

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

HOWARD ROSE COMPANY,)	
)	
Respondent,)	Case Nos. 76-CE-4-R
)	76-CE-41-R
and)	
)	
UNITED FARM WORKERS OF AMERICA,)	3 ALRB No. 86
AFL-CIO,)	
)	
Charging Party.)	
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DECISION AND ORDER

On April 15, 1977, Administrative Law Officer (ALO) Brian Tom issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party each filed exceptions and a supporting brief.

Pursuant to the provisions of Section 1146 of the Labor Code,^{1/} the Agricultural Labor Relations Board has delegated its authority in this proceeding 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 rulings, findings and conclusions of the ALO and to adopt his recommended Order, as modified herein.

The ALO found that the Employer violated Sections 1153 (a) and (c) of the Act by discharging its employees Ezequiel Avalos and Gregorio Margallanes because of their union sympathies and activities. We do not agree.

^{1/} All references, unless otherwise indicated, are to the Labor Code.

The Employer plants, grows and packs roses in Riverside County. The two dischargees were working at the location where the roses are actually grown when they were discharged. Avalos had worked for the employer since about 1968, Margallanes since about 1972. Both men had played varying roles in the United Farm Workers of America, ALF-CIO (UFW) organizational activity, which had culminated in an election victory on February 3, 1976, at the ranch. Daniel Saenz was the immediate supervisor of the field crews on the day the two men were fired. Tom Hamblin was Saenz' superior and also the Employer's personnel manager.

The testimony reveals that on March 12, 1976, the date of discharges, Saenz was in charge of supervising two crews. While directly supervising the work of the larger crew, Saenz observed that the smaller crew was standing idle too much. He went over to that crew, which included Avalos and Margallanes, and told them they were standing around too much. During the course of his confrontation with the crew, Saenz said in effect that they were moving so slow a crow could land on their backs.^{2/} Avalos testified, and was confirmed by Gray and Saenz, that he challenged Saenz claim that they were working too slowly and also said, in effect, that if Saenz didn't like it, "you know what you can do about it". The role of Margallanes in this

^{2/} The ALO found that Saenz directed this comment solely at Avalos, at the same time telling him to shut-up. Saenz and another witness, Jimmie Gray, said the comment was directed at the whole crew, which Gray said was standing around.

confrontation is unclear. Testimony of Saenz and Jimmie Gray indicated that he reiterated and lent his assent to Avalos' comments. Although Margallanes was called to the witness stand twice by the General Counsel, he was not asked by anyone what his exact words were. He testified that he had tried to explain to Saenz why it appeared that they were working slowly. We find, on the basis of the testimony of Saenz and Gray, that Margallanes joined in and supported the comments of Avalos and, in the absence of a denial from Margallanes, that he also told Saenz, in effect, that he would not change his pace. The ALO found that after these last remarks, Saenz turned away and got into a truck and drove off.^{3/}

After his confrontation with the employees, Saenz went to speak to his superior, Hamblin. Saenz testified that he went to get Hamblin's advice on how to handle the two workers because it seemed to him that they were asking to be fired. Hamblin testified that he has the final say in the decision to discharge a worker and that he made the decision to discharge the two workers based on Saenz¹ account of that morning's confrontation. Hamblin said that the employees left him no other choice, as they had

^{3/} The ALO also found that Gray indicated that Saenz left without any indication as to what he intended to do at that point. This is a true reflection of Gray's testimony on that issue. It does not, however, reflect his other testimony that Saenz, in response to Avalos¹ alleged comments that because of the union the days are over of the supervisor telling the workers that they were slow, had said, "You guys think I can't do anything. I can if I want to. I don't want to do it to you guys". Gray was the only witness who testified as to these comments and also was the only witness who said that any references were made to the union during this conversation. Saenz said he just walked away.

indicated they were not going to abide by the supervisor's orders.

We find that during the course of their confrontation on March 12, 1976, Avalos and Margallanes told Saenz that they would not obey his order. Moreover, their testimony reveals that they knew they were being insubordinate.^{4/} Avalos even acknowledged that he was exposing himself to some form of punishment.^{5/} The ALO discounted the seriousness of the confrontation, even allowing that the employees were entitled to speak back to their supervisor. But on this record we cannot find that discharge of these employees was a violation of the law.

We cannot agree with the ALO that it is "clear" that the Employer had knowledge of the union activities or sympathies of these two employees. The ALO's conclusion was based on the testimony of one witness that it was common knowledge who supported

^{4/} Margallanes testified that on about March 15, 1976, he and Avalos met with the personnel manager Hamblin to ask for their jobs back, and that subsequently he and Avalos wrote a letter to the Employer in which they said they "would act right" if they were reinstated.

^{5/} Avalos gave the following testimony in explaining what he meant by his comments that morning:

"A. Yeah, I told him (Saenz) if he didn't like it, to do whatever he wanted to. By that, I didn't mean to bring me my check, though.

Q. What did you mean by that?

A. Oh, you know, some kind of punishment that he might want to give us or something like that."

the union, and on the fact that Saenz had had many discussions with employees about unionization. The latter point is supported by the record but it does not establish that Saenz or the Employer knew of any union activities engaged in by these two employees so much as it reflects that unionization was a much talked-about issue among employees. It is apparent from the record that employees often raised questions about union matters with their supervisors. In light of the testimony by the two discharges that they conducted their union activities out of the view of supervisory employees, we cannot agree with the ALO's conclusion that it "appears clear" that the Employer knew of their activities.

We also disagree with the ALO's finding that there "is no serious dispute as to the Employer's animus toward the UFW", as it appears he bases that finding on the Employer's anti-union campaign in the election which was held five weeks before the discharges. Although the Employer conducted an active campaign and denied union organizers lawful access to its employees by trying to limit them to certain areas of its property, such conduct does not establish that the two employees were discharged because of the Employer's past anti-union campaign rather than for cause.

Although it is clear that Avalos and Margallanes were active union supporters, there is insufficient evidence in the record to establish that the Employer had knowledge thereof, or that they were discharged because of their union activities. Rather, on the basis of the record, we find that these two employees were discharged for cause, insubordination. Accordingly,

the Section 1153(a) and (c) allegations of the complaint with respect to the discharges of Avalos and Margallanes are hereby dismissed.

THE REMEDY

We modify the ALO's recommended remedy to reflect the findings and conclusions herein and to clarify obligations with respect to the posting, mailing and reading of the attached Notice to Workers, which remedies we have previously found to be necessary and warranted in the agricultural setting. Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the Employer, Howard Rose Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:
 - a. Denying access to its premises to organizers engaging in organizational activity in accordance with the Board's access regulations.
 - b. In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Labor Code § 1152.
2. Take the following affirmative action which is necessary to effectuate the policies of the Act:
 - a. Post copies of the attached Notice to Workers at times and places to be determined by the Regional Director. Copies of the notice shall be furnished by the Regional Director in appropriate languages. Employer shall exercise due care to replace any notice which has been altered, defaced, or removed.
 - b. Mail copies of the attached notice in all appropriate languages, within 20 days in receipt of

this order, to all employees employed during the payroll periods which include the following dates: December 31, 1975, through February 3, 1976.

- c. A representative of the Employer or a Board agent shall read the attached notice in appropriate languages to the assembled employees of the Employer on company time. The reading or readings shall be at such times and places as are specified 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 employees may have concerning the notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Employer to all non-hourly wage employees to compensate them for time lost at this reading and question-and-answer period.
- d. Notify the Regional Director in writing, within 20 days from the date of receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Employer shall notify him periodically thereafter in writing what further steps have been taken to comply with this Order.

DATED: November 22, 1977

Gerald A. Brown, Chairman

Ronald Ruiz, Member

Robert Hutchinson, Member

NOTICE TO WORKERS

After a hearing in which each side had a chance to present its side of the story, the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has told us that union organizers may enter on our property to speak with you when you are eating your lunch and for an hour before and after work. We will not interfere with organizers who come here. You may talk with them freely.

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help unions;
3. To bargain as a group and to choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help and protect one another; and
5. To decide not to do any of these things.

Because this is true, we promise that:

We will not do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT prevent union organizers from coming onto our land to tell you about the union when the law allows it;

WE WILL NOT interfere with union organizers who are trying to talk with you.

DATE:

HOWARD ROSE COMPANY

by _____
(Representative)

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



HOWARD ROSE COMPANY)
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 Respondent)
)
 and)
)
 UNITED FARM WORKERS OF AMERICA)
 AFL-CIO)
)
 Charging Party)

Case Nos. 76-CE-4-R
76-CE-41-R

APPEARANCES:

Jorge A. Leon of San Diego, California,
for the General Counsel
Surr & Helleyer, by
William E. Robinson and John D. McAlearny
of San Bernardino for Respondent
John Rodriguez and Nancy Jarvis of
San Jacinto for Charging Party

DECISION

STATEMENT OF THE CASE

BRIAN TOM, Administrative Law Officer: This case was heard by me
on February 21, 22, 23, and 24, 1977 in Hemet , California. The order
consolidating cases and the consolidated complaint issued on January 4,
1977. The complaint is based on charges filed by the United Farm
Workers of America, AFLCIO (hereafter the "UFW". The charges were duly
served on the Respondent, Howard Rose Company. The complaint allege
that the Respondent committed various viola-

1 Tions of the Agricultural Labor Relations Act (hereafter referred to as the
2 "Act").

3 All parties were represented at the hearing and were given a full
4 opportunity to participate in the proceedings. The General Counsel, Charging
5 Party and the Respondent filed briefs in support of their respective
6 positions after the close of the hearing.

7 Upon the entire record, including my observation of the demeanor of the
8 witnesses and after consideration of the arguments and briefs submitted by
9 the parties, I make the following:

10
11 FINDING OF FACT

12 I. JURISDICTION

13 Respondent, Howard Rose Company is a corporation engaged in
14 agriculture in Riverside County, as was admitted by the Respondent.
15 Accordingly, I find that Respondent is an agricultural employer within the
16 meaning of Section 1140.4(c) of the Act.

17 I further find the Union to be a labor organization representing
18 agricultural employees within the meaning of Section 1140.4
19 (f) of the Act.

20 II. THE ALLEGED UNFAIR LABOR PRACTICE

21 The complaint allege that the Respondent violated Section
22 1153(a) and (c) of the Act by the discriminatory discharge of Eze-
23 quiel Avalos and Gregorio Magallanes, and by a discriminatory re-
24 fusal to promote Ezequiel Avalos. The complaint further alleges
25 unlawful interference violative of Section 1153(a) by Respondent
26 with the rights guaranteed by Section 1152 of the Act, by unlawful
27 surveillance of its employees and by denial of access to UFW representatives
28 to Respondents premises.

1 Respondent generally deny each and every allegation alleging
2 a violation of the Act. Respondent, however, admits that Bob
3 Linqvist, Jr., Earl Chapman, Austin Abernathy, Daniel Saenz and Tom
4 Hamblin (hereafter "Linqvist", "Chapman", "Abernathy", "Saenz" and
5 "Hamblin", respectively) were supervisors within the meaning of Section
6 1140.4(j) of the Act and further admits that Gregorio Magallanes
7 (hereafter "Magallanes") and Ezequiel Avalos (hereafter "Avalos")
8 were agricultural employees within the meaning of Section
9 1140. 4 (b) of the Act from August 28, 1975 through March 12, 1976.

10 A. Preliminary Facts

11 The Respondent plants, grows, and packs roses in bare root
12 form at two locations in Riverside County. At Respondent's State
13 Street location the roses are actually grown. It is at this location
14 that the two employees were working when they were discharged.
15 In addition, Respondent has another location on Devonshire Street
16 which has within it a packing shed. Avalos had been employed with
17 Respondent since about 1968, generally working in the fields where
18 the roses are grown. Magallanes had been employed by the Respondent
19 since about 1972, also, working primarily in the fields.

20 Hamblin is a general foreman employed by the Respondent.
21 In addition, he is also the personnel manager. According to his
22 testimony, he makes the final decision as to who is fired. Linqvist
23 is also a general foreman. Saenz was the immediate supervisor of
24 Avalos and Magallanes. He was the person in charge of two crews in
25 the fields on the date of the discharge of the two employees. Chap-
26 man and Abernathy are both foremen working for the Respondent.
27 During the year Respondent's total employees will range from 30 to
28 100 depending on the season. Sometime in the late summer of 1975,

1 the UPW began a organizing drive among the Respondent's employees. This
2 continued until February 3, 1976 when an election was held.

3 B. The Discharge of Avalos and Magallanes

4 Avalos and Magallanes were discharged on March 12, 1976.
5 As previously indicated, they had been employed by Respondent since
6 1968 and 1972 respectively.

7 In the late summer of 1975 , the UPW began its organizing
8 drive of Respondent's employees. Magallanes became involved in the
9 organizing drive and was designated an employee organizer for the
10 union. As part of his union activities, he passed out and collected
11 authorization cards from fellow employees, distributed union literature,
12 spoke with other workers about the union, spoke to union organizers
13 and wore UFW buttons to work. Avalos became a union supporter
14 after discussing the union with Magallanes. His activities
15 for the most part were similar to Magallanes and he was also designated
16 an employee organizer. Saenz, the immediate supervisor of
17 Avalos and Magallanes, was aware of their union activities.

18 Avalos had worked for Respondent for a eight year period
19 on a continuous basis except for a two month break for an operation.
20 He was considered a good worker by Saenz, and during his long period
21 of employment had not received any reprimands or warnings about poor
22 job performance, with the possible exception of a pink slip placed
23 in his personnel file stating that he left his job during working
24 hours. As Avalos was not given a copy of this pink slip, it would
25 be unfair to characterize this as a warning or reprimand.

26 Magallanes had worked for Respondent for a four year period
27 and had never received a reprimand or warning about poor job
28 performance or for any other reason. To the contrary he was des-

1 | cribed as a "darn good worker" by Saenz, his Immediate supervisor.

2 | The Respondent had just gone through an organizing drive
3 | an by the UFW and/election had been conducted in February of that year.
4 | The UPW won the election but the results were challenged by the
5 | Respondent. It was quite clear from the demeanor of all the witnesses
6 | that there were very strong feelings regarding the union organizing
7 | campaign, feelings that were still quite evident even at
8 | the time of the hearing, some 12 months after the election.

9 | On the day of the discharge, March 12th, Saenz was supervising
10 | two crews at the Howard Rose fields on State Street. Both
11 | crews were engaged in an activity known as "picking up sticks." The
12 | crew that Avalos and Magallanes were on (hereafter "Crew A") had 5
13 | workers including Avalos, Magallanes, Augustine Castro, Jimmy Grey,
14 | and Raymondo Mendez. The other crew (hereafter "Crew B") had 9 or
15 | 10 workers.

16 | While supervising the work of Crew B, Saenz observed that
17 | Crew A was working at a slower pace than what he felt was acceptable.
18 | He thereupon went over to Crew A and addressing the whole
19 | crew, told everyone they should work faster.

20 | At that point in time Avalos, Grey, Mendez and Castro were
21 | working in close proximity to each other while Magallanes, who was
22 | working at a faster pace was some twenty feet away from the rest of
23 | the crew. Avalos responded to Saenz that the reason why they were
24 | slower was that Crew B had twice as many workers as their crew.
25 | Saenz then turned to Avalos, told him to shut up and said that "you
26 | are moving so slow a crew could land on your back."

27 | Avalos replied that "you can't treat us like that anymore,
28 | we have the union to protect us.". It is unclear from the testimony

1 exactly how Saenz responded to that remark, however, at some point
2 Avalos said that "you know what you can do about it.". At that point
3 without saying another word, Saenz turned around and got into
4 his truck and drove away. Magallanes's role in this exchange is
5 somewhat unclear. He was standing some twenty feet away when the
6 initial conversation took place. He joined the conversation and
7 lent his assent but at what point he did so, or what he said is
8 uncertain. Grey, a witness called by the Respondent, testified that
9 there was no indication that Avalos or Magallanes were going to be
10 fired when Saenz left. Rather the crew continued working until the
11 usual lunch break.

12 Up to this point there is no serious dispute in the evidence.
13 Saenz upon leaving the field went to consult with Hamblin to
14 relate the events that took place, and decide on the appropriate
15 action. The conference lasted between one half to one hour.

16 Hamblin testified that he decided to fire Avalos and Magallanes
17 after his consultation with Saenz. He stated that he had the
18 final authority to fire employees. His reasons for the discharge
19 were that they were "slowing the pace of work" and they "did not
20 abide by decisions". To Hamblin 's knowledge there had been no
21 previous complaints regarding their work performance.

22 Hamblin testified that Saenz said the workers asked for
23 their checks. This was, he explained, equivalent to requesting
24 termination of employment. Hamblin testified that the main reason for
25 the discharge was a "production problem" that the workers were
26 unable to keep pace with the crew. He specifically stated that throug-
27 hout the discussion with Saenz there was no mention of the union
28 activities of Avalos or Magallanes as being a factor in the discha-

1 rge. Hamblin further testified that the task the crew was engaged
2 in was called "scratching out", that is, removing leaves and other
3 debri from around the small plants by using rakes. According to
4 Hamblin there were two crews that day of between 10 to 11 workers
5 each.

6 Saenz testified that on that day there were 5 workers in
7 Crew A and Crew B had 9 workers. He testified that he fired both
8 Avalos and Magallanes because they both said "If I didn't like it I
9 knew what I could do about it.". In addition, his testimony was
10 that he did not fire them for working too slow. According to Saenz
11 neither Avalos nor Magallanes asked for their checks. Inasmuch as
12 the testimony is that Hamblin made the final decision as to the firing, his
13 reasons for the firing should be accorded the primary consideration. I do
14 not credit the testimony of Hamblin. Not only
15 were there contradictions between his testimony and Saenz, but his
16 demeanor when he was testifying was not convincing. He appeared
17 hesitant in some answers, and in general tried to avoid giving
18 answers.

19 After the discussion between Saenz and Hamblin, Saenz had
20 the final checks for Avalos and Magallanes issued and went to dis-
21 charge them. The workers were on their lunch break at that time and
22 Grey was eating his lunch by Avalos and Magallanes.

23 According to the credible testimony of Grey, Saenz told
24 Avalos and Magallanes in the course of the ensuing conversation,
25 "Here's your checks", "I'm sorry to lay you off, you had your hopes
26 too high." "You guys are trying to go over me all the time."

27 Several days after the discharge, a meeting was set up by
28 Elliot for the two discharged workers to meet with Hamblin. All the
participants agree that the meeting was for the purpose of having

1 Avalos and Magallanes re-instated in their jobs and to explain their
2 side of the incident. No mention of union activities on the part of
3 Avalos or Magallanes was brought up by Elliot, Magallanes or Avalos
4 during this meeting. Hamblin decided not to re-instate either
5 person after the meeting.

6 C. Promotion of Avalos

7 The alleged promotion offer to Avalos as an irrigator took
8 place in August of 1975- It appears that on a day when Avalos was
9 working as a temporary irrigator, there was a conversation between
10 Avalos and Saenz regarding a permanent position for Avalos as an
11 irrigator. This conversation was initiated by Avalos.

12 According to Avalos, he asked Saenz if there was a possi-
13 bility of working full time as irrigator. Saenz allegedly replied
14 that if he left "the things of the union" he could work as an irri-
15 gator. Saenz on the other hand flatly denies making a job offer to
16 Avalos during that conversation. He remembers the conversation, and
17 admits complimenting Avalos on his job performance that day, but
18 distinctly recalls that no job offer was made.

19 In assessing the testimony of Avalos on that day I find
20 that it lacks definteness as to what occurred. In addition, the
21 Extent of the union activity of Avalos in August of 1975 is uncer-
22 tain. While the record is clear that Avalos was quite active as a
23 union supporter late in 1975 and early 1976, his union activities
24 in August was not established.

25 Accordingly, I did not find sufficient persuasive evidence
26 to warrant the conclusion that Avalos was discriminatorily denied a
27 Promotion to irrigator, and I will recommend that this allegation
28 in the complaint be dismissed.

1 D. The Interference of the Right to Access

2 After the UFW started an organizing drive in late summer
3 of 1975 at Respondent's company, Avalos and Magallanes became em-
4 ployee organizers. Union organizers were Nancy Elliot, Eugene Ar-
5 ballo and Karen Demont.

6 Hamblin testified regarding company policy on union access
7 He testified that union organizers initially were not allowed on
8 company property at any time in the middle of the day; that management
9 felt that it would be trespassing. He specifically instructed his
10 supervisors not to allow union organizers into the packing shed
11 as he and another foreman had determined that there would be a "lia-
12 bility problem" because of the machinery located there. He recalls
13 the police being called on one or two occasion to enforce this policy
14 but does not remember when. It was, however, at a time in connection
15 with Elliot's presence on the company premises. This policy
16 continued up to October of 1975. After October 1975, the policy
17 changed so that organizers would be allowed on company premises but
18 restricted to a "designated area" in the parking lot at the
19 Devonshire Street location. The designated area consists of a 40
20 by 100 feet area between two rows of the parked cars. It appears
21 that some workers crossed this area on their way to and from their
22 cars during the lunch break. In regard to the designated area if the
23 organizers did not use the area they would be advised that they
24 were trespassing and asked to leave.

25 Elliot worked with the UFW in 1975 and early 1976
26 as a supervisor and was responsible for the organizing drive at
27 the Howard Rose Company. She testified that on December 31, 1975,
28 she went to the Respondent's premises on State Street during the

1 lunch hour. She went there to disseminate information to the work-
2 ers. She was met by Abernathy. Abernathy began yelling at her to
3 "leave the property immediately; you are trespassing". Abernathy
4 yelled at workers to get back to work and threatened to call police.
5 Magallanes was there and went to talk to Elliot, however, Abernathy
6 got between them. Elliot did not get an opportunity to speak to the
7 workers. On January 5th, she went to the packing shed on the Howard
8 Rose property on Devonshire during the lunch period. Employees
9 eat their lunch in and near the packing shed and in their cars in
10 the parking lot. A supervisor met her there and blocked her path
11 and told her to get off property. Linqvist was present and followed
12 her around while she attempted to talk to the workers. Linqvist ar-
13 gued with her throughout the time she was there on the property
14 while she was attempting to talk to the workers. On January 7, 197
15 Elliot again returned to the company premises on Devonshire. She
16 testified that Chapman told her to stay in the designated area. A
17 supervisor had called the police and as she was leaving they came up
18 to question her asking her name and license number. This continued
19 through the month of January.

20 She further testified that while she was never physically
21 restrained from leaving the designated area if she leave she would
22 be followed by a company supervisor. During one of her visit, Chap-
23 man threatened to "have her arrested". Linqvist never threatened
24 her but stood directly in front of her path and stood very close to
25 her during the time she was on the company property. She testified
26 that as a result of his standing so close she was frightened. I
27 credit Elliot's testimony. In addition to her demeanor while testi-
28 fying, her testimony was corroborated for the most part, by Linqvist,

1 Linguist testified that he recalls the incident of January
2 5, 1976 at the Devonshire Street premises when Elliot was there. He
3 testified that Chapman called the police that occasion because they
4 felt Elliot was trespassing. He advised Elliot at that time that
5 she was trespassing. He testified that he did not directly block
6 her path, but positioned himself in such a fashion as to have the
7 same result. He admits that he followed her around and that he said
8 to her repeatedly "As agents of the Howard Rose Company, we would
9 advise you to leave the property because you are trespassing". He
10 testified that this statement extended to an "illustrification"
11 which he explained as a lengthy conversation. He freely admitted
12 that he followed her around for the purpose of finding out what Elliot
13 was telling the workers. He would talk to the workers at the same
14 time to correct any errors that Elliot made from his viewpoint. He
15 testified that at times the concurrent conversations became quite
16 heated and that the situation would become quite "tense". He fur-
17 ther testified that at those times, while he did not verbally
18 threaten Elliot, he would rise on his toes and stand over her.¹ He
19 testified that these incidents took place approximately 30 times
20 during January and February of 1976. He admitted that one of the
21 reasons for positioning himself in the manner he did was to prevent
22 her from going into the packing shed. His testimony corroborated
23 the testimony of Elliot. He admitted that it was company policy
24 that the presence of union organizers on company premises apart from
25 the designated area was considered trespassing by Respondent. He

26
27 1/ While not testified to by the witnesses, the ALO will note that: Elliot
28 appears to be a woman in her mid-twenties, approx. 5'4" and 120 lbs.
Linguist appears to be a man in his late twenties, over 6 feet tall and
approx. 170 lbs.

1 further explained that he would inform Elliot, during those times she)
2 not within the designated area, that he would call the Sheriff.

3 From the largely uncontroverted evidence I find that El-
4 was present on the days in question on Respondent's premises
5 at lunch time at locations where Respondent's employees were eating
6 lunch.

7 E. The Unlawful Surveillance

8 Paragraph 6(b) of the complaint alleges that on or about
9 December 31, 1975, and continuing through to the month of March
10 1976, Respondent though certain agent engaged in surveillance of
11 Respondent's employees' union activities. "The burden is on the
12 Party alleging illegal surveillance to present evidence to warrant
13 Conclusion that the Respondent or his supervisors were present
14 Union organizers are attempting to talk to workers for the pur
15 of surveillance" Tomooka Brothers 2ALRB52, Konda Brothers 2ALRB
16 There is some evidence in the record that Linquist followed El-
17 around for the purpose of overhearing the conversations Elliot
18 having with the workers. However, I am not convinced that it
19 Linquist 's intention and purpose to engage in surveillance. I
20 that his presence when Elliot was speaking to the workers was
21 directed to interference with the union's access to the premises. No
22 other evidence was introduced regarding any surveillance by Respondent.
23 Accordingly I recommend that this allegation in the complaint
24 be dismissed.

25 E. Discussion of the Issues and Conclusions

26 1. The termination of Avalos and Magallanes. As is often
27 Recognized under the NLRA, a finding in regard to an employer's dis-
28 Criminatory intent when discharging employees is "normally support-

1 able only by the circumstances and circumstantial evidence". Amal-
2 gamated Clothing Workers v. NLRB., 302F. 2d 186, 190 (CADC 1962),
3 citing N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 597, 602 (1941).

4 In the following this rule for the present case, it must
5 be determined whether the evidence, largely circumstantial in nature
6 establishes that the Respondent discharged Avalos and Magallanes for
7 their views, activities or support for the UFW. In evaluating the
8 evidence the following factors assume primary importance: (1) The
9 work records of the dischargees, (2) the Respondent's knowledge, or
10 lack of, Avalos and Magallanes' affiliation with the UFW and its
11 organizing drive and the timing of the discharge, (3) prior warnings
12 if any, that discharge would result from the conduct alleged as the
13 cause of discharge, (4) the Respondent's animus toward the UFW, and
14 (5) the asserted reasons or explanation for the discharge.

15 Both Avalos and Magallanes were workers who had long work-
16 ing experience with the Respondent. With the one possible exception
17 noted above, Avalos had received no reprimands or warnings over an
18 eight year period working for Respondent. Magallanes also had a
19 clean work record. Avalos had been complimented by Saenz as doing a
20 good job as a irrigator and Magallanes was considered a "darn good
21 worker" by Saenz and acknowledged by his co-workers as being a ex-
22 cellent worker.

23 Hamblin, as personnel director, could recall no work re-
24 lated problems with these two workers.

25 On the date of the discharge, no warning was given to the
26 workers that they were going to be discharged. Avalos and Magal-
27 lanes - both continued on their regular task and were only notified
28 over their lunch break of their discharge when Saenz arrived with

1 their checks. Grey, a crew member present during the entire sequence
2 of events, testified that there was no indication that Avalos and
3 Magallanes were going to be discharged.

4 Both Avalos and Magallanes were active union supporters. Both
5 assisted and aided the UPW in the UPW organizing campaign at the
6 Respondent's premises. As indicated above both workers passed out
7 and collected authorization cards from fellow employees, distributed
8 union literature, spoke with other workers and union organizers
9 about the union and wore UFW button to work.

10 It appears clear that Saenz was aware of these activities. Grey
11 testified that it was "common knowledge" in the fields who the
12 supporters were and what they were doing. Grey further testified that
13 they UPW organizing drive was a subject of intense discussion
14 among the employees during the period in question and he recalls
15 discussing the union 5 or 6 times with Saenz. As Saenz was a super-
16 visor, his knowledge is imputed to the Respondent. N.L.R.B. v. Alabama
17 Marble Co. 83NLRB No. 113, 82 LRRM 1646 (1963). There is no
18 serious dispute as to the Respondent animus toward the UFW. The
19 record is replete with testimony so indicating and it would serve
20 no useful purpose to recount the testimony to support this conclusion
21 The testimony of Linquist in particular establishes that
22 Respondent was taking active measures throughout the period in question
23 to counter the organizing activities of the UFW.

24 In analyzing all the various factors, I conclude that the
25 General Counsel has more than established a prima facie case that the
26 discharge were discriminatorily motivated and in violation of the
27 Act.

28 The burden then shifts to the Respondent to establish that

1 he was motivated by some legitimate objective. As noted in Syracuse
2 Tank Mfg Co., Inc., 133NLRB513 (1961) at 525:

3 It is (them) open to the employer to rebut the
4 presumption by coming forward with a plausible,
5 adequate, and convincing explanation demonstrating
6 that the action taken with respect to each affected
7 employee, and the timing of such action, was based
8 solely upon non-discriminatory considerations. In
9 the last analysis, determination must turn on which
10 is the more persuasive, the inference of discrimination
11 drawn from the circumstances... or the explanation offered
12 to refute it.

9 The conversation between Avalos, Magallanes and Saenz
10 which allegedly lead to the discharge are largely uncontroverted.
11 They were not discharged immediately but rather as a result of a
12 conference between Saenz and Hamblin. The testimony of these two
13 supervisors assume considerable importance, particularly Hamblin ^Ts
14 as he had the final authority to decide on the discharge.

15 Hamblin as indicated above based his decision to discharge
16 primarily because of a production problem. In addition, he testi-
17 fied that the crew was engaged in a task called "scratching out" and
18 that there were 10 workers in each crew. Yet Saenz ' s testimony con-
19 tradicts important elements of Hamblin 's testimony. According to
20 Saenz, the crew was "picking up sticks" and there was twice as many
21 workers in Crew B than in Crew A. Saenz also placed a greater re-
22 liance on the alleged "talking back" of Avalos and Magallanes as
23 the cause for the discharge. What emerges from the testimony of
24 these two supervisors is the clear indication that a "production
25 problem" was not in reality the cause of the discharge. It would
26 be a fair assumption to make that if Hamblin in fact discharged the
27 two workers for production problem he would have been familiar with:
28 the tasks the crews were engaged in and also the relative size of the
respective crews.

1 Respondent argues that Avalos and Magal lanes were dischar-
2 ged for cause and cites rule 7 of the Respondent's "Work Rules" is-
3 sued on December 4, 1975 (Respondent's Exhibit "C") which reads as
4 follow: "Insubordination or refusal to perform work assigned, or
5 refusing to perform work according to the method prescribed by the
6 supervisor". However, neither Saenz nor Hamblin in their testimony
7 referred to this rule as the reason for the discharges and Respon-
8 dent's reliance upon it is merely an after-the-fact justification
9 for the discharge. In any event, I do not find facts that would
10 support violation of this rule by the two employees.

11 Respondent also argues that in the meeting after the dis-
12 charge when Avalos and Magallanes asked for their jobs back and ex-
13 plained their views of the incident, not once did Avalos or Elliot
14 suggest that the two workers were terminated for the union activi-
15 ties and sympathies. However, in my view this fact is not particu-
16 larly significant, as the two workers were there to request reinsta-
17 tement and not to make accusations.

18 The insubordination rationale, also lacks substance, in ray
19 view on the grounds of any remarks made by Avalos or Magallanes.
20 The initial comment of the alleged incident was Saenz's comment
21 about a "Crow being able to land on Magallanes back." This remark,
22 somewhat demeaning, certainly called for some response from Avalos.
23 In considering the circumstances, I do not find the response given
24 to be unreasonable. Furthermore no warning was give to Avalos as
25 to the serious nature of his remark, if indeed it was serious.
26 Rather, Saenz simply left the fields without saying anything and the
27 workers returned to their work.

28 Weighing all the above factors, it can only be concluded

1 that a fictitious reason was devised for the discharge of Avalos and
2 Magallanes. This conclusion is supported by the testimony of Grey
3 Regarding the remarks made by Saenz at the time he gave the checks
4 to Avalos and Magallanes. A remark that they had their hopes too
5 high and that they were always trying to go over him, can only be
6 References to their union organizing activities.

7 Furthermore it is significant that the only two active un-
8 ion supporters in Crew A were discharged, even though Saenz alleged
9 that it was the whole crew that was not working up to standard. Eq-
10 ually significant is the fact that the firing came after a hotly
11 contested election in a campaign in which both workers played an
12 active role. It should be noted that during the two years Saenz was
13 a foreman he had never fired anyone for any reason, and suddenly in
14 one day he was responsible for having two employees fired.

15 The above factors taken as a whole lead to the inescapable
16 conclusion that the primary motivation in the discharge of Avalos
17 and Magallanes was their active support and participation in the UFW
18 organizing campaigning during the period in question.

19 2. Denial of Access. The complaint alleges that from Dec-
20 ember 31, 1975 to March 1976 Respondent denied and continues to deny
21 to representatives of the UFW access to Respondent's premises pursu-
22 ant to Section 20900 of the Board's regulations [Chapter 9, title 8,
23 California Administrative Code] (hereafter "access rule")^{2 & 3}

24
25 2/ The General Counsel argues that a violation of the access rule also
26 occurred on October 7, 1975, however, there is no allegation j in the
complaint regarding this date nor was any amendment requested or granted.
Hence, this issue is not properly before me.

27 3/ Unless specified to the contrary, all references to the regulation of the
Board pertain to the regulation of August 28, 1975.

28

1 The testimony regarding denial of access to UPW organizers
2 to Respondent's premises is largely uncontroverted. Respondent had
3 a policy after October 1975, that UPW organizers were trespassing if
4 they were present anywhere on Respondent's property except for a
5 certain designated area. If a union organizer appeared on Respon-
6 dent's premises outside the designated area, supervisors were noti-
7 fied and these supervisors would follow the organizers around.

8 On December 31, 1975, Elliot was at Respondent's State loc-
9 ation during the lunch period when she was ordered to leave because
10 she was trespassing. She was threatened with arrest. She left
11 without having an opportunity to speak to the workers. On January
12 5 and 7, 1976, she was at Respondent's premises on Devonshire Street
13 Attempting to speak to the workers. She was there during the lunch
14 period. In all respects I find her presence to be lawful and with-
15 in the limitations and provisions of the access rule.

16 On January 5th, Linquist was notified of her presense and
17 he went out to confront her. He advised her that she was trespas-
18 id sing. He followed her around. He threaten to call the police. The
19 police were in fact called. He continually interrupted her as she
20 spoke to the workers. He obstructed her path as she walked toward
21 the workers.

22 Nor was this an isolated incident, as Linquist himself ad-
23 mited that these confrontation took place over 30 times.

24 It is quite evident that the General Counsel has presented
25 a prima facie case of the Respondent's violation of the access rule.
26 Tex-Cal Land Management, Inc. 3ALRB14, Oshita, Inc. 3ALRB10

27 Respondent attempts to justify his actions on basically 3
28 Grounds: (1) Elliot refused to abide by the time limitations embod-

1 Ied in the access rule, (2) Elliot conduct was disruptive of Respon-
2 dent's operation, and (3) Respondent's efforts to provide a central
3 "designated" area for union organizers comported with principles of
4 "reasonable and just accommodations" underlying the access rule.

5 As to the first grounds, Respondent essentially argues
6 that the access rules limits the "one hour" provided therein to the
7 lunch period itself or non-working intervals. However, the Board in
8 Ito Farms 2ALRB51 interpreted Subsection 5(b) of the rule "to grant
9 access during a one-hour period which encompasses the established
10 lunch time", (emphasis added) In any event, I find from the testi-
11 mony that Elliot restricted herself, for the most part to the half
12 hour lunch period and she generally left the Respondent's premises
13 either when the lunch period was over or shortly thereafter.

14 As to the second point that Elliot's conduct was disrup-
15 tive, no evidence was produced that any disruption occurred. There
16 is some evidence in the record from the testimony of Anna Martinez,
17 that some of her co-workers preferred not to speak to Elliot, how-
18 ever, this claim if true, does not constitute disruption. Section
19 20900 5(e) of the access rule states in part that "Speech by itself
20 shall not be considered disruptive conduct."

21 The third justification advanced by Respondent is that the
22 Designated area is a "reasonable and just accommodation underlying
23 the access rule." What this argument choses to ignore is that the
24 Reasonable and just accommodation is provided for the rule itself.
25 allowing union organizers to talk to worker at such location or loc-
26 ations as the employees have their lunch. No provision is made
27 within the access rule for an employer to determine by himself what
28 is "reasonable and just".

1 Furthermore, contrary to Respondent's assertions that the
2 designated area is a just and reasonable accommodation, I find such
3 area neither just nor reasonable. The evidence is clear in the re-
4 cord that the only time the workers used the designated area was
5 when some of the workers passed through there on the way to their
6 cars to eat their lunches. Many of the workers without cars never
7 cross the designated area. Many workers chose not to eat in their
8 cars. However, it is unnecessary to prolong this discussion any
9 further as no provision is made within the access rule itself for a
10 unilaterally determined designated area, therefore this ground can-
11 not be used as a justification for non-compliance with the access
12 rule.

13 The factual background of this case is strikingly similar
14 to the Oshita case, supra⁴. In Oshita, UFW organizers attempted to
15 gain access to employer's bunching shed, however, employer's super-
16 visor continually interfered with such attempts. One of the employ-
17 er's super- visor said he had orders to deny access to UFW organizers.
18 This same foreman threatened to call the police and the police were
19 actually called on two occasion for the purpose of evicting the or-
20 ganizers. On the occasions when an organizer succeeded in speaking
21 with workers, a foreman would follow them and continually repeat
22 that he had been instructed to prevent them from communicating with
23 workers. Under cross examination one of the organizers admitted
24 that on every occasion where he visited the bunching shed he was
25 able to speak with the workers. He further testified that he, as
26 well as other organizers, had access to the workers at their homes
27 and employer's premises in spite of the attempts by the employer to

28 ^{4/} The Oshita case arises under Section 1156.3[c] of the Act, however the
analysis is equally applicable to Section 1153 (a) violations.

1 Having found that the Respondent has engaged in certain
2 unfair labor practices within the meaning of Section 1153(a) and (c)
3 of the Act, I shall recommend that they cease and desist therefrom
4 and take certain affirmative action designed to effectuate the poli-
5 cies of the Act. Having found that the Respondent unlawfully dis-
6 charged two employees and interfered with the rights of employees to
7 have access to union organizers, acts which violate employee's right
8 provided in the Act, I also recommend that the Respondent cease and
9 desist from infringing in any matter upon the rights guaranteed by
10 Section 1152 of the Act.

11 In order to remedy Respondent's unlawful conduct, I also
12 recommend that certain affirmative steps be taken as follows: first
13 Respondent must publish and make known to its employees that it has
14 violated the Act and that it has been ordered not to engage in fu-
15 ture violation of the Act. Attached to this decision in a Notice
16 to Employees, which should serve to sufficiently inform employees.

17 The following means of publication are recommended.

18 1. The Notice to Employees, printed in English and Span-
19 ish, shall be mailed to all employees of the Respondent employed
20 Between December 31, 1975 and March 12, 1976. Said Notices are to
21 be mailed at the earliest reasonable time to the employees' last
22 Known addresses, or more current addresses if made known to Respon-
23 Dent. Mailing Notices is an appropriate remedial provision approved
24 By the Board in Valley Farms and Rose J. Farms. 2ALRB No. 41, (1976)

25 2. Have the attached Notice read in English and Spanish
26 to assembled employees at the commencement of the next harvest sea-
27 son by a company representative or by a Board Agent, and accord the
28 Board Agent the opportunity to answer questions which workers might

1 atives, shall:

2 1. Cease and desist from:

3 (a) Terminating or discharging employees because of
4 their union activities.

5 (b) Denying access by union organizers to its premi-
6 ses for the purpose of organizing pursuant to the duly published
7 Regulations and Orders of the Board.

8 (c) Interfering with union organizers who are attempt-
9 ting to communicate with its workers.

10 (d) In any other manner interfering with, restraining
11 or coercing its employees in the exercise of their rights guaranteed
12 by Section 1152, 1153(a) and 1153(c) of the Act.

13 2. Take the following affirmative action which is nece-
14 ssary to effectuate the policies of the Act.

15 (a) Offer to Ezequiel Avalos and Gregorio Magallanes
16 immediate and full reinstatement to their former or substantially
17 equivalent jobs, without prejudice to their seniority or other right
18 and privileges, and make them whole for any losses they may have
19 suffered as a result of their termination in the manner described
20 above in the section entitled "The Remedy".

21 (b) Preserve and upon request make available to the
22 Board or its agents, for examination and copying, all payroll reco-
23 rds, social security payment records, timecards, pesonnel records
24 and reports, and all other records necessary to analyze the amount
25 of back pay due and the right of reinstatement under the terms of
26 this order.

27 (c) Mail the attached Notices to Employees, printed
28 English and Spanish, to all employees of the Respondent employed be

1 tween December 31, 1975 and March 12, 1976, and post such Notice to
2 Employees at the commencement of the next harvest season for a period
3 of not less than 60 days at appropriate locations proximate to em-
4 ployee work areas, including places where notices to employees are
5 customarily posted.

6 (d) Have the attached Notice to Employees read in En-
7 glish and Spanish to assembled employees on company time and pro-
8 perty at the commencement of the next harvest season, to all those
9 then employed, by a company representative or a Board agent. The
10 Board agent to be accorded the opportunity to answer questions which
11 the employees may have regarding the notice and their rights under
12 the Act.

13 (e) Notify the regional director in San Diego Regional
14 Office within 20 days from receipt of a copy of this Decision of
15 steps Respondent have taken to comply therewith, and continue to
16 report periodically thereafter until full compliance is achieved.

17 It is further recommended that the allegation of the com-
18 plaint alleging violations by Respondent of Section 1153(a) by en-
19 gaging in surveillance be dismissed, and that the allegations of
20 violation of Section 1153(a) and (c) by the discriminatorily with-
21 holding of a job promotion also be dismissed.

22
23 Dated: April 15, 1977
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27 Brian Tom
28 Administrative Law Officer

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WE WILL OFFER Ezequiel Avalos and Gregorio Magallanes
their old jobs back, if they want them and we will pay each of them
any money they lost because we laid them off.

Date: _____

HOWARD ROSE COMPANY

by _____
(Representative) (Title)

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

HOWARD ROSE COMPANY,)	
)	
Respondent,)	Case Nos. 76-CE-4-R
)	
And)	76-CE-41-R
)	
UNITED FARM WORKERS OF AMERICA,)	3 ALRB No. 86
AFL-CIO)	
)	
Charging Party.)	
<hr/>		

ERRATA

In the Decision and Order which issued in this matter on November 22, 1977, the following items were inadvertently omitted and are hereby added to and incorporated in that Decision and order, as follows:

1) Interest the following paragraph on the first page of the slip opinion, following the third paragraph:

The Employer plants, grows, and packs roses in Riverside Country. In late December, 1975, the UFW was engaged in an organizational campaign at the Employer's ranch. The testimony of Robert Lindquist, a part-owner and supervisor of Howard Rose Company, revealed that during the UFW campaign the Employer attempted to confine the activities of the UFW organizers to a limited area of its property. On January 5, 1976, in addition to attempting to impede UFW organizer Nancy Elliott's organizing activities, which the ALO found were conducted in accordance with our regulations, Robert Lindquist admittedly

followed her, while she was speaking to workers, for the purpose of finding out what she was telling the workers. The ALO found that Lindquist's intention was not to engage in surveillance of employees' protected activity. We do not agree. Rather, we consider Lindquist's own admission of his purpose to be dispositive and accordingly we overrule the ALO and find that the Employer violated Section 1153 (a) of the Act by thus engaging in surveillance of employees engaged in protected activities.

2) Delete the first sentence of the first paragraph on page 2 of the slip opinion.

3) On page 6 of the slip opinion, re-number paragraph 1(b) of the remedial Order as 1(c) and, preceding same, insert the following:

b. Engaging in surveillance of employees' union activities or other protected concerted activities.

4) Substitute the attached Notice to Workers for the Notice to Workers on page 8 of the slip opinion.

Dated: January 10, 1978

Gerald A. Brown, Chairman

Ronald L. Ruiz, Member

Robert B. Hutchinson, Member

NOTICE TO WORKERS

After a hearing in which each side had a chance to present its side of the story, the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has told us that union organizers may enter on our property to speak with you when you are eating your lunch and for an hour before and after work. We will not interfere with organizers who come here. You may talk with them freely.

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help unions;
3. To bargain as a group and to choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help and protect one another; and
5. To decide not to do any of these things.

Because this is true, we promise that:

We will not do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT prevent union organizers from coming onto our land to tell you about the union when the law allows it;

WE WILL NOT interfere with union organizers who are trying to talk with you.

WE WILL NOT spy on you while you are talking to
union organizers or are engaged in other union related activities.

DATE:

HOWARD ROSE COMPANY

by _____
(Representative)