

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MCCARTHY FARMING COMPANY, INC. ,)	
)	
Respondent ,)	Case No. 81-CE-65-SAL
)	
and)	
)	
UNITED FARM WORKERS)	8 ALRB No. 78
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	
)	

DECISION AND ORDER

On June 11, 1982, Administrative Law Officer (ALO) William A. Resneck issued the attached Decision in this proceeding General Counsel timely filed exceptions and a supporting brief and Respondent thereafter filed an answering brief. General Counsel filed a response to Respondent's answering brief.

Pursuant to provisions of Labor Code section 1146,^{1/} the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the ALO's rulings, findings,^{2/} and conclusions, as modified

^{1/}Unless otherwise specified, all further statutory references are to the California Labor Code.

^{2/}The ALO found, utilizing the standard of proof set forth in Martori Brothers Distributing v. ALRB (1981) 29 Cal.3d 721, that the General Counsel failed to satisfy his burden of persuasion that Respondent would not have disciplined Lupe Banuelos "but for" his

herein.

Lupe Banuelos served an unfair labor practice charge (Case No. 81-CE-63-SAL) on foreman Guadalupe Velasco Rodriguez (Velasco) on April 10, 1981, and was suspended on April 15, 1981. The ALO suggests that the merits of the underlying unfair labor practice charge impact on the validity of a subsequently filed charge alleging a section 1153 (d) violation. That analysis misses the point. A violation of section 1153(d) occurs when an employer discriminates against an employee because he or she utilized the legal processes provided under the Agricultural Labor Relations Act (Act). Neither the relative merit nor the ultimate disposition of the underlying charge is material in determining the merit of a subsequent 1153 (d) allegation. (Waterman Industries, Inc. (1980) 91 NLRB No. 1041; NLRB v. Marine and Shipbuilding Workers (1968) 391 U.S. 418 fn.2 [68 LRRM 2257].) The ALO's erroneous reliance upon the Regional Director's dismissal of the charge which Banuelos

[fn. 2 cont.]

protected activity. Recently, we overruled that standard and adopted the NLRB's interpretation of Wright Line, Inc. (1980) 251 NLRB 1082 [105 LRRM 1169] in Royal Packing Company (Oct. 8, 1982) 8 ALRB No. 74. As we find that the Respondent herein proved by a preponderance of the evidence that it would have suspended Lupe Banuelos even absent his protected activity, we dismiss the allegations that Respondent violated section 1153 (c), (d), and (a) of the Act.

To the extent that the ALO's credibility resolutions are based on demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates 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].) We have reviewed the record and find the ALO's credibility resolutions are supported by the record as a whole. In finding that Velasco did not instruct "Lorena" to provoke Chavistas, we do not rely upon Evidence Code section 412.

served on Velasco was compounded by the fact that the Regional Director did not dismiss that charge until after Respondent suspended Banuelos. However, as we find that Respondent proved by a preponderance of the evidence that it would have suspended Banuelos even absent his service upon Velasco of the charge in Case No. 81-CE-63-SAL, we affirm the ALO's conclusion that Respondent did not thereby violate section 1153(d) .

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: October 19 , 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN P. MCCARTHY, Member

CASE SUMMARY

McCarthy Farming Co. , Inc.
(UFW)

8 ALRB No. 78
Case No. 81-CE-65-SAL

ALO DECISION

The Complaint alleged that Lupe Banuelos was unlawfully and discriminatorily suspended for his union activities and the prior filing of an ULP charge against the Company. Banuelos was in a planting crew, grafting grape vines. On April 11, 1981, he served an ULP charge on his foreman. On April 14, 1981, he twice refused to accept a bundle of plants from the distributor. Banuelos claimed that he was discriminated against and harassed by being forced to carry around more plants than needed. Respondent claimed the procedure for delivering plants to Banuelos was the same as for everyone else and that Banuelos was insubordinate. A General Counsel witness testified that one month before the incident she overheard the foreman tell the plant distributor to provoke the Chavistas. Banuelos testified that, at the time of his confrontation with the foreman on April 14, 1981, the foreman referred to his union activity.

Based on his credibility resolutions, the ALO found that the foreman did not instruct the plant distributor to provoke the union activists. Finding that the General Counsel did not meet his burden of proof, he recommended dismissal. The ALO found the 1153 (d) allegation to have no merit because the charge filed and served by the employee was dismissed by the General Counsel.

BOARD DECISION

The Board adopted the ALO's recommendation dismissing the complaint. The Board held that the validity of a section 1153 (d) allegation is not determined by the merits of the charge previously filed and served by the employee. The Board did not rely on a negative inference drawn by the ALO in its conclusion that there were no instructions from the foreman to provoke the union activists. Finding that the Respondent had proved, by a preponderance of the evidence, that it would have suspended Banuelos even absent his protected concerted activity and his filing and service on Velasco of an ULP charge, the Board dismissed the complaint in its entirety.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of)

MCCARTHY FARMING COMPANY, INC.)

Respondent,)

and)

UNITED FARM WORKERS OF AMERICA,)
AFL-CIO ,)

Charging Party.)

CASE NO. 81-CE-65-SAL

James W. Sullivan, Esq.
112 Boronda Road
Salinas, CA 93907
General Counsel

William A. Quinlan, Esq.
and
Bert C. Hoffman, Jr., Esq.
Quinlan, Kershaw, Fanucchi & Hoffman
2409 Merced Street, Suite 3
Fresno, CA 93721
Attorneys for Respondent

DECISION

STATEMENT OF THE CASE

WILLIAM A. RESNECK, Administrative Law Officer:

This case was heard before me in King City, California, on March 9 and 10, 1982. On April 20, 1981, the UFW filed a charge alleging that Respondent had suspended Lupe Banuelos on March 15, 1981 because of his Union activities and because he filed a previous un-

labor
fair/practice charge against Respondent. The charge alleged violations of Sections 1153 (a), (c) and (d) of the Agricultural Labor Relations Act (hereinafter referred to as the "Act").

Initially, the charge was included in a consolidated Complaint issued on November 24, 1981. Respondent timely filed an answer on December 4, 1981.

Prior to the hearing General Counsel and Respondent settled the other charges contained in the consolidated Complaint. General Counsel, thereafter, issued an Amended Complaint on the remaining charge on March 19, 1982, after the close of the hearing. The Amended Complaint incorporated the dismissal of certain persons from "Paragraph 4 based on either the stipulation of the parties, or upon limy granting of Respondent's motion at the conclusion of General Counsel's case.

Essentially, this case involves the suspension of Lupe Banuelosi for five days commencing on April 15, 1981. The issue is whether he was suspended for his Union activities and the filing of a prior unfair labor practice charge against the Respondent or for legitimate business reasons. All parties were given full opportunity to participate in the hearing, and after the close of the hearing, the General Counsel and Respondent each filed a brief.

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

FINDINGS OF FACT

I. JURISDICTION

McCarthy Farming Company is engaged in agriculture in various counties throughout California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

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

II. BACKGROUND

Respondent is a large agricultural concern owning properties in Monterey, San Luis Obispo, King, Fresno, Madera and Stanislaus Counties. Its King City operation consists of approximately 13,000 acres, 3,500 of which are devoted to the cultivation and harvest of prime wine varietals. The work here involves the process of converting the red wine varietal plants to white winevarietal plants as a reflection of the growing demand for white wine. The process takes two years: the first year, half the vine is cut off, a hole is dug and new vine is planted alongside the old one. The following year, the half vine of the original plant is dug up, and the conversion process is completed.

Charging party, Lupe Banuelos, has been an employee of Respondent at its Southdown Ranch for over ten years. Mr. Banuelos had never received any written warnings before April 15, 1981, and in fact earlier in the season had been promoted to Assistant Foreman. When Mr. Banuelos' crew was laid off on February 20, 1981. Banuelos was reassigned to another crew as an ordinary employee.

In the years 1980, 1981 and 1982 the UFW conducted organiza-

tional activity at Respondent's King City operation. Mr. Banuelos, and another General Counsel witness, Rosa Morfin, were prominently engaged in the promotion of the UFW organizational campaign.

When Mr. Banuelos was reassigned after February 20, 1981 to another crew as an ordinary employee, he resumed his activities as Union organizer. He solicited signatures on UFW authorization cards and talked with other workers in favor of the Union. Respondent stipulated that it was aware of both Mr. Banuelos' and Mrs. Morfin's Union activities.

On April 10, 1981, Mr. Banuelos served his foreman, Lupe Velasco with a charge alleging that the company discriminated against him when he was demoted to a general laborer (G.C. Ex.2).^{1/}

III. THE ALLEGED UNFAIR LABOR PRACTICE

The events terminating in the suspension on April 15 all occurred on the preceding day, April 14. General Counsel's version of the events were presented by Rosa Morfin, who is a Union organizer and was engaged in planting in the row next to Lupe Banuelos, and

^{1/}The charge was ultimately dismissed by General Counsel and complaint was ever issued, probably because Mr. Banuelos had agreed, in writing, prior to his assignment that his promotion was a temporary one until the crew terminated its work. (Resp. Ex. A; I:79). Reference to the transcripts of the proceedings will contain a Roman numeral, either I or II, indicating the transcript volume, followed by the page number of that volume.

the discriainatee himself, Lupe Banuelos. Their versions of the event corroborate each other.

Respondent's version of the events was presented by Maria G. Martinez (commonly known as "Lorena"); Elena Basulto, another worker Arnauldo Avalos, Assistant Foreman; Valentine Zuniga, Respondent's labor coordinator; Lupe Velasco, the Foreman; and Joe Mendez, a labor consultant.

Although the two versions contain significant factual differences, all sides agree the incidents involved the distribution of the bundle of grapes used for planting. Each bundle contains fifty grape plants and are carried around by the workers in a plastic bucket as they move from vine to vine during the conversion process. The employees engaged in distribution are to observe the number of plants left in the workers' buckets, and to furnish them an additional bundle of fifty plants as the workers run out of plants. General Counsel claims that Lorena, the worker in charge of distribution, deliberately brought bundles of plants to both Rosa Morfin and Lupe Banuelos before they were needed in an attempt to provoke them into an incident. Respondent counters by stating that Lorena was only properly following her work instructions, and that Banuelos engaged in acts of insubordination by refusing to accept the bundles of plants as they were being distributed.

All parties concede that fifty plants in a bundle is quite a heavy load and that the workers do not want another bundle until they are either almost through or completely through with their existing bundle of plants. The factual issue then arose as to how

many bundles were left in Mr. Banuelos' bucket, and whether he deliberately refused plants as they were needed in order to provoke Lorena, or whether Lorena brought him plants before they were needed in an effort to provoke him, allegedly pursuant to instructions obtained from her supervisor a month earlier in order to provoke the Union supporters.

A. General Counsel Witnesses:

1. Rosa Morfin:

She, along with the discriminatee, Lupe Banuelos, were instrumental in the Union organizing campaign. She testified that she overheard a conversation a month earlier, in March, 1981, between Lorena, Siena Basulto and Lupe Velasco, their foreman, outside the bathroom. They did not see her during their conversation. She overheard Lupe Velasco state "Insult the Chavistas; make them talk, make them talk back to you, cuss at them". (I:31)

On the date of the alleged incident, April 14, Rosa testified that Lorena came by and left a bundle of plants by her bucket even though she did not need them. Rosa placed the plants in her bucket, moved it to the end of throw, and counted out the plants that she needed to finish the row. Rosa did this because with a full bundle the bucket was too heavy, and Lorena's actions here were contrary to the usual practice of bringing plants only when they were needed. Rosa made no complaints.

Rosa then observed Lorena do the same thing to Lupe Banuelos, who was working in the row next to her. Banuelos responded that he did not need the plants, and Lorena stated: "Go to

Hell, you mother-fucker. I'm going to leave the plants here, and I'm going to tell Don Lupe"^{2/} (I:34). Rosa then testified that she overheard Arnauldo, the assistant foreman, tell Lupe Banuelos that he did not need the plants and that he had a reason to complain

Rosa testified that about ten minutes later she saw Lupe Velasco up to Lupe Banuelos and tell him he should take the plants because he had ordered it. Banuelos responded that he was not going to pick up the plants, because he had a lot already and did not need them. Velasco stated that he could have him fired, and although Banuelos "thought he was so much because he was with the Union, the Union could not be any help to him." (I:37) Banuelos responded to go ahead and fire him.

Rosa further testified that she interjected and told the foreman that he was making too much out of nothing: he was "drowning in a glass of water." (1:39) The foreman told her to shut-up, that she was a gossip woman and that she should go back to work. The incident ended as both returned to work.

2. Lupe Banuelos:

He essentially corroborated Rosa Morfin's version of the incident. He stated that he already had ten to thirteen plants in his bucket, and when Lorena appeared he told her that he did not need any plants since he already had some. She responded that he had called for her and requested her to bring the plants. He said that he would not take the plants and testified that she responded

2/ Don Lupe refers to Lupe Velasco, the foreman.

by calling him "a son of a bitch and a mother-fucker". (I : 6 9)

Banuelos also testified that Arnauldo, the assistant foreman, observed the incident and said that Banuelos had a right to complain. Soon thereafter, Lupe Velasco, the foreman, appeared and told him to take the plants whether he liked it or not because that was an order he had given. Banuelos responded that he was not going; to take the plants while he still had some because he did not need them and the bucket would be too heavy. Velasco responded that he could fire him. Banuelos said that if he wanted to that he could go ahead. Velasco then stated that he thought he was " it " because he was organizing for the Union, but that the Union was not going to help him in this case. Banuelos responded that they would find out.

Banuelos finished the plants he had and then went home and took the rest. He worked until the end of the day that day. Next day, when he reported for work, he was taken to the office where Valentine Zuniga and Joe Mendez wanted to see him. They told him he was suspended for five days for not obeying orders and would not allow him to give any explanations.

B. Respondent's Witnesses:

1. Maria G. Martinez (Lorena):

She denied the existence of a conversation in March in which she was told to provoke the Union supporters. She told about two incidents that occurred on April 14 with Banuelos. In the first incident, in the morning, she saw that he had seven plants in his bucket when she went to bring him plants, and she counted seven plants ahead and left a bundle there for him. She saw him pass-up

plants, move on ahead and, then, when he was twelve to thirteen stakes ahead, he called for more plants. Lupe Velasco came and put the plants that she had left in Banuelos' bucket. In the afternoon, Banuelos again called for plants. When she went to bring them to him he refused the plants. However, she put them inside the bucket, since she saw that he had only three plants left. Banuelos took them out of the bucket and threw them on the ground. She then saw Arnauldo talk to Banuelos but she could not overhear what they said to each other. She also denied cursing at Banuelos.

2. Elena Basulto:

She denied having any conversation in March outside the toilet with Lorena and Velasco about provoking Union organizers.

3. Arnauldo Avalos:

He contradicted Banuelos' testimony that he had agreed with him that he was right to refuse the plants. Instead, he testified that he asked Banuelos why he did not take them. He also said that Banuelos had only three plants in his bucket and did not overhear Velasco make any reference to the Union in the conversation that Banuelos and Velasco had.

4. Valentine Zuniga:

He is the labor coordinator for Respondent and was advised that Banuelos and Velasco had a confrontation in the field on April 14. He discussed with Joe Mendez, a labor consultant, about Banuelos' refusal to follow Velasco's instructions and decided to suspend him for five days. Their decision to suspend Banuelos was

made prior to their meeting with him and prior to hearing his explanation.

5. Lupe Velasco:

He testified that he had recommended that discipline be imposed on Banuelos since two incidents had occurred on the same day, April 14. In the morning, Lorena and Arnauldo told him that Banuelos would not accept plants because he said his bucket was too heavy and he was not a donkey. He testified that he went out, picked the plants up off the ground where Banuelos had passed them by and gave them to him.

In the afternoon, a similar incident was reported to him that Velasco again would not accept plants. When he told Velasco that he must follow orders or he would get a written warning or even a suspension, he testified that Banuelos told him that "he could shove his written notice by his balls". (II:66) Velasco responded that he warned Banuelos to watch what he was saying, and that when Rosa Morfin tried to interrupt he told her to move away until he was through talking to Banuelos. He further denied telling Elena to provoke the Union organizers and denied mentioning the Union at all in his conversation with Banuelos.

6. Joe Mendez:

He testified that he heard about incidents from Velasco later that day, and it was reported to him that Banuelos twice refused to accept the plants.

////

////

ANALYSIS OF ISSUES AND CONCLUSIONS OF LAW

The issue here is whether Respondent, through its agent Velasco, caused the suspension of Lupe Banuelos because of his Union activities and for filing prior charges against the Company in violation of Sections 1153(a), (c), and (d) of the Act. I conclude that General Counsel has failed to sustain its burden of proof and am recommending that the Complaint be dismissed.

Section 1152 of the Act guarantees employees the right, among other things, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of rights guaranteed in Section 1152. Section 1153(c) makes it an unfair labor practice for an agricultural employer to discriminate in any term or condition of employment to discourage membership in a labor organization. Finally, Section 1153(d) makes it an unfair labor practice for an agricultural employer to discriminate against an agricultural employee because he has filed charges or given testimony.

Preliminarily, Section 1152 rights conferred upon agricultural employees do not immunize employees from discipline. An employer still has the right to maintain discipline and supervise activities without a per se infringement of Section 1152 rights. See Hansen Farms (1977) 3 ALRB 43; Hemet Wholesale (1977) 3 ALRB 47.

The issue then is whether Respondent's action in disciplining Banuelos for refusing to accept plants was based on a legitimate

business reason, or merely a pretext to justify discipline against a Union supporter. This is the so-called "dual-motivation" case which is used to determine whether discharges or other forms of discipline are examples of legitimate business conduct on the part of the employer. The test, now adopted by the California Supreme Court in Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721, and by the ALRB in Nishi Greenhouse (1981) 7 ALRB No. 13, is that introduced by the NLRB in Wright Line, Inc. (1930) 251 NLRB 1033, 105 LRRM 1169, 1175:

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

General Counsel contends that it has made a prima facie showing through its testimony that Respondent encouraged and condoned the harrassment of the Union organizers; through its showing that the discipline was imposed soon after Banuelos served Velasco with an unfair labor practice charge for discriminating against him by his demotion; and by the anti-Union animus displayed by Velasco in his confrontation with Banuelos. Assuming that General Counsel has made a prima facie case here and that Banuelos was engaged in protected activity, the burden of production then shifts to Respondent to show that the discipline would have occurred without the protected activity.^{3/} As the California Supreme Court stated in Martori v. ALRB

^{3/} Preliminarily, General Counsel must establish here for both

3/ continued:

§1153 (a) and a §1153 (c) violation that the discriminatee was in protected concerted activity. Lawrence Scarrone (1981) engaged 7 ALRB No. 13, pp. 4-5. Moreover, an activity may be concerted in nature even if the employee acts alone. Foster Poultry (1980) 6 ALRB No. 15 Miranda Mushroom (1930) 6 ALRB No. 22. Banuelos' protest here was concerted activity, in that his complaints about the alleged change in the distribution process affected another employee, Rosa Morfin, as well as himself. However, the mere fact that the protest may have been sufficient to satisfy the requirements of a concerted activity does not ipso facto establish that a violation has occurred.

///

////

////

///

///

///

(1981) 29 Cal.3d 721:

When it appears that an employee was dismissed because of combined valid business reasons as well as invalid business reasons, such as Union or other protected activities, the question becomes whether the discharge would not have occurred "but for" the protected activity.

29 Cal.3d at 729.

In the context of this situation, General Counsel has not sustained its burden of persuasion that the discipline would not have occurred "but for" the protected activity. The precipitating incident in the morning was when Lorena left the bundle for Banuelos seven plants ahead of him, so that when he finished with the plants in his bucket there would be a new bundle waiting for him. Clearly, such conduct does not amount to harassment of a Union supporter. Moreover, when Banuelos deliberately by passed the waiting bundle proceeded onward and called for new plants, his foreman, Velasco, brought the bundle of plants to him in order to avoid any incident. Clearly, if employer was seeking to provoke an incident that would have led to the suspension of Banuelos, Velasco would have ordered Banuelos to return to get the bundle, thereby provoking an incident. Instead, Velasco went and picked up the bundle and brought it directly to Banuelos.

In that afternoon when Banuelos again refused a bundle, Velasco was properly exercising his prerogative to see that workers follow the proper procedures. Although Banuelos and Morfin contended that Lorena's actions were part of a plot hatched a month earlier in order to provoke Union supporters, the testimony failed to establish the existence of a plot. Rosa Morfin, the General Counsel's witness who

allegedly overheard the plot, was vague as to the time in which such a conversation occurred. Moreover, although she claims to have reduced the conversation to writing through notes that she took, the notes were never produced at the hearing.^{4/} Finally, the purported principals in this plot, Lorena, Velasco, and Elena Basulto, all convincingly denied under oath the existence of such a plot.

General Counsel contends that the timing of the incident following close on the heels of the service of the unfair labor practice charge, only lends credence to its theory that Banuelos was provoked into an incident. However, the charge itself, arising from, the demotion of Banuelos back to an ordinary worker after his crew had disbanded, was apparently an unfounded one since General Counsel choose not to bring the charge to complaint. Accordingly, it appears that if any of the parties were intent upon provoking an incident here perhaps it was Banuelos, who was angered over his demotion and over the denial of his request to be transferred to another crew.

Finally, General Counsel's witnesses were less than candid in their discussion of the alleged harassment. Both Morfin and Banuelos gave the impression that only one incident was involved where Banuelos refused to accept plants. In fact, as Respondent elicited both in his cross-examination of Morfin and Banuelos and in the testimony

^{4/} Respondent correctly points out on page 16 of its Brief that an adverse inference may be drawn from the failure to produce the corroborating documentary evidence. See BAJI Instruction 2.02

of his witnesses, two incidents were involved. Banuelos refused to accept plants both in the morning and the afternoon. Thus, his second refusal of the day forced the employer to take disciplinary measures.

CONCLUSIONS OF LAW

Based upon the foregoing, I make the following Conclusions of Law:

1. McCARTHY FARMING CO., INC. is a California corporation engaged in agriculture and an agricultural employer within the meaning of Section 1140.4(c) of the Act.

2. The UNITED FARM WORKERS OF AMERICA, AFL-CIO, is a labor organization within the meaning of Section 1140.4(f) of the Act.

3. The employer has not engaged in unfair labor practices within the meaning of Section 1152 and Section 1153(a), (c), and (d) of the Act.

On the basis of the entire record and on the Findings of Fact and Conclusions of Law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

The Complaint issued herein shall be dismissed in its entirety.

Dated: June 11, 1982.

AGRICULTURAL LABOR RELATIONS BOARD
By:

WILLIAM A. RESNECK
Administrative Law Officer