

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARDVARK RANCH,)	
Respondent,)	Case No. 79-CE-79-EC
)	
and,)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	8 ALRB No. 96
)	
Charging Party.)	
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DECISION AND ORDER

On October 7, 1981, Administrative Law Officer (ALO) Mark Merin issued the attached Decision in this proceeding. Thereafter, the General Counsel timely filed exceptions with a supporting brief.

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.

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 as modified below and to adopt his recommended Order as modified herein.

The General Counsel excepts to the ALO's conclusion that Respondent did not violate the Agricultural Labor Relations Act (Act) by its conduct in regard to employees Benjamin Rodriguez, Francisco Nava, and Domingo Vega. We find merit in this exception only as to Benjamin Rodriguez.

We affirm the ALO's findings of fact as to employees Francisco Nava and Domingo Vega only to the extent consistent with our findings set forth below. In particular, we reject his implied finding that a prima facie case of discrimination cannot be established absent proof of antiunion animus on the part of Respondent. As discussed below, we find that the General Counsel did establish a prima facie case, but we affirm the ALO's finding that Respondent established that its disciplinary actions against Nava and Vega were motivated by legitimate business considerations and would have occurred even absent the union activity of those two employees. Regarding the discharge of Benjamin Rodriguez, we reverse the ALO's conclusion. We conclude that Respondent violated Labor Code section 1153(a) by discharging Rodriguez because he engaged in protected concerted activity.

Facts

Owner Richard Elmore hired Benjamin Rodriguez, Francisco Nava, and Domingo Vega in the summer of 1978 to do irrigation, shoveling, and related farm work. They were full time employees. Rodriguez and Nava performed a variety of farm work, including substantial irrigation work, throughout their tenure at Respondent's farm. Vega, however, did no irrigation after March 1979 as Elmore had found his irrigation work to be unsatisfactory. In March 1979 Elmore hired Angel Davila, who had been a foreman at Elmore's father's adjoining ranch, to be foreman at Ardvark. Elmore, who had previously functioned as the sole foreman, continued as general supervisor of operations. (His brother, Howard Elmore, was responsible for business office operations.)

Shortly before Davila left Elmore's father's ranch (the John Elmore Ranch) an employee at that ranch told Davila that the three employees then working for Respondent (Benjamin Rodriguez, Domingo Vega, and Francisco Nava) were union adherents, and Davila responded that he would get rid of them. Shortly after Davila began working for Respondent, he recommended to Elmore that the three be fired, but Elmore decided not to follow that recommendation.

In September 1979 Elmore laid off Vega, assertedly because the growing season was at an end and there was no need for a full time shoveler. Elmore testified that he wanted to retain as permanent employees only the workers who irrigated satisfactorily, who could also do shovel work during the period of reduced irrigation, and that any additional necessary shovel work could be done by workers hired through a labor contractor. Rodriguez, Nava, and Vega protested Vega's layoff. In a heated discussion with Elmore, they argued that any layoff should be by seniority, and that other employees, junior to Vega, should be laid off before him. Elmore felt that the three employees were challenging his management perogatives.

The United Farm Workers of America, AFL-CIO, (UFW) filed an unfair-labor-practice charge (ULP) on October 12, 1979, alleging that Respondent violated Labor Code sections 1153(c) and (a) by laying off Vega. Approximately two weeks later, on October 26, Elmore discharged Rodriguez, assertedly for an unsatisfactory irrigation job on October 24, for working on his car on company time, and for having a poor work attitude. Thereafter, the UFW

filed a second unfair-labor-practice charge against Respondent over Rodriguez' discharge. On advice of counsel, Respondent rehired both Rodriguez and Vega in January 1980 in order to limit its potential backpay liability. From that time on, Rodriguez, Vega, and Nava began conspicuously identifying themselves with the UFW, by wearing UFW buttons and in other ways, such as showing foreman Davila union literature. On several occasions, Davila made disparaging remarks about the UFW.

Overall, the relations the three workers had with Elmore and Davila deteriorated after Rodriguez and Vega were rehired. A written disciplinary notice system was then in effect, and the three workers were cited for a variety of work deficiencies, ranging from poor irrigation work to lateness and excessively long breaks. They testified that three less senior permanent employees (Martinez, Lara, and Contreras) were receiving preferential treatment by Respondent.

After another, more brief layoff in late January, Respondent discharged Vega in April 1980. Respondent discharged Francisco Nava in August 1980 after he performed an unsatisfactory irrigation job which resulted in substantial flooding. His discharge had been preceded by several warnings, dating from November 1979 and two suspensions, of one and two weeks, and a final warning that his work was unsatisfactory and that he would be discharged unless his work improved. Rodriguez was still employed by Respondent at the time of the hearing.

The complaint alleged that Respondent violated Labor Code sections 1153(c) and (a) by various acts of discrimination against

Benjamin Rodriguez, Francisco Nava, and Domingo Vega.

Initially, we find that General Counsel established that foreman Davila had, and expressed, antiunion animus. The ALO implicitly discredited Davila on key issues by resolving conflicts in testimony against him. As noted, employee witnesses testified that Davila had made antiunion statements in their presence both before and during his employment by Respondent. Jose de la Torre and Francisco Vallin testified, for example, that just before his employment by Respondent, Davila, upon being informed that there were union adherents working for Respondent, stated that he would get rid of them. Davila denied making such a statement. The ALO found that while he was employed by Respondent, Davila revealed his antiunion sentiments through actions and words of a disparaging nature. We affirm that finding as it is supported by the record evidence.

Consistent with the testimony of employees de la Torre and Vallin that when Davila started working for Respondent he told Elmore that Ardvark's three permanent employees (Rodriguez, Nava, and Vega) were unsatisfactory employees and should be discharged.^{1/} Davila did not deny having made that recommendation to Elmore, but explained, rather unconvincingly, that prior to working for Ardvark he had observed the three employees at work as he drove around Respondent's ranch and while Rodriguez was doing some work at the John Elmore Ranch when Davila was foreman there, and that

^{1/} Elmore testified that he did not take Davila's advice because the three employees had been with him for some time and should be given a chance.

he had formed the opinion that they were not good workers.

On the basis of the above facts, we affirm the ALO's finding that Davila manifested antiunion animus. The ALO, however, found that Richard Elmore was free from antiunion animus and that because Elmore made the decisions to discipline Rodriguez, Nava, and Vega, those decisions could not have been based on the employees' union sympathies. For that reason, the ALO recommended dismissal of Labor Code sections 1153(c) and (a) allegations as to those three employees. Contrary to the ALO, we find that Davila's antiunion animus is attributed to Respondent in view of the fact that Davila, at all times material herein, was clearly a supervisor and agent of Respondent. Davila could and did issue to the workers written notices critical of their job performance and also discussed with Elmore other discipline of the three employees. He also assigned and directed the field and irrigation work of the alleged discriminatees and other employees.

In summary, the evidence indicates that the three alleged discriminatees were union adherents, that Respondent, through foreman Davila, knew or at least believed that they were union adherents and expressed to other employees his animosity toward them and his intention to get rid of them because of their union sympathies. The fact that each of the three employees subsequently received disciplinary notices and was terminated from employment is not in dispute. We find that the above facts establish a prima facie case that Rodriguez, Nava, and Vega were discharged, and otherwise discriminated against, by Respondent because of their union sympathies, and a violation will be found

unless the Respondent has presented a valid business justification for its actions, i.e., unless Respondent has established that it would have taken those actions even absent the employees' union activity. (Royal Packing Company (Oct. 8, 1982) 8 ALRB No. 74; Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].)

We find that Respondent has met its burden of proving valid business justifications with regard to the discharge of Vega and Nava.

Domingo Vega

Respondent proved that it laid off Vega in September 1979 because he was unsatisfactory as an irrigator, and because there was insufficient work for a full time shoveler. (Vega had been restricted from irrigation work since March 1979.) General Counsel contended that Vega had been a satisfactory irrigator, and was discriminatorily restricted from irrigation assignments when foreman Davila began working for Respondent. Richard Elmore testified that he had been dissatisfied with Vega's irrigation work from the outset, based on Vega's first irrigation assignment in August 1978, and that although Vega was assigned to irrigate on a few occasions after that date, Elmore had decided to restrict Vega from irrigation work before Davila started to work for Respondent.

Respondent's work records generally support Elmore's testimony in that regard. They indicate that Vega irrigated considerably fewer times than either Nava or Rodriguez and that for several two-week periods during October, November, and December of 1978 and January of 1979, Vega did not irrigate at

all or that he irrigated only once. In February and March of 1979, Vega did irrigate for several shifts, but never more, and sometimes less, than did Rodriguez or Nava. The resumption of Vega's irrigation work in February and March 1979 was explained by Elmore, who testified that he gave Vega irrigation assignments only when it was to flood an unplanted field (as little or no harm could be done in that assignment) and when no other irrigators were available. Elmore testified that when Davila began working for Respondent he instructed Davila not to assign any irrigation work to Vega.

Elmore further testified that because the work was slackening in September 1979 and other general farm workers (who did irrigation work) were available to do shovel work, he did not want to keep a full time shoveler on the payroll. As Vega was then the only permanent employee who did not irrigate, he was essentially a full time shoveler. Elmore explained that any shovelers who might occasionally be required could be obtained less expensively through a labor contractor, and would need less supervision than Vega. (The record indicates that during the four months between Vega's layoff and his rehire in January 1980, Respondent contracted for additional shovelers only once or twice.)

Based on Respondent's work records and the credited testimony of Richard Elmore, we find that Respondent did not discriminatorily restrict Vega from irrigation work. Respondent laid him off in September 1979 for valid business reasons, as he was the only full time employee who did not irrigate. We also conclude that Respondent's April 1980 layoff of Vega was not

unlawful. Vega had been rehired in January 1980 only because Respondent's counsel so advised in order to reduce any possible backpay liability which might result from the charges filed in this matter. Respondent's reason for laying off Vega in September 1979 remained valid in April 1980 when the need for shovelers again dropped off.

Francisco Nava. We also affirm the ALO's conclusion that Respondent did not discriminatorily discipline, suspend, or discharge Nava. As discussed above regarding Vega, Davila's antiunion animus, attributable to Respondent, tends to support the General Counsel's argument that Respondent violated the Act by its treatment of Nava. Nava's visible union activity, and Respondent's knowledge thereof, began in January 1980. In the case of Nava, as the ALO found, the union activity included the wearing of a union button, distribution of UFW materials (which Davila observed), as well as Nava's informing Davila that he had attended union meetings, and asking Davila for permission to attend a mass on the anniversary of the death of Rufino Contreras, an occasion closely identified with the Union.

In opposition to the General Counsel's case-in-chief, however, Respondent has presented a sufficient justification for having disciplined and discharged Nava, based on its dissatisfaction with Nava's job performance from November 1979 until the time of his discharge in August 1980. Nava's performance record indicates at least eight instances of poor performance from October 1979 to August 1980. He received written warnings on most of those occasions. Some were for poor irrigation work, but one

was for taking an excessively long break and another was for leaving a shift at noontime without notifying the foreman. Other derelictions resulted in suspensions. Nava was first suspended for leaving a pump unattended during an irrigation shift; as a result, the pump sucked air and a pipe was damaged. Foreman Davila testified that, on that occasion, Nava was at dinner for several hours. Another employee, Martinez, testified that it was bad irrigation practice to leave operating pumps unattended for lengthy periods under conditions where the water level might rise or fall suddenly.

At the time of Nava's first suspension, Richard Elmore advised Nava that his work was not satisfactory and that unless it improved he could not continue working for Respondent. Elmore also offered Nava, who had been complaining of tiredness and health problems, two weeks severance pay if he decided to quit.(Nava decided to stay on.)

Nava was suspended a second time in April 1980 for "burning" melons in the course of his irrigation work. The "burning" was caused by an improper mixture of chemicals and water and resulted in crop loss. That suspension was for two weeks; the letter notifying Nava of his suspension cited eleven work deficiencies, including the previous one-week suspension. The letter also referred to Nava's tardiness. (Nava had been cited for frequent lateness.) Nava admitted to four such instances, explaining that he lived in Mexico and the border crossing was occasionally slow.

Nava's discharge in August 1980 followed an incident in

which a field which he was irrigating had been flooded. Nava denied responsibility, contending that when he checked the field around 5 a.m., before going home, the water was at a proper level. Davila found the field in flooded condition around 8 a.m., and summoned Richard Elmore. Elmore held Nava responsible. The letter of termination cited the letter of suspension accompanying the second suspension in April and stated that Nava was "costing [Respondent] considerably, not only by poor performance, but in crop damages as well."

General Counsel theorized that Davila created floods or caused crop damage so that Nava would be blamed and disciplined for those occurrences. The evidence in support of that theory is scant, consisting primarily of Nava's testimony that, regarding the flood, the irrigation job seemed satisfactory when he went home, and, regarding the melon burning, that it was Davila who adjusted the chemical mixture. The claim that a foreman sabotaged Respondent's crops in order to "set up" an employee is a serious accusation, and a fact which, if proven, would be material in finding discrimination. However, the evidence presented is isolated and unconnected, and insufficient to satisfy General Counsel's burden of proof.

Rodriguez

We conclude that Respondent unlawfully discharged Rodriguez for engaging in protected concerted activity, i.e., protesting, along with Vega and Nava, Respondent's failure to observe seniority in connection with the layoff of Vega.

Various witnesses testified that Respondent's layoff

notification to Vega on September 19, 1979, prompted a rather heated discussion between Rodriguez and Elmore about whether layoffs were necessary and how seniority ranking should be applied in effecting layoffs. Testimony by participants in the discussion indicates that Rodriguez was forceful in arguing to Elmore that any layoff should be in accordance with seniority (at that time Vega was not the most junior permanent employee). Elmore claimed that Vega was in fact laid off according to seniority and job classification, as he was the only full time shoveler (the other permanent employees also did irrigation work).

According to Elmore, that discussion occurred when he personally delivered Vega's final paycheck to him at noon. Elmore's testimony indicated that he was annoyed by the discussion with Rodriguez, Nava and Vega, as he felt they were challenging his authority to make decisions which he felt were within the area of management prerogatives. At one point in the discussion, Elmore testified, he told Rodriguez and Nava that if they didn't like his decisions, they could pick up their (final) paychecks too. On October 12, 1979, a charge was filed by the UFW alleging that Vega's discharge was an unfair labor practice. Respondent was notified of the filing of that charge by letter dated October 15. Rodriguez was discharged on October 26.

Labor Code section 1152 guarantees agricultural employees the right to engage in concerted activities for mutual aid and protection. Labor Code section 1153(a) declares that it is an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the

exercise of those rights. We have held in numerous cases that protected concerted activities include a wide range of employee conduct concerning the terms and conditions of their employment, including seniority and layoff procedures. Clearly employees enjoy a basic right to join together to discuss or protest about such matters with their employer or its agents. That is what Rodriguez was doing; protesting that any necessary layoff should be effected in accordance with employer-wide seniority, or at least that Vega should not be considered to be in a separate classification for layoff purposes. Elmore apparently believed that the three were improperly attempting to interfere with his managerial prerogative to make decisions about whether, and under what circumstances an employee would be laid off. While Elmore did, of course, have the right to lay off workers, his employees were lawfully exercising their right to collectively protest to Respondent about whether the layoff should occur and which employee should be laid off. The fact that the discharge of Rodriguez closely followed Respondent's learning that an unfair-labor-practice charge had been filed about its layoff of Vega suggests a possible connection between those two incidents. The ALRB's notification to Respondent of the charge (filed October 12) was dated October 15, 1980. Elmore decided to discharge Rodriguez on October 26, less than two weeks later.

Respondent contends that Rodriguez was discharged for poor job performance, as described in the disciplinary notice for October 24. That notice listed nine job-performance deficiencies. After reviewing the disciplinary notice and testimony pertinent

thereto, we are unconvinced that Rodriguez' work performance on October 24 was the true reason for his discharge. Rather, we find that if Rodriguez had not engaged in the aforementioned protected concerted activity, Respondent would not have discharged him.

At the outset, we note that the October 24 listing of work deficiencies was the first reference to poor performance by Rodriguez and the first occasion on which his performance was criticized by Respondent. Rather than being warned or suspended, he was discharged, although Respondent usually warned or suspended employees in other instances of deficient performance.

Although Elmore and Davila testified that Rodriguez often wanted to discuss with, or suggest to, Davila how work should be done, Rodriguez was never reprimanded, formally or informally, for poor work. Elmore testified that he had the impression that Rodriguez was working fewer hours (eight rather than ten) than he had worked prior to Davila's arrival and that Rodriguez encouraged other employees to work less than a ten-hour shift. The work records, however, do not indicate such a reduction. Furthermore, Respondent's employees were apparently given the option of working fewer than ten hours and had not been informed that to do so would be considered deficient performance.^{2/}

Elmore's note of October 24, submitted to document the purported job deficiencies of Rodriguez, lists nine items, as if

^{2/} Apparently that option applied to non-irrigation work, as irrigation shifts were generally for 24 hours.

to suggest several different incidents of poor performance. However, at least seven of the items listed appear to relate to a single irrigation job^{3/} on October 24. As to Respondent's contention that Rodriguez was fixing his car instead of irrigating, Rodriguez testified that he was fixing his car on his own time, after completing his irrigation shift. Although appearing to present many incidents of misconduct, Respondent's document essentially cites only one instance, which was the irrigation on October 24. Elmore's note also mentioned that he had observed Rodriguez "driving around" on a number of occasions, implying that Rodriguez was doing so when he should have been working. However, Elmore never asked Rodriguez about the "driving around" or otherwise attempted to learn whether Rodriguez had a legitimate explanation therefor. Similarly, although Elmore obviously disapproved of such activity, he never advised Rodriguez of his concern or instructed him to curtail such activity.

The proffered justification is also suspect because at the hearing Elmore provided additional reasons for the discharge, different from the reasons listed on the October 24 document. At the hearing, Elmore referred vaguely to what he perceived to be Rodriguez' deteriorating attitude. Elmore testified, for example, as to his impression that Rodriguez had decreased his work hours from ten to eight and had pressured other employees to do likewise. In his testimony, Rodriguez denied doing either. As noted, the

^{3/} Fixing his car instead of setting water; did not follow foreman's irrigation instructions; did not change water; did not irrigate all rows; did not clean flooded drain box, wasted water; poor row irrigation formation.

work records do not indicate a reduction in Rodriguez' ten-hour work days. (Also, since employees had been given the option of working either eight or ten hours, the reason why Rodriguez would be faulted for working, or encouraging, eight-hour rather than ten-hour shifts is unclear.) Such vague, shifting and undocumented reasons cast further doubt on the validity of Respondent's defense. (See Webb Ford, Inc. (Sept. 30, 1981) 258 NLRB No. 62 [108 LRRM 1311].)

Although Elmore did not mention it, his confrontation with Rodriguez over Vega's layoff and the subsequent filing of an unfair-labor-practice charge over Vega's discharge undoubtedly contributed to Elmore's perception that Rodriguez had developed a "bad attitude." It is significant that although Elmore referred to a gradual worsening, over several months, in Rodriguez' attitude and performance, he did not discipline, or even warn or counsel Rodriguez, until just after the confrontation over Vega's layoff and the filing of the charge. Under these circumstances, we find that Respondent's discharge of Rodriguez, less than two weeks after it learned of the ULP charges, with no prior warnings, no evidence of significant injury to Rodriguez' business, and no attempt to investigate the claimed misconduct, was based essentially on his union activity and other protected concerted activity and therefore constituted a violation of Labor Code sections 1153(c) and (a).

The allegations in the complaint regarding the discharges of Domingo Vega and Francisco Nava are dismissed for the reasons discussed above. As to the other allegations in the complaint, except the discharge of Benjamin Rodriguez, there is

insufficient evidence to establish that a violation has occurred and they are hereby dismissed.

ORDER

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

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee for engaging in union activity or other protected concerted activity.

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

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

(a) Make whole Benjamin Rodriguez for all losses of pay and other economic losses he has suffered as a result of its discharge of Rodriguez, the makewhole amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional

Director, of the backpay period and the amount of backpay due under the terms of this Order.

(c) 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.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between September 1, 1979, and the date such copies of the Notice are mailed.

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

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

period.

(g) 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 with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: December 23, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (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 refusing to rehire and discharging an employee because of his support for the United Farm Workers of America, AFL-CIO, (UFW) or because he engaged in activities for the benefit of employees. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act (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 discharge, refuse to rehire, or otherwise discriminate against any employee because he or she has joined or supported the UFW, or any other labor organization, or has exercised any other rights described above.

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

WE WILL reimburse Benjamin Rodriguez for all losses of pay and other economic losses he has sustained as a result of our discriminatory acts against him, plus interest computed in accordance with the Board's Order in this matter.

Dated:

ARDVARK RANCH

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 319 Waterman Avenue, El Centro, California 92243. The telephone number is (714) 353-2130.

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

Ardvark Farms

8 ALRB No. 96

Case No. 79-CE-79-EC

ALO DECISION

The complaint against Respondent alleged unlawful disciplinary action, including notices, suspension and discharge, and other acts of discrimination against three employees, during various periods of 1979 and 1980. All three employees began working at Ardvark in the summer of 1978 to perform general farm work, including irrigation. All three were union adherents, although there was no apparent organizing activity. In March 1979 the owner hired a foreman who made antiunion statements just prior to beginning work at Respondent's farm.

In September 1979 one of the employees was laid off, even though he was not the most junior employee. The owner, who had been dissatisfied with the employee's irrigation work, had restricted him to shovel-type work, and when reducing the work force, he decided to keep only workers who could irrigate.

The three employees protested-both the layoff and the layoff seniority policy which Respondent utilized, and filed an unfair-labor-practice charge. In October 1979 a second employee was discharged for poor irrigation work and poor attitude. Respondent rehired both of those employees in January 1980, on advice of counsel. The non-irrigator was permanently laid off in the spring. The second employee was employed continuously after the rehiring in January, although he continued to receive disciplinary notices. The third employee was discharged in August 1980 for a poor work record, which included several written notices, two suspensions and an oral warning.

The ALO found that although the foreman manifested antiunion animus, the farm owner, who made the major disciplinary decisions in issue, did not. He also found that Respondent had many legitimate complaints concerning the job performance of the three employees, and concluded that the employees were discharged for legitimate business reasons.

BOARD DECISION

The Board affirmed the ALO's conclusions, with modifications, as to two of the three employees. However, the Board found a violation as to the employee who was discharged in October 1978, shortly after the employees' concerted protest over the layoff of the non-irrigator, in which he had been an outspoken participant. There had been no previous disciplinary notices issued against him, and Respondent offered multiple and shifting reasons for the discharge.

The Board found that the General Counsel had established a prima facie case as to all three workers based on the foreman's statements and actions. The fact that the owner himself was found not to possess antiunion animus was not considered controlling or highly significant. However, as Respondent met its burden of demonstrating that two of the employees were discharged for cause, the Board dismissed the allegations as to those two and issued a remedial order as to the other employee.

* * * *

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

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STATE OF CALIFORNIA BEFORE THE
AGRICULTURE LABOR RELATIONS BOARDS



ARDVARK RANCH,

Respondent,

and

UNITED FARM WORKERS OF
AMERICAN, AFL-CIO,

Charging Party,

Case Nos. 79-CE-79-EC
79-CE-96-EC
79-CE-198-EC
80-CE-45-EC
80-CE-75-EC
80-CE-80-EC
80-CE-82-EC
80-CE-149-EC
80-CE-250-EC
230

Appearances:

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Labor Relations Board

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or
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For Charging Party

DECISION

STATEMENT OF THE CASE

MARK E. MERIN, Administrative Law Officer:

This case was heard before me in El Centro, CA, commencing
December 9, 1980, and continuing on successive days, the weekend
excluded, to and including December 17, 1980.

Charges were filed against Ardvark Ranch on October 12, 1979

(79-CE-198-EC), January 18, 1980 (80-CE-45-EC), January 28, 1980 (80-CE-75-EC), January 29, 1980 (80-CE-80- EC), January 29, 1980 (80-CE-82-EC), March 18, 1980 (80-CE-149-EC), and August 26, 1980 (80-CE-250-EC). A Notice of Hearing and Complaint for the first four of the charges listed above, together with an Order consolidating those cases, issued on March 28, 1980. A Notice of Hearing and First Amended Complaint, essentially adding the next four charges mentioned above, together with an Order consolidating those cases with the former charges, issued on April 29, 1980. A Notice of Hearing and Second Amended Complaint, together with an Order consolidating cases was issued on November 14, 1980, and the Third Amended Complaint was issued on December 9, 1980. The charges, and the initial and amended complaints, together with the consolidation orders, were all duly served upon Respondent.

Respondent answered each of the initial and amended complaints, with the answer to the Third Amended Complaint being filed on December 11, 1980.

Respondent is charged with violations of Labor Code §1153(a), (c) and (d).

Charging Party, the United Farm Workers of America, AFL-CIO, moved and was granted the right to intervene in the proceedings. At the close of the hearing both the General Counsel and Respondent filed briefs. Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following:

FINDINGS OF FACT

I

JURISDICTION

Ardvark Ranch, hereinafter sometimes referred to as "Ardvark", "Respondent", "Employer", or "the Company" is an agricultural employer within the meaning of Labor Code §1140(c). ^{1/} Charging Party United Farm Workers of America, AFL-CIO, (hereinafter sometimes referred to as "the Union" or "UFW") is a labor organization within the meaning of §1140.4(f).

II

RESPONDENT'S OPERATIONS

Ardvark Farms, a partnership owned by brothers Richard and Howard Elmore, grows cotton, alfalfa, wheat, produce, and grasses in the Imperial Valley. Until March, 1979, Richard Elmore acted as Respondent's field foreman, but thereafter Respondent hired from the partners' father's ranch (John Elmore Ranch) a foreman, Angel Davila, who took over supervision of Respondent's field workers. Contemporaneously therewith Respondent considerably expanded its operations.

III

THE UNFAIR LABOR PRACTICES

Respondent is charged with violating §1153(a), (c), and (d) with respect to each of three employees, Francisco Nava, Domingo Vega, and Benjamin Rodriguez, by committing various acts in the period from March, 1979, through May, 1980. Specifically, with respect to Francisco Nava, Respondent is charged with:

^{1/}. Unless specifically stated otherwise, all statutory references are to the Labor Code.

1. Giving him fewer turns at irrigation than other workers since May, 1979;

2. Giving him written warning on November 11, 1979, December 6, 1979, and January 16, 1980, adding a one week suspension at the last warning;

3. Accusing him of selling insurance forms in December, 1979

4. Ordering him to irrigate three melgas with ten feet of water on December 26, 1979;

5. Assigning him and Benjamin Rodriguez to do shovel work and segregating them from other irrigators since January 24, 1980;

6. Giving him a written warning on February 5, 1980;

7. Offering him two weeks pay if he would get another job on February 8, 1980;

8. Requiring him to perform his duties with inadequate equipment (a weeding whip);

9. Suspending him for two weeks without pay on April 9, 1980; and

10. Discharging him on August 18, 1980;

With respect to Domingo Vega, Respondent is more specifically charged with:

1. Closely watching his activities since January, 1980;

2. Laying him off on January 22, 1980; and

3. Hiring other employees to do the same work without contacting him to notify him of available employment on January 28, 1980;

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4. Assigning him the most difficult work since February 21, 1980 and segregating him from other employees on February 26, 1980;

5. Denying him tractor work on March 24, 1980;

6. Laying him off on or about September 9, 1980 because of his union support and concerted activities; and

7. On or about April 14, 1980 again laying him off because of his union support and concerted activities.

As to Benjamin Rodriguez, the Company is specifically charged with:

1. Reducing the amount of work assigned to him since March, 1979;

3. Discharging him because of union support and concerted activities on or about October 26, 1979;

3. Terminating Rodriguez unlawfully on November 29, 1979;

4. Rehiring him on January 24, 1980 but assigning him only shovel and sprinkler work while segregating him from the other workers and on January 28, 1980 refusing to lend him money;

5. Increasing the number of inspections of his work since Rodriguez filed a charge against Respondent and issuing tickets on past incidents following the filing of the charge.

A. Benjamin Rodriguez

Benjamin Rodriguez, at the time of the hearing employed by Respondent as a general field worker with responsibilities for irrigating, shoveling, tractor work, and setting up sprinklers, was first hired by the Company in mid-1978. At that time Richard Elmore personally supervised Rodriguez. In March, 1979, Elmore hired Angel Davila, previously employed by his father, John

Elmore, to be the foreman of field workers at Ardvark Farms. On October 26, 1979, Rodriguez was fired by the Company. After Rodriguez filed with the ALRB a charge against the Company, on January 8, 1980, respondent offered reinstatement to him which Rodriguez accepted on January 21, 1980, rejoining the other field workers at Ardvark Farms. Elmore, testifying for the Company, explained that he fired Rodriguez because of his general dissatisfaction with various things he had noted about Rodriguez' work including working on a car on Company time, failing to irrigate fields properly, failing to follow instructions relating to the proper method for irrigating lettuce the day before his firing, and generally because his work had been poor and because he had a negative attitude after the new foreman was hired. As is more fully stated below, I credit Elmore's version of his reasons for making the termination decision and do not find anti-union animus played any part in Elmore's decision to terminate Rodriguez on October 26, 1979.

A week after returning to work, on January 28, 1980, Rodriguez requested a loan from the Company which was denied. The denial is alleged to have been discriminatory in that the Company policy supposedly had been to grant such advances. According to Elmore he employed a uniform policy permitting loans to employees of no more than the amount they had earned but not yet received. Under this policy the treatment of Mr. Rodriguez was not discriminatory and there was no evidence offered to indicate the policy was other than Elmore testified. Accordingly, I find that the Company did not discriminate against Rodriguez by denying his loan request.

In January, Respondent instituted a written worker notice format to apprise workers of perceived problems with their performance. Written work rules, in English only, were distributed in February. On March 12, 1980, Rodriguez, together with Francisco Nava and Domingo Vega, was given a worker notice for taking 20 minutes instead of the permitted 10 for a breakfast break. On April 5, 1980, Rodriguez got a worker notice for sleeping during an irrigation turn and letting water run improperly out of a field.

On June 24, 1980, Rodriguez was given another notice indicating he had left dry part of "six lands" he was irrigating. On July 5, 1980, Rodriguez was cited for stealing Company ice. Finally, on July 14, 1980, a worker notice was prepared, but possibly not delivered to Rodriguez, documenting Rodriguez' alleged unsatisfactory work assignments and attempts to force Davila to fight with him.

The Third Amended Complaint includes the charge that the amount of work Rodriguez had performed has been reduced since March, 1979. The evidence from the time records, however, indicates to the contrary that Rodriguez worked more during the second and third quarters of 1979 than he did in the first quarter of the year and that only in the quarter including the time Rodriguez was off following his October discharge, were his hours lower than other workers employed during the same period. Accordingly, I find that this allegation is unsubstantiated.

According to the Complaint the Company substantially increased the number of inspections of Rodriguez' work following the filing of the initial charge. However, considering all of the

evidence, I do not find that Rodriguez' work was given any special attention either by Davila or by Elmore himself.

The Complaint alleges that since January 24, 1980, the Company has not assigned Rodriguez irrigation work but has limited him to shovel and sprinkler work and has segregated him from other workers. As to the alleged denial of irrigation work, Company records reflect that Rodriguez spent a substantial portion of his time irrigating, refuting totally this allegation.

Rodriguez, Nava and Vega all testified that Respondent segregated them from other irrigators and field workers at Ardvark and separated Nava and Rodriguez from Vega. While generally denying segregating the complainants from his other employees, Respondent sought to explain separating the workers into two groups by saying that his other irrigators did not drive to work with Rodriguez, Nava and Vega.

In addition to supporting the specific allegations of the Complaint, Rodriguez testified in some detail as to the background of each worker notice and denied culpability in each instance. Specifically, Rodriguez agreed that on October 25, 1979, he spent the day working on his car but added that it was not his work day, as he had just completed an irrigation shift in a lettuce field and was off that day. As to the termination, news of which he got from Davila while he was fixing his car, Rodriguez described learning second-hand from Davila that Elmore was dissatisfied with his work. Rodriguez apparently attributed the irrigation problem to which Davila alluded and which was cited as the principle reason for the discharge, as resulting from Davila' failure to deliver plastic to use in irrigating the field,

impliedly agreeing that there was an irrigation problem with that field, but attempting to shift the blame to his foreman.

Much of Rodriguez' testimony consisted in documenting his requests to Davila to give him more irrigation turns in the belief that he was not getting his share; recounting how he asked Davila to make more equal assignments of irrigation turns; and describing acrimonious exchanges between himself and Davila as to methods of irrigation, whether a job was done properly or not, and whether facts described by Davila were correct or not.

B. Francisco Nava

Nava, at the time of his testimony, had been a farmworker for 25 years with experience as an irrigator, principally in Mexico, Texas, New Mexico and Arizona, but with some experience irrigating in California at one other place beside Ardvark Farms. He was hired by Respondent at the recommendation of Benjamin Rodriguez, in July, 1978. For approximately eight months Nava was supervised by Richard Elmore. Under Elmore, Nava irrigated taking his twenty-four hour turn in rotation and at times working two or even three turns in a row.

Nava took breaks in the field when he had time and would, on occasion, take one and a half hours for lunch in Brawley and a like amount of time for dinner. No one was reprimanded, to Nava's knowledge, by Elmore for leaving the fields for meals and for taking that amount of time to eat.

After Davila became foreman, the Company's policy chanced and Nava learned about the rule change when he received a worker notice on January 15, 1980, for leaving his work for too long a time to eat dinner and leaving a pump operating unattended. Nava

was suspended for one week for that violation. After he received the January 15, worker notice, Nava was not permitted, according to his testimony, to leave the fields to take meals, although he noted that other workers who lived in the area continued to leave for lunch and at times were gone from the fields for more than an hour during these breaks.

Under Davila, the Company started a rule, according to Nava, which required him to ask permission before leaving the fields. On February 5, 1980, after completing a twenty-four hour irrigation shift and continuing thereafter to lay pipes, working with the tractor, Nava left at noon because he had not eaten anything and was tired. He did not inform Davila that he was leaving and, in leaving, prevented the tractor driver from completing the pipe laying since it requires two men to do that job. He received a worker notice for leaving work on this occasion without permission.

Before Davila arrived Nava would start work at seven in the morning at the field to which he had been previously assigned. He went directly to the field and, if reporting for an irrigation assignment, would go directly to that work site. After Davila arrived, however, all workers had to report to the shop at 6:00 a.m., and be assigned the work for the day, even if an irrigator were starting irrigation. At times Davila would assign an irrigator to shovel work for a few hours and later notify that worker that water had come on an emergency basis, and he was needed to begin irrigation immediately.

After Davila was hired three new workers were hired - Guillermo, Enrique, and Martinez. Guillermo started after Nava

was suspended following the January 15 notice and, according to Nava, was taught how to irrigate during the time of Nava's suspension. Nava felt that the three new men were given more favorable treatment than he, Rodriguez and Vega. According to Nava, the work was distributed equally as among Nava, Rodriguez and Vega, but the three of them received fewer irrigation assignments than did the new men. The new men appeared to be given greater latitude as related to late arrival and taking breaks during the day, but Nava agreed that on many occasions he arrived late, after the men have already left the shop, but explained that he lived in Mexicali, and that at times he had transportation problems.

According to Nava, on several occasions he, Rodriguez and Vega spoke to Davila about their complaint that they were not receiving as many irrigation turns as were the others and even raised this topic with Elmore. Both Davila and Elmore denied any inequity.

Following his return from his suspension, Nava was weeding and, instead of using the long handled hoe--his usual weeding implement--Nava was presented with a "weeding whip" with which to cut the weeds. He felt the tool was inappropriate for the work assigned but, when he confronted Davila, Davila told him that that was the equipment they were to use on the weeds.

After his suspension, Nava felt that he was segregated from Guillermo, Enrique, and Francisco, and only worked jointly with Vega and/or Rodriguez.

Nava believed that Vega was not getting his share of irrigation work since, while Vega had irrigated prior to Davila's

arrival, after Davila became foreman Vega did not get any irrigation assignments. Nava and Rodriguez spoke to Davila on Vega's behalf about his not getting turns irrigating; Davila agreed that Vega was not irrigating and gave the reason that he did not know how to irrigate.

When Vega was laid off in September Nava and Rodriguez, accompanied by Vega, spoke to Davila about the reason for the lay off. Davila advised them not to stick their noses into it because, according to Nava, "they would be next."

Nava and Rodriguez accompanied by Vega, then went to speak with Richard about Vega's lay off. Richard denied knowledge of the termination, according to Nava, and referred them to Davila since he was "the boss." Continuing the discussion with Davila, Nava and Rodriguez were again told to stay out of the matter. When Davila was told that Vega had more seniority than others at the Company, Davila responded that Vega was a shoveler and there was no shovel work left. Davila insisted that Vega could not irrigate and that the shovel work there was to do, could be done by others.

In January, Vega was recalled to work. Davila asked Nava, who was at home during his suspension, to bring Vega to work. Nava found Vega at home and brought him to work the following day.

On one occasion Nava was caught irrigating when a plane sprayed the field with insecticide. He reported the incident to his foreman and asked permission to see a doctor. According to Nava, Davila told him he did not look like he needed a doctor, that he did not look sick. That night Nava experienced symptoms

he attributed to the exposure to the pesticide. Later, when a similar incident occurred and pesticide was accidentally splashed on his arm and body, he developed a rash for which he sought medical attention.

In order to see the doctor under medical coverage provided by the company, an insurance form had to be obtained. Nava testified that Davila denied him a form but that he got one at the office. Nava spoke to Elmore about seeing the doctor and Elmore, according to Nava, then accused him of selling insurance forms. The doctor did not diagnose the rash nor restrict Nava's work with pesticides. Shortly after the second pesticide incident, Nava was again assigned to work with pesticides but did not object, according to him, because he had been told by Davila that refusal to do assigned work would be grounds for termination.

Nava disagreed with the irrigation methods advanced and required by Davila and Elmore. Relying on his experience, Nava told Davila when he thought Davila's methods were in error. Davila insisted that he was doing it the way Elmore wanted and would require Nava to push the water faster or apply more than Nava felt was necessary in a particular area. On occasion Nava blamed flooding and other irrigation problems on his being required to use the wrong method.

The last worker notice Nava received was for an incident that resulted in his termination on August 16, 1980. A flood, documented by photographs, was caused, according to Nava, by his being required to complete an irrigation job begun improperly by another irrigator, Francisco. Francisco, according to Nava, had started irrigating from the wrong end of the field requiring water

to run up hill over area already wet. Nava testified he asked Davila if he could change the water but was told "no". Nava was relieved the following morning at 8:00 a.m., having finished and moved on at 2:00 a.m., from the field found flooded. He denied that there was anything wrong with the field at the time he left and did not receive his notice and termination until August 18, when he returned.

C . Domingo Vega

Domingo Vega was hired by Respondent on August 31, 1978, and worked as a shoveler and irrigator until Angel Davila was hired, after which time he was given no further irrigation assignments. On September 19, 1979, Vega was laid off for lack of shovel work, but re-hired on January 17, 1980. A few days after returning to the Company he was again laid off for approximately one week.

In March, Vega, along with Rodriguez and Nava, was given a worker notice for taking too long a morning breakfast break. A month later, on April 11, 1980, Vega was again discharged and has not worked for Ardvark since.

IV

UNION AND CONCERTED ACTIVITIES
OF RODRIQUEZ, NAVA AND VEGA

When Vega realized, after Davila became foreman, that he was no longer receiving irrigation assignments, he spoke with Davila and later Richard Elmore. Rodriguez and Nava also spoke with Davila and Elmore on Vega's behalf and generally complained about what they felt was an unequal distribution of irrigation work.

They complained, as well, to Davila about being required to use a weeding whip, as opposed to the long-handed hoe, to clear weeds. Rodriguez was particularly out-spoken and brought to his foreman's attention his disagreement with Davila 's evaluation of his poor work, his objection to Vega's termination, and his rejection of Davila 's accusation that he had been sleeping on the job.

According to Nava, his membership in and participation in union activities was obvious and known to both Davila and Elmore. He personally wore a union button at the job and distributed buttons to others in Davila's presence. He kept UFW material, including buttons, in his car which the foreman entered on occasion. Nava asked for permission to attend a union mass on the anniversary of the death of Ruffino Contreras, and informed Davila that he had attended union meetings.

Rodriguez' involvement with the union became apparent after the union filed Charge No. 79-SE-79-EC for Rodriguez on October 29, 1979. Vega announced his union support by wearing a UFW button to work after he returned in January, 1980. Vega testified he has been a UFW member since 1969 and showed his UFW card to three workers, Antonio Ursua, Aaron Partida, and Faustino Castro in May, 1979.

V

DISCUSSION

This case is unusual in that, without exception, the witnesses appeared forthright, open, and honest, although the perception of the events which the witnesses described varied widely.

The growth of Respondent's company and the difficulty which Richard Elmore experienced in attempting personally to supervise his workers led him to hire a foreman. The addition of the foreman, the introduction of more sophisticated farming methods, including new approaches to irrigation and the inclusion of pesticides and chemicals in the irrigation water, and the issuance and enforcement of written work rules led to regular conflicts

between the workers, used to greater latitude, and Elmore and Davila.

From all of the testimony and especially crediting that of Richard Elmore, I have concluded that Elmore had made allowances for his workers' errors in performance and permitted them great freedom which he was supervising them, but tightened up after he hired a foreman to better organize his operations. The tensions which accompanied the arrival of the foreman, who enforced hours of arrival and required work to be done as he directed, was inevitable, under the circumstances. Elmore testified that: he though Rodriquez felt he should have been made foreman instead of Davila, and it is clear that the workers resented the restrictions which accompanied the additional supervision and closer inspection which Elmore had previously been too pressed to conduct. Furthermore, the workers did not understand the changes in irrigation methods which were instituted after Davila's hiring and repeatedly questioned the directions they were given, at times disregarding specific instructions.

Numerous notations document the Respondent's concern about the worker's performance, particularly that of Rodriguez and Nava. Many of these notes, both informal and in the form of "worker notices," were not distributed to the employees, but served only as a record from which Respondent's witnesses could refresh their recollection.

In Rodriguez' case, I find that Elmore's notes and the worker notices documented legitimate concerns which Respondent had in connection with Rodriguez' work. I also find that the temporary discharge from October 26, 1979 through January 21, 1980, was

justified in view of the list of problems which Richard Elmore noted on October 24, containing nine items including disobedience to specific instructions and flooding of furrows. The summaries of the employer's work records do not substantiate Rodriguez' claim that he was given a reduced amount of work following March, 1979. While Respondent admits refusing to lend Rodriguez money after he returned in January, 1980, a sufficient business justification was offered to negate any inference that the refusal was discriminatory and/or motivated by anti-union animus.

Other than Mr. Rodriguez' feeling, I find no objective evidence that the number of inspections of his work was increased in an attempt to intimidate, coerce, or harass him. In fact, I find no evidence that inspections of Rodriguez' work occurred at any greater frequency than the inspections of any other employee' work.

Nava alleged that his turns at irrigation were diminished yet work records indicate that he received at least as many turns as did other employees. His objections to using the weeding whip, which he considered an inappropriate tool, are attributable more to his unfamiliarity with the tool and his preference for the hoe, than to any interest which the Company had in inconveniencing him on the others. To the contrary the tool is manufactured for the purpose for which Respondent indicated it was to be used.

Nava smarted under the accusation, attributed to Richard Elmore, that he had obtained and sold forms necessary to obtain medical care under Respondent's insurance policy. The accusation, labelled an "inquiry" by Respondent, arose from Elmore having previously supplied a copy of the requested form to Nava's doctor

and subsequently learning that Nava obtained an additional form from Elmore's brother. Nonetheless, while insensitive and insulting, the accusation was not the basis for any disciplinary action.

Nava complained of receiving various worker notices relating to alleged poor performance, and charged that the notices were themselves evidence of discrimination. The worker notice, as previously indicated, constituted a new system adopted by Respondent to document employee problems. The use of the system appears to have been company wide and I do not find that the notice were used in a discriminatory fashion. As to the substance of the Company's complaints recorded in the notices, I find that in all instances the Company properly documented situations which to the foreman or to Elmore constituted poor performance. Indeed, in one instance, photographs adequately portray the extent of flooding which occasioned Mr. Nava's termination. In another instance, Nava received a notice for leaving a pump while it was running. While not necessarily negligence, in that instance the pump apparently sucked air and was damaged. That damage could have been avoided had Mr. Nava been attending the pump.

Nava and Rodriguez claimed that they were segregated from other workers yet Nava admits, on occasions, working in the same field as they. The Company agreed that at times it did purposely separate complainants from other workers who, according to the Company, complained of being harassed by complainants for working too fast, being prevented from working more than eight hours in one day, and being made to "look bad".

While separation of employees for the purpose of interfering with employee rights could violate section 1153(a) or (c), here the employees first assembled at a common place and otherwise had access to one another to discuss union and/or other matters. Accordingly, even though the complainants were generally separated from other workers, because I do not find that the separation was motivated by any intent to interfere with employee rights but rather was responsive to expressed employee sentiment, I do not find that the separation of employees violated any section of the Act.

Nava testified that he was offered two weeks pay if he agreed to find another job. Coming, as this offer did, on the heels of the issuance of a warning notice for leaving a field without permission, itself a basis for discipline, the offer seems motivated more by a concern for Nava's well-being than an intent to discriminate against him.

The employer's work records indicate that in the third and fourth quarters of 1978 Vega irrigated approximately a third as often as Rodriguez and half as often as Nava did, suggesting that an unequal distribution of irrigation work existed before Davila's hiring. After Davila joined the company, additional irrigators were hired for the fields, which by then had grown in acreage substantially over that worked by the company in 1978. The additional workers were concentrated in irrigation and thereafter Vega received no irrigation turns. Confined to shovel work, according to respondent, Vega was no longer as useful to the company as was a combination irrigation-shovelor. I am persuaded by the company that the decision to restrict Vega to shovelling

assignments was based solely on his demonstrated ability or lack thereof to do an adequate irrigation job. In that the company's need for shovellers varied, that Mr. Vega was assigned, on occasion, to "make work" assignments, and contract labor could be obtained at a lower per hour cost, I find that it was only a legitimate business reason which motivated the company to terminate Mr. Vega.

Vega claimed that he was discriminated against by being denied training in irrigation while a novice at irrigation, Francisco Lara, was trained and given irrigation shifts. The evidence, however, indicates that Lara was trained on his own time by friends and family and thereafter irrigated acceptably to respondent. I do not find that the respondent has any obligation to continue to attempt to train an employee who has been found unsatisfactory for the work required. Accordingly, I do not find that the General Counsel sustained its burden of establishing that an unlawful motive was a motivating factor in its decision to terminate Mr. Vega.

As anti-union animus is an essential element to establish violations of Section 1153(a) and (c) (except when the employer's actions are inherently destructive of important employee rights), so discussion of the evidence adduced in this area is appropriate. The General Counsel's theory in this case is that Davila was himself anti-union, expressed that he was leaving his former employer (Richard Elmore's father) where the union had won the right to represent the agricultural employees, knew that there were three union members or sympathizers at Ardvark when he was hired as foreman, and vowed to get rid of them. under this theory

Elmore hired Davila with the intent to use him to purge his work force of union members.

In support of its theory, General Counsel offered testimony from Jose De La Torre who reported having a conversation with Davila a few days before Davila left John Elmore's employ and in which Davila said he would fire the union sympathizers (Rodriguez, Nava and Vega) at Ardvark when he became foreman. Although recalling the conversation somewhat differently, another participant, Francisco Vallin, corroborated it in its principle aspect, and said that when told that there were union supporters at Ardvark where he was going to work as foreman, Davila said he would have to get the men out of there.

Other evidence established to my satisfaction that Davila revealed anti-union sentiments while at Ardvark, shook his head when he saw Nava distributing union buttons, and made disparaging remarks about the union.

While General Counsel satisfactorily established Davila's anti-union animus, Davila had no power to fire or discipline workers which power was reserved to Richard Elmore as to whom there was scant evidence of anti-union feelings, principally a statement, which Elmore denied making, to the effect that the workers should take a notice he was giving them to their "fucking

In view of my finding that the problems with the complainants' work were legion, that Elmore's comment - even if uttered (and I credit Elmore's denial since his credibility was convincing) - was an isolated instance, and that Davila's anti-union sentiments did not influence discipline or discharge

decisions of respondent, I do not find that anti-union animus was a moving cause in the discipline and discharge complained of here.

In conclusion, giving full consideration to the testimony of General Counsel's witnesses, and weighing conflicting testimony as I have indicated above, I find that the complaints of discrimination and violation of the Act are not well-founded and that respondent discharged its burden and established that the discipline and discharges here involved were for legitimate business reasons. Accordingly, I recommend that the consolidated Third Amended Complaint be dismissed in its entirety.

Dated: October 7, 1981.

KANTER, WILLIAMS, MERIN & DICKSTEIN



By: _____

MARK E. MERIN