STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. G. BOSWELL COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 77-CE-4-D 4 ALRB No. 13

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

On October 13, 1977, Administrative Law Officer (ALO) James Wolpman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to adopt the recommended Order of the ALO. We do not necessarily adopt all of the ALO's factual findings or legal conclusions. We expressly decline to affirm the factual finding that Respondent had anti-union animus at the times in question as the record evidence does not support such a finding.

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ORDER

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

Dated: March 23, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

CASE SUMMARY

J. G. Boswell Company (UFW)

4 ALRB No. 13
Case No. 77-CS-4-D

DECISION

Contrary to General Counsel's contention that the one employee in question was terminated because of union activity, ALO determined that he was discharged for failure to comply with a valid company rule requiring employees to notify their foreman when they expected to be absent from work.

Upon failure to call in sick on November 8, 1976, employee was discharged pursuant to a policy which became effective that date and which provided that:

> Any hourly employee that fails to report for work without prior notification to his foreman will be terminated immediately.

The ALO credited the dischargee's assertion that he was not aware of the new consequences (under a prior policy, dischargee had been warned and temporarily suspended for repeated absences without notification) even though the stiffer reporting requirement had been posted as well as discussed among members of the heavy equipment crew on November 5.

While the ALO was of the opinion that the new requirement was necessary to curb absenteeism and the resultant problems in scheduling, he was also of the opinion that, in light of its severe penalties, the policy was implemented in an unnecessarily harsh manner without a phase-in period during which warnings were issued and without employees being fully informed. Nevertheless, he concluded that there was insufficient evidence upon which to find an anti-union motive for the termination, ruling that "It must appear that the discharge had its origin in the employee's union activities and not in Respondent's lack of judgment and consideration for its workers."

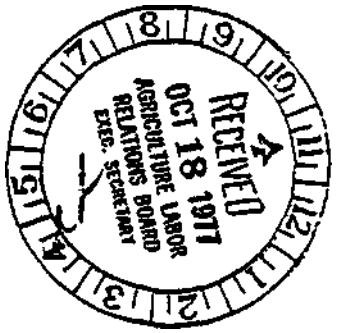
DECISION

General Counsel excepted to the ALO's conclusions that: the dischargee's union activities were too slight to have been the reason for his termination; the termination did not stem from anti-unionism; Respondent's reporting rule was not a pretext for ridding the company of UFW supporters. Respondent excepted to that portion of the Decision which indicated that it had a general anti-union animus and that it had knowledge that the dischargee had engaged in protected activity. Respondent excepted particularly to the manner in which the ALO characterized its policy. The Board upheld the ALO on his recommended order that the complaint be dismissed in its entirety but refrained from appearing to accept all of his findings or legal conclusions and expressly rejected his factual finding that Respondent had anti-union animus at the pertinent times herein as the record evidence did not support such a finding.

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



J. G. BOSWELL COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 77-CE-4-D

Jane E. Rasmussen, for the General Counsel

William A. Quinlan and Bert Hoffman, Doty, Quinlan & Kershaw, of Fresno, California, and John Sterling, of Los Angeles, California, for the Respondent

Coert Bonthius and Stephanie Blank, of Lament, California, for the Charging Party

DECISION

STATEMENT OF THE CASE

JAMES WOLPMAN, Administrative Law Officer: This case was heard before me on June 20, 21, 22, 23, 24 and July 11, 12, 13, 27, 1977, in Bakersfield, California; all parties were represented. The complaint alleges that the Respondent,

J. G. Boswell Company, violated Sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereafter called the "Act"). The complaint is based on a charge filed by the United Farm Workers of America, AFL-CIO (hereafter called the "Union"), a copy of which was served on the Respondent on March 28, 1977. Briefs in support of their respective positions were filed after the hearing by the General Counsel and Respondent.

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

FINDINGS OF FACT

I. Jurisdiction.

Respondent, J. G. Boswell Company, is a corporation engaged in agriculture in Kern County, California, and was admitted to be by the Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

Further, it was stipulated by the parties that the Union is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices.

The complaint alleges that Respondent violated Sections 1153 (a) and (c) of the Act by terminating the employment of Zeferino Perales in November, 1976. The General Counsel maintains that Perales was terminated because of his activities and beliefs in support of the United Farm Workers and unionization in general.

Respondent denies that the termination was brought about because of Perales union activities and beliefs and claims instead that it resulted from his failure to abide by a valid company rule requiring an absent employee to notify his foreman when he is going to be absent.

III. The Facts.

A. Background.

The J. G. Boswell Company owns and operates the Buena Vista Ranch (hereafter called the "Ranch"). The Ranch consists

of approximately 24,000 acres and is located Southwest of Bakersfield. Its primary crops are cotton and various grains.

Since 1973, when Respondent purchased the Ranch which it had previously been leasing, it has undertaken a program of soil and water conservation. The soil conservation aspect of the program involved primarily the leveling of rough land; the water conservation aspect involved the construction of irrigation ditches to accept the larger flow from the California Aqueduct. Most land leveling and a large part of ditch construction is performed by the Ranch's heavy equipment crew of which Zeferino Perales was a member.

Perales first began working for Respondent at Buena Vista in 1966, and was off with an industrial injury the following year. Except for one break in service in 1969, he was a regular member of the heavy equipment crew and a permanent year-round employee since 1968. This made him one of the two or three most senior members of the crew.

Although he occasionally operated a bulldozer or a ditch plow, his primary assignment in recent years was that of grader operator. Both his supervisors and his co-workers agree that he was a skilled and capable worker. It does appear, however, that over the years he has had problems with absenteeism and that on a number of occasions he failed to call in to let his foreman know that he was going to be absent. Up until November, 1976, Respondent was generally tolerant of these failings, and Perales received little more than an occasional talking to or a temporary re-assignment to operate lower paid equipment.

B. Perales' Union Activities.

Perales was neither an organizer nor even a member of the UFW; he was, however, favorably disposed toward the Union and its efforts to organize farm workers. His wife Maria Luisa and his daughter were active in the UFW and because of this he had some contact with the Union and its activities. None of those activities, however, had any direct relationship to the Respondent; and the UFW was not involved, during this period, in any formal, organized campaign at the Buena Vista Ranch.

Also throughout the Summer and Fall of 1976, when the critical events here occurred, Proposition 14 was before the California electorate; and there were strong feelings about that initiative, both pro and con, throughout the State and especially in farming communities. Perales was in favor of the Proposition and, on a number of occasions, said so to fellow workers.

Although his memory was hazy when it _came to recounting specific conversations and recalling when they occurred and who was present, he was able to remember two which took place in 1976 while he was working temporarily in the Machine Shop at the Ranch:1/ One with Pascual Valdez (with other workers present) where he expressed hope that Proposition 14 would receive a "yes" vote so that farm workers would be given the opportunity to learn, about the benefits which a union could provide for them; and another with Antonio Frias, "about the Union [the UFW], that I liked it, and that I was still with them." This later conversation he saw to be the outgrowth of an earlier argument with Frias back in 1973: Perales had arrived at the Ranch parking lot and found Frias showing other workers a magazine photograph of women participating in a UFW picket line and he was criticizing their involvement. Perales defended the women and pointed out that the Union had done good things for workers.

Shortly after Proposition 14 was defeated in November, 1976, he had a conversation with Robert Carter, a fellow worker, in which he criticized Carter's "no" vote as being contrary to his self-interest as a worker.

Finally, Perales appears to have been proud of his wife's and his daughter's involvement with the UFW and to have spoken, on occasion/ to other workers about it.

The picture which emerges is of an employee who was favorably disposed toward the UFW and the causes it espoused and who, from time to time, said so in conversations with his co-workers. His advocacy did not go beyond that; in fact, on one or two occasions, while expressing support for unionization in general, he conceded that Boswell workers were treated well and were therefore less in need of a union than other farm workers.

C. Respondent’s Knowledge of Perales' Union Activities.

At least three supervisors, including Jay Talbot who signed Perales' termination notice, were aware of Mrs. Perales involvement with the UFW. There was no reason for Respondent to believe that Perales did not share his wife's sympathies; espec-

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1/ The Respondent sought to cast doubt on Perales' veracity by showing that he did not work in the Shop just prior to the 1976 harvest, but much earlier in the year. However, Perales specifically acknowledged his uncertainty as to the exact times of these conversations, so I do not find the discrepancy to undermine the basic veracity of his testimony in this regard.

ially since Milton Smart, his immediate supervisor on the heavy equipment crew, was aware of his generalized sympathy for unionization among farm workers. Furthermore, Perales made no secret of his beliefs. He was straightforward in taking James Checchi--a worker whom he knew to be closely aligned with management — to task for having a "No on 14" bumper sticker on his camper. I find, therefore, that Respondent was aware of Perales' union sympathies and activities, such as they were. There is no basis for believing, however, that Respondent was laboring under the misapprehension that Perales was an active organizer, rather than simply a passive supporter of the UFW.

D. Respondent's Anti-Union Animus.

General Counsel introduced a considerable amount of evidence in attempting to establish that Respondent was generally hostile toward unionization and Union adherents. There was , first of all, its failure to rehire Maria Perales as a Seasonal worker in 1975. And, while I have considerable doubt that Jay Talbot would ever have admitted to her husband that the reason she was not rehired was her activities on behalf of the UFW, I do not find Gary Gamble's explanation that she was passed over because of complaints from fellow workers particularly convincing either. I do, however, accept the un contradicted testimony of Porfiera Amaya that field foreman Ruben Martinez told her that, "perhaps it [the failure to rehire Mrs. Perales] was due to the Union," as indicating anti-union animus. This finding receives additional support from the testimony of Jose Gurrola that foreman Mike O'Neal questioned him sometime in 1976 concerning the Union sympathies of employees on his crew, particularly one named Natali.2/

It does appear, therefore, that Respondent has a generalized animosity toward unionization and that the events in question must be intrepreted against that backdrop. 3/

2/ Because of the specific denial by foreman Smart that he told Perales that Erasmo Resendez was not being rehired because of his union sympathies, I have not relied on that evidence in concluding that anit-union animus existed.

3/As will appear hereafter, I conclude as a matter of law that Respondent's opposition to Proposition 14 cannot be considered as evidence of anti-union animus, or otherwise in this proceeding.

E. The Events Leading Up to Perales' Termination.

In both 1975 and 1976, Perales had been absent on a number of occasions. He was well aware, as were the other employees who were questioned about it, that the proper thing to do when you are going to be absent is to let your employer know. Nevertheless in a significant number of those instances, he failed to do so. Smart had spoken to him about the problem and had, on occasion, reassigned him to lower paid equipment as a kind of discipline. Still and all, the requirement had not been rigorously enforced and, at least up until November 6, 1976— he had little reason to believe that he would be dealt with severely for future violations.4/

Then on November 5th a new policy was issued to take effect on November 8th, specifying that:

> "Any hourly employee that fails to report for work without prior notification to his foreman will be terminated immediately." [General Counsel's Exhibit 5]

Foreman Smart testified that he told the heavy equipment crew of this policy before work on the morning of the 6th. Perales denies having heard about the change. It may be that this was due to the fact that he was usually one of the last to arrive before work and therefore missed the announcement. In any event I believe him when he says he was not aware of the severe consequences which would follow upon his failure to call in sick.

On Sunday, November 7th, he experienced a recurrence, of a back problem which had bothered him in the past. He went to bed hoping to be able to work the following day. On Monday morning he got up feeling a little better, but by the time he was to leave for work, the pain had again increased to a point where he had to return to bed. He did not attempt, to telephone Smart until that--evening; and, when he called, it appears no one was home. On Tuesday he was still unable to work so he again called Smart. This time he spoke with Mrs. Smart who told him that her husband had already left for work. He explained the situation to her and asked that she pass the information on to her husband. He spoke with her again on Tuesday night and on Wednesday morning, leaving essentially the same

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4/ Indeed, the record does not indicate that he was talked to or even warned when he failed to call in on November 4th.

message.

Meanwhile on Monday morning, November 8th, Talbot noticed that the grader was idle; he asked Smart about it and was told that Perales had not reported and had not called in. Talbot contacted Gary Gamble, the Ranch Manager, as asked whether to enforce the new policy against Perales. Gamble said yes; and so, later that day, Talbot prepared Perales termination notice.

On Wednesday, November 10th, Perales, concerned that he had not heard back from Smart, drove out to the Ranch even though he was still in considerable paid. Smart referred him to Talbot, who informed him that he was terminated but would be eligible for rehire, probably some time after the first of the year. Perales testified that when he pressed the matter, Talbot admitted that he was "through with the Company." Talbot denied this. Since the Termination notice is explicit about Perales re-employment rights and since he did not chose to put matters to the test by re-applying/ I credit Talbot's testimony in this regard.

F. The Policy Regarding Prior Notification of Absence.

The policy which went into effect November 8th and which Respondent asserts as the reason for Perales' termination represents a considerable departure from the loose practice which had previously obtained at the Ranch. To be sure/ workers always recognized "that they had some obligation to notify their supervisors when they were going to miss work. But they had no reason to believe that the consequences of failing to do so would be the immediate termination of their employment. This is especially true of members of the permanent crews. Their derelictions had been tolerated or dealt with lightly in the past.

For its part, Respondent certainly had every right to tighten up the reporting rule. Indeed, matters appear to have reached a point where something needed to be done. Hence the Memorandum of November 5th. Contrary to the testimony of Respondent's witnesses at the hearing, that Memorandum appears to have arisen primarily out of concern with the failure of seasonal workers to give prior notification of impending absence. Its rationale concerning expected overstaffing problems due to the low amount of cotton on the ground and the fact that it was to remain in effect only until the completion of the second picking both point in that direction, as does a similar policy adopted in the Spring and made applicable

only to the seasonal weeding crews. That is not to say, however, that there was no concern about the permanent crews. Respondent was unhappy, and justifiably so, with the scheduling problems created by the failure of members of the heavy equipment crew to call in. And the Memorandum, in spite of its recitations, is by its terms applicable to all hourly employees, permanent as well as seasonal.

The implementation of the policy left much to be desired. Good personnel practice would dictate that, where a substantial change is to be made in policy, especially one which could, if violated, result in termination, then every effort should be made to see to it that employees are fully informed so that they do not place themselves in jeopardy without clearly understanding the consequences. That was not done here. Notices were not posted; the rule did not provide for a phase in period where employees would first be warned; and no steps were taken to insure that each individual was at least orally informed of the rule. Carter did not find out about it because he happened to work a later shift. Perales did not learn of it, probably because he did not happen to arrive at work before the actual starting time and hear his foreman talking about it.

DISCUSSION AND CONCLUSIONS

I. The Legal Framework, for Deciding Discrimination Cases.

Section 1153 (c) is, in applicable part, identical to Section 8 (a) (3) of the National Labor Relations Act, as amended. Section 1143 requires the Board to follow applicable NLRA precedents. There are certainly no lack of precedents under Section 8 (a) (3). Indeed, if anything, it is the abundance of precedent which creates the problem. The meaning and interpretation of Section 8 (a) (3) has been before the U.S. Supreme Court on at least eleven occasions since the Jones & Lauglin Decision in 1937.5/ Those decisions cover the gambit of

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5/ NLRB v. Jones & Laugnlin Steel Corp., 301 U.S. 1 (1937); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) ; Radio Officers' Union v. NLRB, 347 U.S. 17 (1934); Truck Drivers Local 449 v. NLRB (Buffalo Linen Supply Co.), 353 U.S. 87 (1957) American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961) ; NLRB v. Erie 'Resistor Corp., 373 U.S. 221 (1963) ; NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964) ; Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263 (1965) ; NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) ; NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

of employer conduct which is arguably discriminatory: discharge of union adherents, lockouts, favoritism because of union membership/ the right to go out of business to avoid unionization, super-seniority for non-strikers, reduction of benefits to former strikers and the failure to rehire them. These decisions— perhaps because they involve such a variety of employer conduct-- contain no consistent analysis of the meaning of Section 8(a)(3); instead each decision is marked by a shifting and recasting of the elements required to establish a violation. Most are further riddled with concurring and dissenting opinions, indicating that there still remain substantial differences as to the interpretation of the Section. The current test is the one formulated by Chief Justice Warren in Great Dane Trailers, Inc.:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight' an antiunion motivation must be proved to sustain the charge 'if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.'" 388 U.S. at 34.

This test is useful in focusing on the sort of conduct which'can be seen as having aspects of business justification while, at the same time, having a substantial adverse impact on employee rights. Super-seniority for non-strikers is a good example. But when it is applied to other sorts of cases, it is not very helpful, primarily because the categories "inherently destructive" and "comparatively slight" are too nebulous. It is doubtful, for example, that the Chief Justice intended that a discharge of a union adherent would be overturned without proof of anti-union motivation and in the face of business considerations. Yet it is difficult to say such a discharge is not "inherently destructive" of employee rights, and consign it to the category of "comparatively slight".

An analysis has been suggested which is more helpful in cases involving discharges, but which likewise takes into account the variety of situations in which discrimination questions arise and will continue to arise.6/ In addition, it does

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6/ See Christensen & Svanoe, Motive and Intent in the Com-mission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L. J. 1269 (1968).

rationalize the many precedents which do exist in this area of the law.

Under this analysis the first question to be asked, is: What business interest does the employer appeal to in seeking to justify conduct which adversely affects employee rights? The next inquiry is: Is that interest the real reason for the conduct or is it a pretense? And the final question is: If the reason offered is the actual reason, does the societal interest in allowing employers to further their business interests by such conduct outweigh the harm which that conduct inflicts on the ability of workers to pursue the legitimate and important goal of forming and maintaining unions.

This third inquiry can be very important in some contexts--the use of the lockout, super-seniority for non-strikers, and so on--but it is not especially important in individual discipline situations like that at issue here; for, in such cases, the employer generally is appealing to an interest which ail would acknowledge he is entitled to pursue. Here, for instance, no one would deny that Respondent has the right to require that workers notify it as soon as possible if they are going to be absent so that other arrangements can be made to insure that work progresses.

The inquiry that is important to this case and ones like it is the second one: Is the reason advanced by the employer the real reason-, or is the discipline the result of wanting to punish or deter workers for engaging in activities in support of unionization. Notice that such an inquiry involves, almost inevitably, the issue of motivation, something which is not at all germane to the balancing test which terminates the analysis.7/

In attempting to ascertain motivation, such factors as the level of union activity, company knowledge, anti-union animus, timing, the particular facts surrounding the rule and its application are all of considerable importance; and so it is to these that I now return.

7/ The chief virtue of this test is that it consigns motivation to a specific place, rather than allowing it to color (and very often confuse) every element of the alleged violation.

II. Discussion of the Issues.

Respondent argues that the Union activities which are contemplated in and protected by the Act are not the trivial comments and passive support which characterize Perales commitment to the UFW. I disagree. The exercise of the right to self organization may have very humble origins. It can begin with casual lunchtime conversations about shared gripes or grievances and it can be nurtured in bull sessions where employees speak in generalities about unionization. Even the vaguest expression of sympathy for a union can be part of the process which ultimately finds expression in a full fledged organizational drive. Indeed, it is in this early and delicate stage that self-organization is often most vulnerable. Therefore, in line with the intention of the Act to provide the fullest possible protection to self-organization among farm workers, I conclude that Perales sympathies and activities, such as they were, are protected; and if they formed the basis for his termination, there would be a violation.

Respondent also argues that Perales support for Proposition 14 is outside the protection of the Act. Again I disagree. The campaign in support of Proposition 14 was so intimately connected with the notion of self-organization among farm workers that it would be unrealistic to say that an employee working on a farm who expressed support for it was not, at the same time, expressing support for self-organization; and if he were discharged for such expression, it would be difficult to say it was not an attack on the right to self-organization; especially where, as here, the support for Proposition 14 was part of an overall context of support for unionization.

Looking at the employer side, opposition to Proposition 14, especially in the context of other evidence of union hostility, may as a factual matter indicate anti-union animus. However, as a matter of law, It cannot be considered. The reason is clear enough: It is extremely important in our society that persons have the right to express their views on political issues without being penalized for doing so. That policy is so important and so critical that it must take precedence over any advantage that might follow from having a complete and accurate picture of an employer's true feeling toward unionization. Section 1155 of the Act, granting the right of expression so long as it is untainted by threat or promise, specifically forbids reliance on such evidence.

It must be concluded, therefore, that Perales comments and sympathies are protected by the Act. Furthermore, the Respondent was aware of those sympathies. And finally, there is enough evidence (quite apart from its opposition to Proposition 14) to indicate that Respondent was hostile toward unionization.

That being so, the burden "is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him."' NLRB v. Great Dane Trailers, Inc., 388 U.S. at 34.

The justification offered by Respondent is its November 8th policy that workers who fail to report without prior notification are to be terminated.

General Counsel attacks the policy as being a pretext for the termination, contending, first of all, that the rationale for the rule "shifted": originally it had to do with overstaffing during the second picking; later, at the hearing Respondent's supervisors testified that it was adopted to deal specifically with absenteeism in the heavy equipment crew and a shortage of development funds to keep the crew employed during the slack season. While I agree with the General Counsel that Respondent's emphasis at the hearing on the unique problems of the heavy equipment crew was misplaced, I cannot conclude that the policy had no application to Perales and other permanent employees. The primary reason for the change in policy may have been a problem with seasonal pickers, yet the inclusion of all hourly workers in its strictures does establish." a secondary concern with permanent employees, a concern which appears justified by the facts. Furthermore, that the policy was intended to have broad application makes more understandable its eventual effect of reducing further an already understaffed heavy equipment crew. Any policy which attempts to correct an overall problem is likely to create incidental difficulties in certain crews. Besides, the understaffing of the heavy equipment crew made it all the more important to have notice of absence so that replacements could be found to keep the equipment operating. Nor does the fact that the policy was to terminate before the slack period came support the inference that it was pretextual. Having all equipment in continuous operation during the slack period was not nearly so important as doing so during the picking season.

The unfortunate and unnecessarily harsh manner in which the policy was implemented—without adequate notice and with-

out a phase in period where warnings were given--has already been commented upon. Few arbitrators, operating under the just cause provision of a collective bargaining agreement, would sustain a termination in a situation where the implementation was so haphazard and its application, falling as it did on a long time employee who had not received actual notice, was so harsh. But this case does not arise in that context. It must appear that the discharge had its origin in Perales union activities and not in Respondent's lack of judgement and consideration for its workers.

Perales was terminated as an example to other workers: an example of what happens to those who fail to call in, not as an example of what happens to union sympathizers. True, there is a background of anti-union animus, but Perales was not perceived as a threat by the Respondent. His union activities and his commitment were too slight. The fact that he was kept on long after his activist wife was let go supports this conclusion.

General Counsel also argues that Respondent was at least in part motivated by anti-union feeling in terminating Perales; i.e., that there was a "dual motive". To be sure, if the termination was even partially motivated by his union sympathies or activities, there would be a violation. That is to say if his termination would not have occurred at all or if he would have received some lesser penalty had he not been an union adherent, then a violation would be established. Sweeney and Co. v. NLRB, 437 Fed.2d 1127 (1971). But again I conclude that Respondent was not concerned about Perales union sympathies and activities. They were simply too slight. Respondent was out to teach other employees a lesson; and, while one may deplore the sacrifice of a capable and long standing employee, simply to teach other employees that henceforth they had better call in when absent; nevertheless, such motivation does not constitute discrimination for protected activity.

A final observation is in order. Most cases of this kind concern workers whose employment has been permanently severed. That is not the situation here: the Notice of termination specifically provides that Perales is eligible for rehire, and Talbot so advised him. This decision should not be read as in any manner altering that situation. Perales is admittedly a good worker. Should Respondent have need for a heavy equipment operator and should Perales make himself available for employment, then there is every reason to expect that he would be rehired. If he were not, he would, of course, have every right to raise, once again, the issue of discrimination.

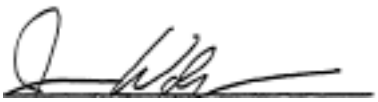
III. The Alleged Violation of Section 1153(a) of the Act.

A violation, of Section 1153 (a) is alleged as essentially derivative in nature. Since it has already been concluded that the termination of Zeferino Perales did not arise out of his union sympathies and activities, I find no basis for concluding that Respondent has interfered with, restrained or coerced employees in the exercise of their rights under Section 1152.

IV. Conclusion and Recomendation.

Because there is insufficient evidence to support the contention that Zeferino Perales was terminated because of his union sympathies or because he was engaging in activities protected by Section 1152, I find that Respondent did not violate Section 1153(a) or Section 1153(c). I therefore recommend that the complaint be dismissed.

DATED; October 13, 1977.



JAMES WOLPMAN
Administrative Law Officer