

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SUN PACIFIC FARMING
COOPERATIVE, INC.,

Respondent,

and,

JUAN PABLO OCHOA,

Charging Party.

) Case No. 2017-CE-020-VIS

) **DECISION AND RECOMMENDED**
) **ORDER**

Appearances:

For the General Counsel:

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For the Respondent:

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DECISION AND ORDER

John J. McCarrick, Administrative Law Judge. I took testimony in this case on November 5 and 6, 2019, in Fresno, California. Having considered the entire record including the testimony of the witnesses and the briefs filed by General Counsel and Respondent, I make the following:

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FINDINGS OF FACT

On August 28, 2017¹, Juan Pablo Ochoa (Ochoa) filed a charge with the Agricultural Labor Relations Board (Board) in Case 2017-CE-020-VIS, alleging that Sun Pacific Farming Cooperative, Inc., (Respondent) committed unfair labor practices under the Agricultural Labor Relations Act (Act) by discharging him for engaging in a protected activity. On June 7, 2019, the Regional Director of the Visalia Regional Office of the Board issued a complaint alleging that Respondent violated section 1153(a) of the Act by discharging Ochoa for engaging in protected activity. Respondent filed a timely answer denying it had committed any unfair labor practices.

Respondent admitted that it is an agricultural employer within the meaning of the Act. Respondent admitted that Ochoa has been employed as an agricultural employee of Respondent and that Jose Gaeta (Gaeta) was a statutory supervisor at all times material herein, having the authority to discipline and fire employees under his supervision.

At all times material herein, Respondent has grown, packed and shipped fresh fruit in throughout the state of California. Respondent employs about 2000 employees in its business. Respondent has an office in Firebaugh, California, where the vegetable harvesting department is located. There are about 12 to 18 employees in Respondent's farming department, including irrigators, tractor drivers, sprayers, mechanics and welders. Jose Gaeta is Respondent's farming supervisor and works in Firebaugh. Gaeta reports to Respondent's ranch manager, Jeff Rurup (Rurup).

Ochoa was employed by Respondent as a tractor driver from 2006 or 2007 until his termination in August 2017. His supervisor was Jose Gaeta. In early May 2017², Ochoa spoke together with Respondent's other tractor drivers about a wage increase. About a week later the drivers and all of the other employees in the farming department, about 17 to 18 employees, spoke with Gaeta about a pay raise. According to Gaeta the employees' spokesperson was Gustavo Cervantes.³ All of the tractor drivers, including Ochoa, spoke up about a pay raise at this meeting. Gaeta told the drivers he would speak about the employees' request with Rurup, his supervisor. That same day Gaeta spoke with Rurup about the raise and Rurup said he had to talk to his supervisors. About two weeks later, all of the farming department employees, with Cervantes as spokesperson, asked Gaeta what was happening with their requested pay raise. Gaeta again said he would speak with Rurup. In early June all employees in the farming department received a pay raise.

Ochoa

According to Ochoa, at the end of July, he took time off to go to Mexico to take care of some immigration matters. According to Ochoa, he spoke with Gaeta about the time off and said he would be gone for about 15 days but that it could take longer. Gaeta told him it was alright to go. Ochoa had an appointment in Juarez, Mexico on August 7, regarding his immigration status. Ochoa said he called Gaeta on August 5 or 6, and asked that his most recent paycheck be given to his wife. Ochoa explained that he was waiting in Mexico for his August 7, appointment.

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¹ All dates herein refer to 2017 unless specifically noted.

² While Ochoa said the initial meeting of tractor drivers was in June 2017, he was vague about dates. Gaeta testified that the first meeting he had with farming department employees about a pay raise was in May 2017 and that the raise was given to the employees in early June 2017. Given the date of the raise in early June, I credit Gaeta's testimony concerning the timeline of the meetings regarding the pay raise.

³ I credit Gaeta's testimony that Cervantes was the employees' spokesman.

Ochoa testified that he returned to the United States on August 16, and arrived home the same date. Ochoa said he sent Gaeta a text on August 16 that he needed that day to go to the Social Security office. Gaeta returned the text and related that he had gotten a letter from the office stating that Ochoa had abandoned his job since he had not shown up for work. Ochoa then called Gaeta and Gaeta told Ochoa he had nothing to do with Ochoa's termination and that it was from the office. Ochoa then called Respondent's office and was told he needed to speak with Gaeta.

Gaeta

Gaeta has worked for Respondent for 26 years as a farming supervisor in Firebaugh, California. Ochoa is a tractor driver under Gaeta's supervision. According to Gaeta, at the end of July Ochoa asked for two weeks off to take care of immigration documents in Juarez, Mexico. According to Gaeta, Ochoa did not specify how many days he would be gone, that he said he would be gone two weeks. Gaeta did not tell Respondent's Human Relations department (HR) that Ochoa was taking time off. At the end of the two weeks, Gaeta did not report to HR that Ochoa had not returned. In his August 7, phone call with Ochoa, Gaeta said that Ochoa did not indicate when he would return.

On August 14, Gaeta got a phone call from Mireya Zepeda (Zepeda), an analyst in Respondent's HR department. Zepeda asked Gaeta about Ochoa's hours and why they were so low. Gaeta explained that Ochoa had time off to go to Mexico and that he had not returned as expected on August 14. Zepeda reminded Gaeta about Respondent's policy that if an employee did not show up for work for three days, the person was considered terminated and that if he did not show up for work on Wednesday August 16, the three-day rule would be triggered. When Ochoa did not show up for work on Monday, Tuesday or Wednesday, Gaeta called Ochoa at 7:00am on Wednesday August 16 and got no answer. Gaeta then called Marta Tavares (Tavares) in HR and said Ochoa had not shown up for work. Tavares said they would have to apply the Respondent's three-day policy. Gaeta then sent Ochoa a text at 8:30 am stating the he had called Ochoa and received no answer. Gaeta's text said he was sorry but he had sent termination paperwork to the office because Ochoa had not shown up for three days. An hour later Ochoa returned the text saying he would call the office. Gaeta sent Ochoa's termination paperwork⁴ by mail to Respondent's HR office in Exeter, California. Gaeta said the date of the termination paper should be August 16, and the last day worked should be July 29. These dates are consistent with Ochoa's testimony.⁵

I will take administrative notice that July 29, 2017, was a Friday. The next work day was Monday August 1. Two weeks later would have been August 14. Failure to report to work on Monday August 14, Tuesday August 15 and Wednesday August 16 would have triggered Respondent's three-day rule. In this regard I do not credit Ochoa that he was given permission to take leave for 15 days or an indefinite period of time by Gaeta. Rather, I credit Gaeta that he gave Ochoa permission to leave work for two weeks. I make this finding on the basis that Gaeta was a more detailed witness who testified with greater specificity on dates and events than Ochoa. Ochoa's recollection of dates was vague and confused.

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⁴ General Counsel's exhibit 5.

⁵ I credit Gaeta's version of the sequence of phone calls and texts between he and Ochoa on August 16. As noted elsewhere, Ochoa's recollection of dates and the circumstances and timing of the employee meetings concerning a pay raise were plainly in error. Indeed, Ochoa's testimony regarding the sequence of calls and texts is inconsistent with the pleadings. Whereas, I found Gaeta's testimony to be detailed and without contradiction.

RESPONDENT'S THREE-DAY RULE

Leticia Basaldua (Basaldua) has been employed in Respondent's HR department for 18 years. According to Basaldua, Respondent has maintained a three-day rule⁶ for at least 26 years that provides if an employee does not notify Respondent of his absence for three days, it is considered a voluntary termination. The rule applies to all of Respondent's employees. The record reflects that either a field supervisor or HR can initiate the three-day policy. In August, Basaldua was reviewing employees' hours for award of a safety incentive and she noticed that Ochoa's hours were less than his coworkers. She asked Maria Zepeda to check on this.

Mireya Zepeda has worked as an Analyst in Respondent's HR department for nine years. On August 14, Basaldua asked Zepeda to call Gaeta about Ochoa's low hours. That day Zepeda called Gaeta and Gaeta told her he had approved two weeks of leave for Ochoa and that he was due back on August 14 but had not returned. Zepeda told Gaeta that if Ochoa did not return by Wednesday, the three-day rule would be implemented and Gaeta should call HR about job abandonment.⁷ On August 18, Zepeda called Gaeta and he told her that Ochoa was not back. Zepeda told Gaeta to fill out a payroll status change form. (See General Counsel's exhibit 5.)

EVIDENCE OF DISPARATE TREATMENT

General Counsel submitted Respondent's Employee Status Change Forms⁸ for seven employees covering the period June 30, 2007 to June 9, 2018, for the purpose of establishing that Respondent's termination of Ochoa did not follow its past practice regarding the three-day rule and as evidence of Respondent's animus toward Ochoa's protected activity.

Edwin Bonilla⁹

The records reflect that Bonilla was terminated by Respondent on June 28, 2007. Bonilla was terminated when he chose not to return to work after having been suspended for one day for not showing up for work. When he left work early without permission, he failed to return to work the next day. This case did not involve the three-day rule. The delay in submitting the termination paperwork does not reflect disparate treatment in the application of the three-day rule nor does the fact that Bonilla was given suspensions since they did not implicate the three-day rule. Moreover, Ochoa's case is different that Bonilla in that Gaeta was told by HR on August 14 to process the termination on August 16 if Ochoa did not show up for work.

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⁶ General Counsel's exhibit 2 at page 28.

⁷ According to Gaeta, he called HR on August 16 and spoke with Marta Tavares who told Gaeta Respondent would have to apply its three day rule. General Counsel contends that since Tavares was not called as a witness, I should draw an adverse inference that Gaeta did not speak with Tavares on August 16. I find no basis for drawing such an adverse inference. I find Gaeta was a credible witness who testified with great specificity and was not materially contradicted. There is nothing inconsistent with Gaeta testifying that he spoke to no one else from HR about the termination. His conversation with Zepeda on August 18 occurred after the decision had been made to terminate Ochoa. Moreover, Zepeda's testimony that Gaeta had not contacted HR as of August 18, reflects only that Zepeda did not speak to him and that she may not have been aware of his conversation with Tavares. It is irrelevant whether it was HR or Gaeta who initiated the three day rule as there is no evidence of a shifting rationale for Ochoa's termination that he did not show up for work for three consecutive days.

⁸ General Counsel's exhibit 4.

⁹ See General Counsel's exhibit 4 at bates pages 1065-66.

Benjamin Reyes¹⁰

Reyes was terminated by Respondent on August 3, 2007, when he told Respondent he was quitting. This termination did not apply the three-day rule.

Sergio Andrade¹¹

Andrade was fired by Respondent on October 6, 2007, when he did not report for work for three days. Respondent treated this as job abandonment. This appears to be a consistent application of Respondent's three-day rule.

Jesus Villa¹²

Villa was terminated on March 28, 2009, when he failed to report to work for three days after being told to bring in a doctor's note and failing to do so. He was also warned and suspended from work for one day absences. This is also a valid application of Respondent's three-day rule. There is no evidence that Villa was treated differently than Ochoa since Villa's prior discipline did not involve the three-day rule.

Onofre Gonzalez¹³

On January 18, 2014, Gonzalez told Respondent he was resigning his job. This resignation has nothing to do with the three-day rule.

Juan Gonzalez¹⁴

June 6, 2018, Gonzalez was considered to have quit his job when he failed to show up for work and coworkers related that he had taken another job elsewhere. This case does not involve the three-day rule.

Edgar Ramirez¹⁵

Respondent considered that Ramirez had voluntarily terminated his employment on August 19, 2016, when he failed to report to work for three consecutive days. This another example of Respondent's consistent application of its three-day rule.

THE ANALYSIS

In order to establish a prima facie case that Respondent has violated section of the Act, General Counsel must prove that the employee engaged in protected activity, that the Respondent has knowledge of that activity and that the motive in terminating the employee was his protected activity. *Gerawan Farming, Inc.* (2019) 45 ALRB No. 7 pages 3-4; *Wright Line, Inc.* (1980) 251 NLRB 1083, 1087. Once General Counsel has established these elements, the burden shifts to Respondent that it would have terminated the employee even in the absence of the protected activity. *Gerawan farming, supra; Wright Line, supra.*

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¹⁰ Ibid. at bates pages 1067-68.

¹¹ Ibid. at bates pages 1069-70.

¹² Ibid. at bates pages 1071, 1072, 1079-84.

¹³ Ibid at bates pages 1073-74.

¹⁴ Ibid. at bates pages 1075-76.

¹⁵ Ibid. at bates pages 1077-78.

There is no dispute that Ochoa engaged in protected activity when he and other employees discussed among themselves the need for a pay raise and when he and other employees presented their request for a pay raise to their supervisor Gaeta. There is also no dispute that Respondent was aware of Ochoa and other employees' protected activity as they presented their pay request in person to Gaeta. The main issue for resolution here is whether Respondent terminated Ochoa because he engaged in protected activity.

General Counsel can establish Respondent's animus in a number of ways. Statements indicating Respondent's hostility toward an employee's protected activity are one method. Timing of a discharge that is proximate to the protected activity is another method. Disparate treatment in the termination of an employee is yet another way animus may be established. Conflicting justifications for a discharge may supply the requisite animus. (*Roseburg Forest Products Co.* (2019) 368 NLRB No. 124, slip op. at page 10; *Premier Raspberries, LLC*, (2013) 39 ALRB No. 6.)

Here, there are no statements from Respondent's supervisors that Respondent was hostile to Ochoa and other employees' protected activity of requesting a raise. No statements indicating such hostility were made to Ochoa, Cervantes, the primary employee spokesman, or any other of Respondent's farming department employees at any time. Ochoa's termination occurred three months after his initial protected activity, making the termination remote in time to his protected activity. There is no evidence that any other farming department employees, including Cervantes, were disciplined in any manner after requesting the pay raise. Generally timing alone, without evidence of other improper motivation will not be enough to supply the requisite animus. *In re Enjo Contracting Co.* (2003) 340 NLRB 1340, 1351; *Martech Med. Products Inc.* (2000) 331 NLRB 487, 501. Moreover, there is no evidence that Ochoa was treated in a disparate manner from other employees regarding the three-day absence rule, as discussed above. To the contrary, the only examples of discipline involving the three-day rule shows it was enforced in a consistent manner.

I conclude that General Counsel has failed to establish that Respondent had a hostile motive in terminating Ochoa, rather the record shows Ochoa was terminated as a voluntary quit in accord with Respondent's three day absence rule when Ochoa failed to report to work for three days after he was expected to return to work.

CONCLUSIONS OF LAW

I find that General Counsel has failed to establish that Respondent violated section 1153(a) of the Act by terminating Ochoa. I recommend that the complaint be dismissed.

Dated: February 26, 2020.



John J. McCarrick
Administrative Law Judge
Agricultural Labor Relations Board

**STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD**

**PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)**

Case Name: SUN PACIFIC FARMING COOPERATIVE, INC., Respondent and,
JUAN PABLO OCHOA, Charging Party.

Case No. 2017-CE-020-VIS

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On **February 26, 2020**, I served the within **DECISION AND RECOMMENDED ORDER AND NOTICE OF DECISION DEEMED TRANSFERRED TO BOARD AND ORDER SETTING DATES FOR EXCEPTIONS AND REPLIES** on the parties in said action, by **U. S. CERTIFIED MAIL WITH RETURN RECEIPT REQUESTED AND/OR EMAIL** and placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follow:

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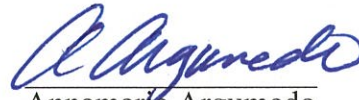
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Executed on **February 26, 2020**, at Sacramento California. I certify under penalty of perjury that the foregoing is true and correct.



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