in termination. (General Counsel Exhibit No. 3-i).

According to Mr. Lyons, he had no further problems with supervisor Kirby through June, 1980. In fact, Lyons testified that upon receipt of his last evaluation during that time period, Kirby allegedly told Lyons that he was doing a good job, and that he was a dependable mechanic.

In March, 1980, the afore-referenced ALRB decision was rendered (Foster Poultry Farms, supra). Lyons spoke with the Longshoremen's Union in spring or early summer of 1980 and contacted members of the employees' organizing committee at the feed mill, setting up a meeting with one other employee and two members of Local #6 (organizer Felix Rivera and business agent Nick Jones). The group met for lunch at the Divine Gardens Restaurant in Turlock in July, 1980, where Lyons recognized his former supervisor Jim Osmer (who was then working in Respondent's

Safety Department), also eating lunch, at the restaurant. The group decided to call a meeting for August 5, 1980, and Lyons attempted to contact as many employees as possible. The day before the meeting, he put up a sign on the Respondent's bulletin board (Building A), but did not ask permission to do so, nor sign the notice. At the August 5 meeting, it was decided to schedule another meeting for August 24. Mr. Lyons contacted people verbally, and also printed up a flier (General Counsel Exhibit #7) which he testified to having distributed to approximately 10 to 12 employees at the mill during the week of August 11.

On August 15, 1980, supervisor Kirby gave Mr. Lyons a written notice of suspension without pay pending investigation for allegedly not following company procedures in disconnecting a rail car on August 13, which contained fat for the feed. Supervisor Kirby told Lyons that there was a problem with the fat unloading system on the rail cars, that a filter was plugged, and that Lyons had indicated in the log that he had cleaned the filters. Because Lyons could not offer an immediate explanation and because supervisor Kirby considered this a rather serious violation, Lyons was 'suspended pending investigation. Kirby told Lyons to call if he had an explanation prior to Monday, August 18, 1980.

Lyons testified that he attempted to telephone Kirby with his version of events commencing at 10:00 a.m. Monday (Lyons' regularly scheduled shift started at 4:00 p.m.), but could not

get through the company switchboard. When Lyons arrived at the mill immediately preceding his normal shift, supervisor Kirby stated that although he "hated to be the bearer of bad news", he had to terminate Lyons. The written notice of termination (General Counsel Exhibit #9) stated that Lyons was "found responsible for failing to service and maintain the fat system at rail car area as specifically directed. The inaction resulted in loss of productive time and a waste of materials/solidly plugged fat filters". It pointed out that Lyons had "repeatedly disregarded counseling and instructions to perform and communicate maintenance needs."

Lyons' attempts to explain to Kirby what he thought happened -- that the fat solidified between the 5:30 p.m. time that the car was disconnected and the 8:00 p.m. time that Lyons cleaned the system--were futile and he was issued his final paycheck. A subsequent meeting between Lyons, Kirby, and Oilar did not change the result.

Lyons testified that he told Mssrs. Oilar and Kirby on this last occasion that he felt his discharge was related to his union activities. Oilar allegedly conceded that the Respondent was aware of the activities, but denied that the termination had anything to do with this conduct Mr. Lyons further suggested that other incidents of fellow maintenance mechanic mistakes and/or errors -- e.g a sprocket falling off a-shaft; a large spillage of fat; a valve malfunctioning which resulted in a large quantity of fat being dumped onto the track; and an

improper unloading of a truck containing fat which resulted in the overflowing of the tank and several hundred gallons of material being spilled on the ground -- were not the subject of any company discipline.

For the Respondent, Ben Kirby testified that he was hired as Respondent's feed mill maintenance supervisor in February, 1979. He described the previous operation of the feed mill as "very loose" -- e.g., procedures were inconsistent, morale was low, and efficiency was poor. After he came to the mill, supervisor Kirby attempted to "tighten up" and enforce the procedures he employed. He described one verbal warning (of unascertained rationale) that was given Ed Lyons prior to July, 1979. (R.T., Vol. Ill, p.' 33, 11. 17-24). On or about 5 July, 1979, Kirby testified that he gave Lyons a written warning regarding the latter's failure to remove a "lockout" from some feed-mill machinery. On November 9, 1979, Kirby testified that he gave Lyons a copy of a "written and verbal" warning that Kirby had drafted the previous day. (General Counsel Exhibit #3-i). Mr. Lyons was charged with possessing "an attitude and work habits" which were disruptive to the maintenance department morale. Specifically, he was cited for failure to clear a pluggage in the wet corn leg elevator and leaving the job for the next shift's (more junior) mechanic. On 21 November 1979, Kirby suspended Lyons for "failing to communicate and failing to follow procedures" -- in that he left a piece of machinery down for an extended period of time (more than one hour) without

notifying Kirby by telephone at home. The notice of suspension indicated that this was a final warning to Mr. Lyons, and that the next offense would result in discharge. According to Kirby, "at supervisory discretion", the next incident would be cause for termination if it came within one year from the date of the suspension.

Between November 24, 1979, and August 1, 1980, Kirby related two occasions when he criticized Lyons' work -- both of them related to the new fat tank system. In one instance, the supervisor testified that Mr. Lyons poorly constructed a vent fill pipe contrary to Kirby's instructions. In the other, Kirby counseled Lyons about maintaining proper verbal communications and comprehesive log notations for the following shifts. According to Kirby, these discussions with Lyons re communications seemed to be necessitated on a weekly basis, and because Lyons often worked alone on swing shift without direct supervision, the latter's mode of communication was critical to the operation of the feed mill.

On 15 August 1980, Kirby suspended Lyons because of pluggage in one of the filters in the fat tank system which the supervisor attributed to Lyons. Kirby testified that his investigation suggested that Lyons was responsible for the incident, because Lyons could not explain the reason for the blockage after all mechanics- had been instructed to clean all filters, and because Lyons had indicated in his daily preventative maintenance checklist log that he had cleaned the

entire system on the date in question (13 August). At first, Lyons indicated to Kirby that he had cleaned both filters. Then, according to Kirby, Lyons conceded that he only cleaned one filter, surmising that perhaps the fat solidified between the time that the tank was disconnected (5:30 p.m.) and the time that Lyons was able to clean the system (approximately 8:00 p.m.) Kirby was particularly peeved at the incident because there had previously been a problem with a hose being disconnected from one of the rail cars. While Kirby did not point a finger at Lyons regarding the hose incident, he had indicated to all the crew that he wanted thoroughness on these fat system procedures. A notice to this effect was posted on 8 August 1980 (General Counsel Exhibit #5). Kirby further recalled that between July 30 and 31, 1980, Lyons had left another filter for his replacement to clean, which Kirby attributed to Lyons' "general dislike" of cleaning filters.

At the conclusion of the Kirby-Lyons meeting of August 15, Lyons was suspended three days "pending further investigation". Between August 15 and 18, after speaking with other mechanics, reviewing the logs more thoroughly, and considering Lyons' personnel file, Kirby recommended that Lyons be terminated on 18 August 1980. Kirby stated that he consulted with feed mill manager Jake Kramer on August 15, and again on August 18 for approval of this action. Since Lyons had not contacted Kirby with any additional explanation concerning the incident, Kirby took steps to get Lyons his final paycheck at approximately

noon on August 18. He spoke with division personnel manager Bob Meroney, and director of personnel Cliff Oilar on this date and the decision was affirmed. Kirby denied that Lyons' previous ALRB testimony, or union activities played any rule in the decision to terminate. He testified that he followed the Respondent's progressive disciplinary system in an effort to rehabilitate employees, and cited examples of other employees (e.g., Mike Riddle) who were disciplined for similar violations of rules. Kirby explained that no disciplinary action toward other mechanics was taken when a sprocket fell of a shaft because he was unable to pinpoint any mechanic responsible for error. The valve malfunction was allegedly a problem with the fitting on 'the car itself, and the spillage of fat was due to a poorly designed selector switch, rather than to any ascertainable employee misconduct.

V. Analysis and Conclusions:

Labor Code Section 1153 provides:

> "It shall be an unfair labor practice for an agricultural employees to do any of the following: (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152 . . . . (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization. . . . (d) To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part."

The General Counsel has the burden of establishing the

elements which go to prove the discriminatory nature of the discharge. Maggio-Tostado, Inc., 3 ALRB No. 33 (1977), citing NLRB v. Winter Garden Citrus Products Co-Operative, 260 F. 2d 193 (5th Cir. 1958). The test is whether the evidence, which in many instances is largely circumstantial, establishes by its preponderance that the employee was discharged for his or her views, activities, or support for the union. Sunnyside Nurseries, Inc., (May 20, 1977) 3 ALRB No. 42, enf. den. in part; Sunnyside Nurseries, Inc. v. Agricultural. Labor Relations Board (1979) 93 Cal. App. 3d 322. Among the factors to weigh in determining General Counsel's prima facie case are the extent of the employer's knowledge of the employee's union activities, the timing of the alleged unlawful conduct, and the employer's anti-union animus.

Respondent's knowledge of Ed Lyons' union activities and testimony at a previous ALRB proceeding was not contested at the instant hearing. Lyons had notified his supervisor as well as plant manager Jake Kramer that he was organizing (for the Teamsters) as early as December, 1977. He was a coordinator of the Longshoremen's employee organizing committee in 1978, and testified against Respondent in Foster Poultry Farms, 6 ALRB No. 15 (.1978). Supervisor Kirby conceded that he had "second-hand information regarding this testimony of Mr. Lyons, and Lyons' name was later affixed to the notice of ALRB meeting posted on a company bulletin board in May, 1979,

While there is no direct evidence of employee knowledge of

Mr. Lyons' latest activities -- to wit, the setting up of the Turlock meeting, and distribution of leaflets for the proposed second meeting -- Respondent was fully aware of the union sentiments of Mr. Lyons on the date of termination, as was conceded by personnel director Cliff Oilar. And knowledge of Lyons' 1930 union activities may be inferred by the latter's openness in distributing literature and organizing meetings, and the apparently coincidental presence of management personnel (Jim Osmer) at the same restaurant which was the site of the initial Lyons-union representatives meeting in July, 1980. Analogizing the instant situation to the "small plant doctrine" and imputing the supervisor's knowledge regarding the employee's sympathies and activities (S. Kuramura, Inc., 3 ALRB No. 49 (1977), rev. den. by Ct. App., 1st Dist., October 26, 1977; hg. den. December 15, 1977; NLRB v. MacDonald Engineering Company, 202 NLRB No. 113, 82 LRRM 1646 (1973), I find that the Respondent was fully aware of Ed Lyons' union sentiments and previous activities on the date of his termination.

The timing of the discharge -- immediately preceding the second organizational meeting that Mr. Lyons arranged -- further suggests that Lyons' discharge was discriminatorily directed at discouraging the union organizational effort. The fact that Lyons alone was reprimanded for various failures to follow unwritten and at times unarticulated company policies, and was placed on an indefinite final probation hints that an actively pro-union employee was "set up" so that Respondent could presen

a justifiable non-discriminatory basis for its termination decision.

There is also some indicia of Respondent's anti-union animus in the record. In the first Foster Poultry Farms decision, the Board found that Respondent violated Section 1153(a) of the Act by illegal interrogatories, a threat to change employees' working conditions, and by giving employees the impression of surveillance of their union activities during the period late-1977 to early-1978 (6 ALRB No. 15, supra). The Board further found that an employee was terminated because of his union activities, and that Respondent's asserted reasons for the discharge -- "bad attitude" and "low quality and quantity of work" were insufficient to overcome the General Counsel's prima facie case of discrimination.

Respondent's contention that the real reason for the discharge was the fat blockage incident of August 13 for which Ed Lyons was held responsible is persuasive, however, and supported by documentation. Lyons indicated that he cleaning the entire system the day in question (see General Counsel Exhibit #3-h). The pertinent check list, as confirmed by supervisor Kirby and employee Bob Carson, called for cleaning two filters when a-rail car was to be disconnected (General Counsel Exhibit #3-f). Lyons at first denied failing to clean both filters, and later theorized that perhaps one became blocked during the two-three hour lapse between disconnection and Lyons' work in the system. Finally, Lyons contended at hearing that the pertinent procedures required only that he clean one

of the filters. The company followed its own progressive disciplinary system in Mr. Lyons' case. He received verbal warning(s), written warning(s), suspension(s) and finally termination. All were related to a similar deficiency in Lyons' work -- his failure to communicate properly, and work as a member of the "Foster Poultry Farms" team.

In applying the standard recently recommended by this State's highest court and by the NLRB, the ultimate question is whether the discharge would not have occurred "but for" the union activity.[1] " Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal. 3d 721, citing Wright Lines, a division of Wright Lines, Inc. (1980) 251 NLRB No. 150, 105 LR$-M 1169; Royal Packing Company v. Agricultural Labor Relations Bd. (1980) 101 Cal. App. 3d 826; Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Bd., supra. That is, once the employee has shown that his union activities were a motivating factor in the employer's decision to discharge him, then burden shifts to the employer to show that the discharge would have occurred in any event. "If the employer fails to carry his burden in this regard, the Board is entitled to find that discharge

1

One line of cases has suggested that if anti-union bias plays any part, or partially motivates the discharge, the employee is entitled to reinstatement even though other legitimate grounds for discharge may exist ("the straw that broke the camel's back test"). See, e.g. Harry 'Carian (1980) 6 ALRB Ho. 55; NLRB v. Central Press of California (9th Cir. 1975) 527 F. 2d 1156). Another test (''dominant motive") has' focused on the determination of whether union activities or legitimate business reasons were the principal moving forces behind the discharge. (See, e.g. Alien v. NLRB (D.C. Cir. 1977) 561 F. 2d 976.).

was improper." (Wright Line, supra, at pp. 1174-1175). When it is shown that the employee has been guilty of misconduct warranting discharge, the discharge should not be deemed violative of the Act unless it is determined that the employee c would have been retained "but for" his union membership. Martori Brothers Distributors, supra, at p. 730.

In the instant case, there is some evidence to support a finding that Lyons' discharge was improper under the "but for" test, including Lyons' involvement in organizing activities for the period immediately preceding his discharge, the indefinite "final" probationary status under which Mr. Lyons was compelled to work during his last nine months with Respondent, the better-than-satisfactory evaluations received by Lyons two months prior to his termination, the lack of corroborating evidence that Lyons actually received the entire panoply of warnings that Kirby testified were given to Lyons.

On the other hand, there, is significant evidence that Respondent adhered to company policy in the termination decision, and that the late organizational activities of Lyons were more a "shield" to protect him from an eminent discharge which he realized would be forthcoming for his failure to abide by company rules and his inability to communicate with his co-workers and supervisory personnel.

While there is a suspicious similarity between the alleged "failure to follow procedures", and" inability to communicate" with which Ed Lyons was herein charged, and the nonspecific

reasons of "poor attitude and work performance" on the part of employee Otis Hicks in the earlier Foster Poultry Farms decision, there are distinguishing features in the two factual scenarios. In the Hicks situation, the method of discharge was inconsistent with Respondent's discharge policy. Hicks was discharged without first being put on suspension, in contravention of company policy which called for a four-step procedure: oral warning,, written warning, suspension, discharge. In the instant case, Respondent adhered to its progressive discipline system in the termination of Lyons. In the Hicks case, the Respondent did not come forward with any specific reason for the termination or tangible evidence (other than the supervisor's general observations) of the employee's poor performance or attitude. Here, the Respondent documented instances of Mr. Lyons' failure to remove his lock-out from company machinery, failure to notify supervision when the machinery was down for longer than one hour, and blockage in the fat system which Lyons had claimed he cleaned. The probationary period extended to Hicks was the outcome of the employee's request for re-evaluation of his job classification. Although Lyons was reprimanded (suspension) on one occasion immediately following his discussions with personnel director Oilar regarding alleged anti-union remarks made by supervisorial personnel to other employees, there is no evidence linking the Lyons-Oilar discussion to the subsequent discipline. Indeed, supervisor Kirby was not a participant in the Oilar-Lyons conversation, had prepared the suspension

papers previously (for specific instances of Mr. Lyons' failure to notify management when production had stopped for more than one hour), and had told Oilar that he wished to speak with Lyons before Oilar was apparently aware of the reasons Lyons wished to speak with the personnel director.

I find General Counsel's reliance on various NLRB decisions rejecting proffered defenses of "poor attitude" (see General Counsel's Brief, p. 9, citing KBM Electronics, Inc., (1975) 218 NLRB No. 207; NLRB v. Melrose Processing Co. (8th Cir. 1965) 351 F. 2d 693, NLRB No. 120 )"to be inapposite to the present case. In KBM Electronics, Inc., there was direct evidence (statement by the manager and general manager during the termination interview) of discriminatory motivation. And there had been no previous warnings to the employee that "attitude problems and sub-standard performance" subjected the latter to possible discharge. Neither of these factors was present in the instant case.

In Melrose Processing Co., (8th Cir. 1965) 351 F. 2d 693, the Eighth Circuit affirmed the Board's rejection of the employer proffered rationale (unauthorized gatherings) for its failure to rehire a union activist. Incompetence, absenteeism, poor safety record, personal antagonism and "horseplay" were also ruled out as motivating factors because those issues took no part in the consideration not to rehire. Here, the employer's alleged rationale for the termination remained consistent from the date of original notice, prior warnings had been given, and

the reasons for the termination were explained to the employee.

While determining the actual motive behind the dismissal of an employee may be an extremely difficult task, "dependent principally upon circumstantial evidence, and informed estimates concerning the springs of human conduct" (Auto-Truck Federal Credit Union (1977) 232 NLRB 1024). I do not find that the dismissal here was particularly abrupt, or devoid of prior written warning. Rather, the present factual circumstances seem more closely akin to the predicaments faced by employees in Cathay (1976) 224 NLRB 461 (irascible employer disliked employee's independent attitude); Court Square Press, Inc. (1978) 235 NLRB 106 (employee fired for' poor attitude and unsatisfactory job performance following various warnings including a formal written warning); United Gas Distribution Company, 187 NLRB 225 (1970) (one incident and attitude which made employee difficult to supervise). All afore-referenced discharges were found not to be violative of the NLRA. While Mr. Lyons' independence and ability to work without close supervision was ideally suited for his swing shift maintenace mechanic tasks, these traits also caused consternation to his new supervisor. Certainly Lyons' perceived contempt for the Foster Poultry Farms name riled supervisory personnel, and perhaps made him susceptible to disciplinary action.

Some aspects of this case are particularly troublesome, and seem to parallel the rebuttal suggestion in Wright Line, supra, that the employer had a predetermined plan to

discover a reason to discharge the employee.[2] On balance, however, after weighing all the testimony, reviewing all the documents and tapes, and considering the briefs of counsel, I find that the preponderance- of the evidence suggests that Lyons would have been fired regardless of his union activities. Conversely stated, General Counsel has been unable to prove by a preponderance of the evidence that Lyons would not have been discharged "but for" the latter's union activities. I reach this conclusion, albeit with some difficulty, with the following considerations:

1.) The significance of Mr. Lyons' union activities, and Respondent's knowledge of the latest organizing attempt is not

[2]For example, Mr, Lyons' problems seem to have been triggered by his rejection of the company three-year award in June 1979. Supervisor Kirby candidly admitted that the attitude on the part of Lyons irked the supervisor. The new policy of telephoning one's supervisor when equipment was down for over one hour was not made particularly clear to Lyons who only reviewed the procedures in the daily log upon his return from vacation. Indeed, the very independence and lack of communication of which Kirby complained regarding Lyons' conduct may also lend some credibility to Lyons' suggestion at the hearing that Kirby did less counseling, and was less thorough in informing Lyons at least of new or changed company policies. Because Kirby's shift commenced early in the morning, there were many days when he would not see Lyons. The ultimate discharge involved a new fat system which had created numerous problems for the Respondent, and ultimately involved the question as to whether or not one or two filters had been cleaned. As the system had been initiated only very recently, it is somewhat suspect that a long-term employee would be fired for this mishap. This suggestion is buttressed by evidence of some disparate treatment -- warnings being removed from personnel files of other employees after a specific lapse of time (.e.g. 90 days); failure to, terminate other employees for reasons similar to those asserted with respect to Mr. Lyons;and the favorable evaluation received by Lyons two months prior to his discharge. All these factors hint at some discriminatory motivation in the ultimate decision to terminate the alleged discriminatee.

particularly weighty in the instant case. While General Counsel has contended that Respondent violated §1153(d) of the Act by terminating Lyons in retaliation for his ALRB testimony, that termination occurred more than two years following the previous hearing. The evidence that the termination resulted from Lyons' distribution of the leaflet announcing the second organizational meeting is less than persuasive because (a) Lyons' name was not affixed to this document; (b) the announcement refers to a meeting "next Sunday" -- August 25. While Lyons testified that they were prematurely distributed during the week of August 11, the lack of corroboration in this regard, and Lyons' inability to fully explain the apparent inconsistencies in the dates give some cause to question whether the leaflet was not in fact passed out following the termination.

2.) In considering the demeanor and the testimony of the two critical witnesses -- Lyons and Kirby -- I find both to have been reasonably credible. Lyons was articulate, intelligent, sincere, and extremely knowledgeable about his work as a maintenance mechanic. Kirby, in comparison, seemed equally sincere and knowledgeable about his work, although a bit more stern in manner. He conceded that he was hired to straighten out the procedures at the mill, and he apparently made a sincere effort to do so. Lyons' independence and dislike for the Respondent immediately irked Kirby who was a "company man". Although one might suspect that being a company man signified that Kirby would take (unlawful) discriminatory action against

union activists if ordered to do so, I decline to find that such was the case here. Kirby's reference to himself as being a company man is, I think, insufficient evidence to sustain the proposition that (a) Kirby was ordered to terminate a union activist and (b) he would concoct a pretext to do so. Rather, I credit Kirby's disavowal of discriminatory motivation in the ultimate decision to terminate Lyons.[3]

3.) I have listened to the tape recordings of the two pertinent Lyons-Kirby conversations: 24 November 1979 (re suspension) and 18 August 1979 (re termination). (General Counsel Exhibits #13 and 14). While the discussions were apparently recorded surreptitiously by Lyons, I find nothing contained therein to shed any further light on Respondent's alleged discriminatory motivation. In the suspension incident, Lyons seemed somewhat apologetic and understanding of his discipline for failing to follow company procedures. Kirby indeed appeared reluctant to be a strict disciplinarian, but felt compelled to take some form of action as the incident was of sufficient severity and had occurred on more than one occasion. There was no contemporary union activity even alleged by General Counsel (apart from the immediately preceding

[3]This is not to suggest that I reject Lyons' assertions that Lyons thought that he (Lyons) was discriminated against. I believe Lyons was equally sincere and straightforward in his testimony in this regard. However, I conclude that General Counsel has not sustained its burden of proving that Lyons would not have been discharged "but for" his union activities.

Oilar-Lyons discussion which was not linked to Kirby's conduct) to be the causal factor of that discipline. In the final Kirby-Lyons discussion of August 18, Lyons did attempt to theorize as to how and why the fat system blockage occurred. Kirby did not seem particuarly ready to reconsider his decision to terminate. But there is no suggestion in the tapes that Kirby's position in this regard was due to any discriminatory motivation. When Lyons suggested he would go to the ALRB, Kirby replied that "I'm sorry this has come to this, but that's your prerogative." Both concurred that they thought they personally "got along pretty well together". Kirby agreed that Lyons was a "pretty decent" mechanic, but lamented that he could not get Lyons to go along with .the communication aspects and to follow company procedures. In Kirby's perception, Lyons had a tendency to run off and do things his own way.

4.) Lyons' original efforts to explain the problems of August do seem somewhat inconsistent with his position taken at the hearing. Both by declaration (General Counsel Exhibit #11) and in the tape of the August 18 conversation with Kirby, Lyons referred to the possibility of the fat coagulating in the lines during the period he was unable to attend to the system. He also referred to the "newness" of the system. At hearing, however, Lyons maintained that he understood company procedures to call for the cleaning of only one filter. Credible testimony of both supervisor Kirby, as well as maintenance mechanic Bob Carson, suggested that in disconnecting the system--

as opposed to switching from one tank to another -- all filters had to be cleaned.

5 . ) I do not find that the factual discrepancies in the Lyons and Kirby versions of the number of warnings actually given to Lyons prior to discharge to have been material. There is no controversy that Lyons was warned about the lockout incident, that he was subsequently suspended for reasons he discussed with Kirby at the time of the suspension, and that the reasons for the suspension and subsequent termination in August 1980 were explained to Lyons and related specifically to the blockage in the fat system. Further the reasons given to - Lyons by management personnel regarding that termination remained consistent -- the fat system blockage incident-- and Lyons was given some opportunity to present his side of the case in that regard.

6 . ) While Lyons' evaluations were generally satisfactory (or better), and supervisor Kirby admitted that Lyons was a decent mechanic, the deficiencies in Lyons' performance -- failure to communicate with co-workers and supervisory personnel, failure to follow company procedures and poor attitude -- were practically

[4]Lyons recalled receiving only a verbal warning for July, 1979, (failure to remove a lockout) and the review of the various documents concerning his suspension after return from that suspension in November, 1979. Kirby stated that he verbally warned Lyons about the importance of communication and following procedures on numerous occasions, and that all written warnings introduced at the hearing were delivered to Lyons at the time of the applicable discipline.

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congruent to supervisor Kirby's tenure with Respondent. Perhaps, some other less rigid supervisor would have tolerated Lyons' latest mishap, or "wiped the slate clean" six months after the November 1979 suspension. That Kirby did not do so, however, I do not find to be violative of the Act. In the absence of union discrimination, the purpose of labor legislation does not vest in the Board any control over an employer's business practices. Martori Brothers Distributors, supra, citing NLRB v. Lowell Sun Publishing Company (1st Cir. 1963) 320 F. 2d 835.

7.) The evidence of disparate treatment -- i.e., contemporaneous terminations of similarly situated mechanics only for gross misconduct, excessive absenteeism, etc., and the refusal of Kirby to reconsider Lyons' status following the meeting of August 15, 1980, may affect a finding of just cause for the termination. But it is not the purpose or the role of an administrative law officer to determine whether the employer's reasons for termination were good, bad, or nonexistent. Rather, the question for resolution is whether the discharge was for Lyons' union activities. (See e.g., Hansen Farms, 3 ALRB No. 43 (1977). Where, as here, Respondent followed its progressive disciplinary system in providing verbal and written warnings, as well as one disciplinary suspension, where the employee's performance had been under criticism for some period of time (at least from July 1979 through August 1980), where the (non-discriminatory) reasons given for the termination were consistently maintained and documented by the employer, where t.

supervisor sincerely (and I find somewhat reasonably) believed that further disciplinary action would be futile, and that a parting of the ways was necessary, I find that Respondent has met its burden of proving that the discharge would have taken place even in the absence of the protected conduct engaged in by Mr. Lyons.

8.) The poor attitude for which Lyons was criticized seemed to be related to his decision to reject the company three-year award. However, Kirby testified, and I believe his conduct exemplified, his (Kirby's) willingness to allow Lyons his own opinions. That is, the disciplinary action taken against Lyons resulted only when Lyons' work deficiencies caused some problem at the feed mill. The failure to remove the lockout left a piece of machinery inoperable; the failure to advise supervisor Kirby of the wet corn leg incident left that machinery "down" for some period of time; the fat blockage had to be cleaned, and some time and materials were necessarily lost. Although it is difficult to objectively assess how critical these mishaps were to the company's operations, I find that Kirby was entirely sincere in his efforts to keep production going and in his concern for assuring that his employees did likewise.

9. The failure of the Respondent to produce the maintenance log for August 15 casts some doubt on whether Lyons was appropriately held responsible for the incident in question. However, I do not feel that this omission is tantamount to Respondent's having contrived the events in order to fire Lyons.

Nor do I find Respondent's' efforts to be particularly cautious in regard to Mr. Lyons' case -- personnel director Oilar testified that he only reviewed a percentage of the company's terminations, and that he was concerned about the Lyons' case because he was certain it would end up in hearing -- sufficient evidence to conclude that Lyons was terminated for his union activities. Respondent's awareness of Lyons' ability to "stand up" for himself may have provoked the "extraordinary" caution of Lyons' last weekend. But I fail to find a causal link between the union activities of Lyons and the ultimate decision to discharge him.

For the reasons stated, I find that it is more probably true than not that Lyons was terminated for the reasons alleged and perceived by the Respondent's supervisory personnel -- to wit, his failure to follow company procedures, inability to communicate and poor attitude -- than that Kirby engaged in a predetermined plan to discover a reason to discharge Lyons. Although Respondent may not have been unhappy to be rid of Lyons, and although his poor attitude may have been in some sense connected to his union sympathies and activities, I find that under the circumstances supervisor Kirby would have recommended Lyons' dismissal, and that this dismissal would have been affirmed by Kirby's superiors regardless of Lyons' protected activity. I therefore recommend that the complaint be dismissed in its entirety.

VI. Recommended Order

IT IS ORDERED that all allegations contained in the complaint are dismissed.

DATED: September 29, 1981.

STUART A. WEIN
Administrative Law