

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

KAPLAN FRUIT AND PRODUCE)	
CO., INC., aka)	
KAPLAN RANCH,)	Case No. 76-CE-7-F
)	
Respondent ,)	
)	
and)	5 ALRB No. 40
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	

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 November 16, 1977, Administrative Law Officer (ALO) Ernest Fleischman issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief, and the General Counsel filed a brief in response to Respondent's exceptions.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO, and to adopt his recommended Order as modified herein.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent, Kaplan Fruit and Produce Co., Inc., aka Kaplan Ranch,

its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Discouraging membership of agricultural employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against any such employees with respect to their hire or tenure of employment or any other term or condition of employment.

b. In any other manner interfering with, restraining or coercing any agricultural employee in the exercise of rights guaranteed by Section 1152 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act.

a. Offer to Silvestre Ramos and the employees in his crew immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges to which they may be entitled and make them whole for any loss of pay or other economic losses they have suffered by reason of their discriminatory discharge, plus interest measured thereon at seven percent per annum.

b. Preserve and make available to the Board or its agents, for examination and copying, all payroll records and any other records necessary to compute the amount of back pay due and other rights of reimbursement under the terms of this Order.

c. Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages,

Respondent shall reproduce sufficient copies of the Notice in each language for the purposes set forth hereinafter.

d. Post copies of the attached Notice for 90 consecutive days, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

e. Mail copies of the attached Notice in all appropriate languages, within 31 days after issuance of this Order, to all employees employed at any time during the payroll period which includes January 3, 1976.

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

g. Notify the Regional Director in writing within 31 days after issuance of this Order what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter, in

writing, what further steps have been taken in compliance with this Order.

Dated: May 24, 1979

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing at which all sides had an opportunity to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice.

1. The Agricultural Labor Relations Act is a law which gives all farm workers these rights:

- (a) To organize themselves;
- (b) To form, join, or help unions;
- (c) To bargain as a group and to choose whom they want to speak for them;
- (d) To act together with other workers to try to get a contract or to help and protect one another; and
- (e) To decide not to do any of these things.

2. Because this is true, we promise you that:

WE WILL NOT do anything in the future that interferes with your rights under the Act, or that forces you to do, or stop doing, any of the things listed above.

WE WILL NOT discharge or otherwise discriminate against any .employee because such employee exercised any of such rights.

3. The Agricultural Labor Relations Board has found that we discriminated against Silvestre Ramos and the employees in his crew by discharging them. We will reinstate them to their former jobs and give them back pay plus seven percent interest for any losses that they suffered as a result of their discharge.

Dated:

KAPLAN FRUIT AND PRODUCE CO., INC.,
aka KAPLAN RANCH

By: _____
(Representative) (Title)

This is an official document of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Kaplan Fruit and Produce Co., Inc.,
aka Kaplan Ranch (UFW)

5 ALRB No. 40
Case No. 76-CE-7-F

ALO DECISION

The issue in this case was whether Respondent's discharge of crew boss Silvestre Ramos, which in effect resulted in the discharge of his crew, was a violation of Labor Code Section 1153(c) and (a). The General Counsel alleged that the discharge of Ramos, who is admittedly pro-UFW, was a device used by Respondent to rid itself of Ramos' pro-UFW crew, thus weakening the strength of the union in impending contract negotiations. Respondent contended that its discharge of Ramos was due to his poor performance of supervisory duties, and had no relationship to his union activities.

The ALO concluded that the discharge of Ramos was substantially motivated by Respondent's desire to retaliate against the Ramos crew members for their pro-UFW activities, discourage membership in the UFW, and weaken it as a collective bargaining agent. The ALO based his conclusion on two grounds: (1) the evidence suggests that Respondent had anti-UFW animus and knowledge of the Ramos crew's pro-UFW sentiment; and (2) that the manner in which the Ramos crew was replaced demonstrates that Respondent wished to avoid rehiring the crew. The ALO was not persuaded by Respondent's contention that Ramos was discharged for economic reasons, finding much of that argument was based on hearsay and conjecture. Relying on *Pioneer Drilling Company v. NLRB*, 391 F. 2d 961, 67 LRRM 2956 (1968), the ALO concluded that even if there had been some justification for dissatisfaction with Ramos' performance as a crew boss, that would not preclude a finding that Ramos was discharged as a device to terminate his pro-UFW crew. In *Pioneer*, the NLRB found that the discharge of two supervisors was the employer's pretext for ridding itself of "union activists working in the supervisors' crews, even though there was a concurrent finding, that a valid business reason also existed for the employer's act.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO, ordered Respondent to offer Ramos and his crew reinstatement to their former or equivalent jobs, with back pay and reimbursement for other economic losses suffered by reason of their discriminatory discharge, plus 7% interest on the award, and to post an appropriate remedial Notice to Employees.

* * *

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

* * *

BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD
STATE OF CALIFORNIA



.....
KAPLAN FRUIT AND PRODUCE CO., INC. :
also known as KAPLAN RANCH, :

Respondent, :

and :

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

Charging Party. :
.....

Case No. 76-CE-7-F

Harry J. Delizonna, General Counsel,
Jane E. Rasmussen, Esq., John Moore,
Esq., Martin Fassler, Esq.,
for the General Counsel,
Agricultural Labor Relations Board

Sister Jean Eilers,
Stephen Hopcraft, Esq.
Glenn Rothner, Esq.
for the Charging Party

Sidney P. Chapin, Esq.,
of Barton, Petrini and Conron, Esqs,
A. H. Caplan and Associates,
for the Respondent

DECISION

STATEMENT OF THE CASE

Ernest Fleischman, Administrative Law Officer:

This proceeding, with all parties represented, was heard before me between April 18, 1977 and May 18, 1977 in Porterville, California; on an original complaint issued March 1, 1977 and as amended during the hearing.

The United Farm Workers of America, AFL-CIO, hereinafter referred to as the UFW, filed an unfair labor practice charge against the Kaplan Ranch. The correct name and legal entity of the firm is the Kaplan Fruit and Produce Co., Inc. and it is hereinafter referred to as Kaplan or the respondent. The UFW charged that respondent had violated Labor Code Section 1140, et seq., the Agricultural Labor Relations Act, hereinafter referred to as the Act.

The original complaint, General Counsel Exhibit No. IB^{1/}, alleged that respondent violated Sections 1153(a) and (c) of the Act. Respondent denied the same.

Witnesses were excluded from the hearing room pursuant to Section 777 of the Evidence Code except for John Bono, Jr.^{2/}, an employee of the respondent, who was permitted to remain in the room to assist counsel pursuant to sub-section (c) of that Section.

fn 1. References to exhibits shall be made as follows: General Counsel Exhibit No. __ , will be GC NO. __ , Respondent Exhibit No. __ , will be R. No. __ , United Farm Workers Exhibit No. __ , will be UFW No. __ .

fn 2. References to John Bono, Jr. will be to Bono. His father John D. Bono, Sr. will be referred to as Bono, Sr. Generally, witnesses will be referred to by their surnames.

On the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and the respondent, I make the following:

I. FINDINGS OF FACT.

A. JURISDICTION

Kaplan, a California corporation, is engaged in agriculture in California and it admitted and it was stipulated that it is an agricultural employer within the meaning of Section 1140(c) of the Act and I so find.

Respondent admitted and it was stipulated that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act and I so find.

During the hearing paragraphs 5 and 7(b) of the complaint were amended, (G.C. No. 15) to clarify the spelling and identity of 33^{3/} listed employees who allegedly were deprived of their rights guaranteed them by Section 1152 of the Act and I find that they are agricultural employees within the meaning of Section 1140.4(b) of the Act. I also find that the identity of the listed employees as set forth in the amended complaint is the same as those set forth in the original complaint.

B. The Alleged Unfair Labor Practices and the Pleadings.

The alleged unfair labor practices are set forth in Paragraph 7 of the complaint. It states that Kaplan has interfered with, restrained and coerced employees in the exercise of their rights guaranteed in Section 1152 of the Act, by:

fn 3. The complaint was further amended to delete the name of Guillermo Savala from the list of employees.

Paragraph 7(a) alleges that Kaplan on or about January 3, 1976/ interfered and coerced its employees in the exercise of their Section 1152 rights by discharging Silvestre Ramos, a crew boss and supervisor within the meaning of Section 1140.4(j) of Act and since then has failed and refused to reinstate him to his former or substantially equivalent position as a device for terminating his pro-UFW crew, and/or as an integral part of a pattern of conduct aimed at penalizing its employees for their protected activities.

Paragraph 7(b) was amended during the hearing (G.C. No. 15), to allege that on or about January 3, 1976, Kaplan interfered and coerced its employees in the exercise of their Section 1152 rights by discharging Ramos and thereby discharging the said 32 individuals because of their individual and collective support for or activities on behalf of the UFW or because of Silvestre Ramos' support for or activities on behalf of the UFW.

The complaint alleges that the acts of the respondent as set forth in paragraphs 7(a) and 7(b) of the amended complaint constitute unfair labor practices within the meaning of Section 1153(a) and (c) of the Act and the acts of the respondent described in paragraph 7(b) of the amended complaint constitute unfair labor practices within the meaning of Section 1153 (c) of the Act.

Kaplan denies that it engaged in the unfair labor practices set forth in the complaint as amended; that the General Counsel has not carried his burden of proof; that Ramos was discharged

for his failure to carry out his supervisory duties and that the statutory rights of the crew as set forth in the Act were not violated.

Finally, respondent admitted that Bono, Bert Berra, and crew bosses Ramos, Guillermo Santiago, Manuel Macabalin, Val Ebreo and Constantine Regaspi were supervisors within the meaning of Section 1140.4(j) of the Act and I so find.

C. The Facts

1. The Operation of the Respondent's Business.

Kaplan is in the business of growing produce and selling the same at wholesale. It is in the language of the industry, a grower-shipper. The selling operation is conducted out of its main office and storage space in Los Angeles, California.

Kaplan leases 500 to 600 acres on five ranches in Tulare County on which it cultivates various varieties of table grapes. During harvesting time, which is the peak employment season, it employs approximately 250 agricultural workers. In this geographic area, apart from a few irrigators, two ranch managers, Bono and Berra, and a bookkeeper, Mary Berra, the crew bosses and their crews are seasonally employed. During the past few years there have been three crew bosses, and in 1975 they were Ramos, Manuel Macabalin, and Guillermo Santiago. Ramos was hired in the early part of 1972 and had top seniority among the crew bosses with respect to length of service. Bono testified that crew bosses are hired on a permanent basis, but they are laid

off with their crews when they are not engaged in seasonal operations.

Because agricultural activities are dependent, on external factors, such as weather, pests, market demands, prices, etc., seasonal operations vary from year to year. Then again, various varieties of grapes ripen at different times. The longest season, harvesting, starts in late July and continues until the middle or end of November. Then after a brief layoff, some of the crew or what is referred to as the regular crew, are recalled for pruning which continues until some time in January which is followed by vine tying which lasts for a week or so. The employees are then laid off for about three months after which they return for leafing, cane throwing and other cultivation activities which continue into the harvesting season.

All grapes are picked and field packed into boxes and are taken to the Mountain View cold storage plant for pre-cooling or cold storage. They are kept there for periods ranging anywhere from a few hours to six months.

The boxes are then shipped directly to customers or, as is more often the case, to the Los Angeles headquarters of Kaplan.

Crew sizes for each of the crews vary between fewer than 20 in the pruning period to approximately 80 in the peak harvesting season.

During the harvest season the workers are usually paid on the basis of a combination of hourly and piece work or bonuses

calculated at so much per box. The crew boss likewise receives an hourly rate together with a fixed amount for each box his crew picks and packs. The crew pools its earnings so that each member of the crew shares equally.

2. Hiring, Discharges, Layoffs and Recalls

The supervisory management of Kaplan's grape division consists of Bono, Berra, Bono, Sr. and the crew bosses. Bono is General Manager of the grape growing operations in the area, Berra is the Manager and chief ranch operator in charge of agricultural tasks and the crew bosses under the directions of Bono and Berra, supervise their respective crew members. Bono, Sr., who is stationed in Los Angeles and has overall charge of the grape operations, is concerned in the main in the selling end of the business. However, he visits the ranch to observe operations from time to time, particularly during, the harvesting season. During such visits he checks the grapes picked for quality, examines the boxes to see that they are neither under or over weight, observes the workers, corrects any deficiencies, speaks to the crew bosses and members of the crews and supervises them. He also confers with Bono and Berra as to whether crew bosses should be discharged and I find he is a supervisor within the meaning of the Act.

Mary Berra, the wife of Bert Berra, is the ranch bookkeeper and maintains records, calculates payrolls, receives wage data from the crew bosses, calculates the pay of the employees, and gives the pay checks to the crew bosses who in turn

distribute them to their respective crews. Mrs. Berra testified that although she was paid only for her work as a bookkeeper, she also drove tractors, did some irrigation work and in general made herself useful to the respondent. I find she was not a supervisor within the meaning of Section 1140.4(j) of the Act. Although an employee need not satisfy all of indicia of authority set forth in the aforesaid Section, nevertheless the key factors such as the right to hire and fire or effectively recommend the same must be demonstrated. The mere fact that she identified herself with the respondent and was openly antagonistic to the UFW is not enough to give her the status of a supervisor. The burden of proof thrust on the General Counsel in this respect has not been met by him.

The practice concerning hiring, firing, layoffs and recalls in the grape growing industry, including that at Kaplan, was adduced through testimony. Seasonal agricultural employees absent a collective bargaining agreement providing to the contrary, are hired and fired by their crew bosses who also determine the order of layoffs and recalls. Seniority plays no role whatsoever. The crew is attached to a particular crew boss. If the crew boss quits or is discharged, the employment relationship between the employer and the members of the crew is automatically terminated.

In the early part of 1972 the only crew boss at Kaplan was one Steve Tagorino. Ramos had previously worked for Berra in 1962 as a crew boss and Berra telephoned him and asked

whether he was available for work on a permanent basis as a crew boss for Kaplan. At that time Ramos was employed at the Nash De Camp ranch as a crew boss. When Ramos accepted and thus replaced Tagorino he brought most of his crew with him. All on Tagorino's crew were automatically discharged and a few who had been on Tagorino's crew were hired by Ramos after they had applied to him for work.

All the discharged employee witnesses at the hearing who were former members of Ramos' crew, were hired by Ramos. The only exceptions to the general rule on hiring was in 1976 when according to the testimony of Rudolfo Rodriguez and Ignacio Robeles, Berra hired them directly without referring them to a crew boss.

The record is not too clear with respect to discharges. Ramos testified that he did not have the right or power to fire a member of his crew. He couldn't remember if he sent workers home or fired them on either his own or Bono's direction. He recalled the instance when five supposedly experienced pickers, described as Arabs, had packed boxes which were short weighted. Bono was angry and told Ramos to discharge them.

Either Bono or Berra told the crew boss the size of the crew needed on a particular job. The crew boss would then lay off, recall or set them. The particular person to be laid off, recalled or hired would be determined by the crew boss.

The crew boss was the direct supervisor of his crew. He checked for quality, saw to it that boxes were packed to the desired weight; that off-color, unripened, overly ripe and

rotten grapes were not packed; that the workers worked the necessary hours to harvest the crop; taught new hands the art of cultivation and furthermore he had to be an able and efficient recruiter when new workers were needed.

Prospective employees would find out through their friends or directly when a particular ranch was hiring and who to see, either in person or by telephone, in order to apply for these jobs. Crew bosses themselves keep track of available persons. These may be former employees, neighbors or social contacts.

The ability to assemble and maintain an adequate qualified labor force quickly is of prime importance to the respondent taking into consideration the perishable nature of the crop.

Crew bosses do not have fixed and rigid criteria to be used in selecting their crew members. However, the method of compensating employees would have a major bearing on the selection of the crew members. Apart from the drive to accomplish the various tasks within the dictates of the nature of agricultural work, crew members particularly in the harvest season, pooled their earnings. Thus, a poor picker would to some degree affect the wages earned by other pickers. Crew bosses received an hourly rate plus a bonus for each box of grapes picked by his crew.

The crew boss kept records of hours worked, boxes packed, etc., and sent the same to Mrs. Berra who prepared the payroll. The pay checks would then be distributed to the workers by their

respective crew boss.

Berra was out in the fields daily and usually visited the crews several times each day, observing the employees at work and checking on what they did. He met with Bono to discuss the operations because Bono acted as the liaison with Kaplan's Los Angeles sales and base office.

Bono, Sr. is stationed in Los Angeles and is concerned in the main with sales. However, he visited the ranches from time to time and did participate in many of the conversations and activities of the field operations which are the subject of these proceedings.

3. Kaplan-UFW Relationship and Events Prior to the 1975 Representation Election.

On September 11, 1975, pursuant to a petition the Board conducted a representation election among the agricultural employees of Kaplan. The Amended Tally of Ballots, G.C. No. 11, shows 190 persons voted, one void ballot, 37 for the Teamsters, 61 for the UFW, 5 for "no union" and 14 unresolved challenged ballots.

Prior thereto, the UFW and Kaplan had been in contractual relations for the three year period ended on April 14, 1973. It was stipulated that during the contract period all employees, including Ramos, were members of the UFW. On the expiration of the contract, the UFW established a picket line but the picketing was carried on intermittently, averaging two times a week. The picketing ceased ^n 1975 prior to September 11, 1975.

Ramos was a member of the UFW and its predecessor, the Agricultural Workers Organizing Committee for the period from September 1964 to the time of the hearing. Although he ceased being a card carrying member in September, 1973 he still considered himself a continuing UFW member and payed dues even though he was not obligated to do so. Moreover, Ramos by his pro-UFW activities such as attending UFW meetings, organizing and/or permitting his home to be used for union meetings and other actions herein described, evidenced his adherence to the UFW. Then, too, Bono testified that he had seen Ramos wearing a UFW button occasionally.

During the period following the expiration of the 1970-73 contract Ramos worked behind the picket lines because as he stated he did not want to lose his job and therefore he did what he was told. Ramos in fact carried a gun, at the suggestion of counsel somehow associated with Mary Berra, in order to protect his crew.

Numerous witnesses testified that during this pre-election, post-contract period and even on the very day of the election, organizers from both the UFW and the Teamsters circulated in the Kaplan fields among the employees during working hours seeking their membership and union sympathies.

Berra, at the request of Bono, released the workers in the Ramos crew so that Bono could address them in connection with the forthcoming election. Bono told them that there would

be two unions vying for their votes, the UFW and the Teamsters. He urged them to vote for the Teamsters and stated that he had been a Teamster for 14 years and they provided good benefits. He contrasted this with the UFW or Chavez union, which did not provide good benefits. Ramos protested and cited the instance concerning Steve Ragudo, one of his crew members, who had been operated on both eyes and the UFW had paid for the same. Bono said he was unaware of this.

Bono asked the assembled workers to select whatever union they wanted but he suggested that they vote for the Teamsters. The above events were attested to by Ramos and Ragudo, Simeon (Sam) Gonzalo and Angel Jacinto corroborated the foregoing. Bono admitted he did speak to the employees out stated that Kaplan did not want any union; that he advocated this "no union" policy and because of his own bad experience with the Teamsters neither the Teamsters nor the UFW merited the support of the workers. I credit the testimony which supports the contention that Bono urged the workers to support the Teamsters in the forthcoming election. I find, however, that the expression by Bono of his views was not coercive, contained no threat of reprisal or force and no promise of benefit and was privileged within the meaning of Section 1155 of the Act.

Another instance evidencing the pro-Teamster tilt of Kaplan occurred on September 11, 1975, the date of the election. The election itself was held in a shed on the respondent's premises and during the hearing, the parties and I visited the

site.

The shed is approximately 40 feet by 115 feet and is open on the longside. The voting booth was located in the south-east corner of the shed and the employees waited to vote in two lines which ran outside the shed. Jacinto testified that while waiting in line he saw Berra standing near his pick-up truck, which was parked within the property line, speaking to two men wearing Teamster buttons.

Jacinto didn't hear their conversation and during the visit to the election site he pointed to the place where Berra's pick-up truck was parked and this was approximately one hundred and thirty five feet from the waiting lines. Jacinto identified the vehicle as a white pick-up truck. Berra admitted that on September 11, 1975, he did have a white pick-up truck. Ragudo and Agapito Andres confirmed the main thrust of Jacinto's testimony regarding Berra's conversation with Teamsters which took place in full view of the voters standing on the lines waiting to go into the polling place.

The unfriendly attitude to the UFW stems at least from Kaplan's experience with that union during the 1971-73 contract period. Bono, Sr. testified that he encountered problems during this time in that because of the hiring hall he couldn't find enough workers to pick Cardinal grapes. As he said: "You must pick in time or you are dead." This inability to secure enough "crew" lasted a week and he was angry "until the problem was over".

During the period following the expiration of the bargaining contract the UFWs picketing aroused the animosity of the respondent. Bono recalled seeing the UFW mass picketing which made him feel like Custer facing the Indians.

It was apparent from the testimony and the behavior of Mary Berra on the witness stand that she identifies herself with the respondent. She was quick tempered, aggressive and admitted that she "annoys very easily". She cited what she considered acts of serious misbehavior such as rocks coming from picket lines which smashed windshields in two of Kaplan's trucks, in two of its pick-ups and in one rented truck. She also testified that her husband had to fix 15 to 20 flat tires per week, the flats having been caused by "little wired things" in driveways. She never did see the throwers.

She also testified that Richard Curtis who was a voluntary UFW organizer in 1975, who when requested by her to go over to the other side of the road, became abusive and called her a "m____ f____." She denied calling the pickets "dirty communists" but she admitted that she probably said: "Go back to the gutter".

Mary Berra testified that she probably discussed the events which took place during the picketing with her husband on a daily basis.

The testimony described ineluctably leads to the not surprising conclusion that there was a feeling of hostility by the respondent towards the UFW.

In or about May or June, 1975, which was approximately two years after the Kaplan-UFW contract had expired, the UFW engaged in an active organizational drive which it hoped would result in the UFW being certified as the exclusive collective bargaining agent for the Kaplan agricultural employees.

4. The Role of Ramos in the UFW Organizing Campaign

Ramos had the most seniority among the three crew bosses. His active participation in the UFW organizational campaign and the value of the same to the union was attested to by Richard Curtis.

Richard Curtis was employed as a volunteer organizer in 1975 and worked in the Porterville office of the UFW Service Center. In or about April, 1975, he was put in charge of the organizing campaign in the Porterville area which sought to win representation elections affecting 15 growers. Curtis testified that he evaluated Ramos as a strong person, a strong supporter of the UFW and that "one doesn't run into people like Silvestre Ramos very often".

Curtis described the various organizing techniques including the use of house meetings. They were utilized to explain the "new law", union history and meaning and to try to get workers to sign authorization cards to be used in connection with representation proceedings. At least one such house meeting was held in the home of Ramos in June or early July.

After the Kaplan election a ranch committee was elected

and Curtis testified he attended and explained the role of the committee. The members were to act as stewards and were to put time in on negotiations. Ramos was elected to the negotiations committee and Curtis testified Ramos' presence on the committee was crucial.

According to Valesco, Ramos had a higher percentage of workers who had signed UFW authorization cards than other crew bosses and in that sense the Ramos crew was exceptional. Steve Ragudo, a long time member of the UFW and a member of the Ramos crew since 1972, testified that he attended the UFW meeting in Ramos' house and tried without success to get workers from Guillermo Santiago's crew to come to the same meeting. Pasqual testified that he attended a UFW meeting in June, 1975, in Ramos' house at which meeting he received an authorization card. He also testified that persons present were asked to sign a card similar to UFW No. AA. Mary Ramos, the wife of Ramos, credibly testified that a UFW meeting was held in her house in June, 1975, and she identified 23 of the 33 names listed in paragraph 7b of the complaint as being present. Many of them signed authorization cards. There were others whose names were not on the list, who were also present.

Apart from the use of his house for at least one organizational meeting, the participation of Ramos in the dialogue which ensued at the meeting of his crew called by Bono just prior to the election did a great deal to bolster their morale and incidentally gave the respondent positive notice where Ramos

stood vis-a-vis the Teamsters, the UFW and his employer with respect to his sympathies.

On or about August 9, 1975, the UFW conducted a barbecue get-together and meeting in Murry Park, Porterville. Approximately 25 to 30 persons were present of which about 20 were from the Ramos crew. Valesco testified that he explained the need to elect delegates to the UFW convention and three delegates were elected. The list of persons set forth in Paragraph 7(b) of the complaint was shown to him and he stated that two of the three delegates, Ragudo and John Ramos, were on the list.

Gonzalo, a farm worker since 1933, started to work at the Kaplan ranch in 1972 and had previously worked in Ramos' crews at other ranches. He has been a UFW member since 1970 and he testified that he attended the Ramos' house meeting in June and the August barbecue at which delegates to the UFW Fresno convention were elected. The following day while in the Kaplan fields, Berra asked him how the barbecue went and who were elected delegates but Gonzalo didn't identify them.

Ragudo also testified that he attended the barbecue at Murry Park and that the next day Berra said: "Good morning boys, how was the barbecue yesterday?" Ragudo answered: "Fine, boss." Berra was laughing and although he spoke to all present, it was Ragudo who answered him. This occurred at 7 A.M. when work was about to start and the entire crew was present.

Berra denied he had any knowledge in 1975 of the barbecue.

5. The Election and the Morning Thereafter.

Following the closing of the polls, the Board agent and the observers from the UFW and the Teamsters left the premises and counted the ballots that evening. Patricio Salazar, a short term employee of Kaplan, acted as one of the two observers for the UFW and testified that the ALRB agents put all of the ballots in boxes and sealed them. They were finally counted in a motel room on Highway 99 rented by a Board agent and the tally was concluded close to 9 P.M. that evening. He went to the UFW office and he spoke to someone there about the results. He then informed Ramos and other members of the crew of the results the following morning, September 12. He arrived on the work site about 15 minutes before starting time and left his car about 10 minutes later. Some of the workers then asked him about the election results. He saw Berra arrive before work was started.

Gonzalo testified that he usually starts working about 6 A.M. in September and because it was his practice to arrive about one half hour early he sets his arrival time at 5:30 A.M. He then parked his car and went to his work station. Ramos and Ragudo were there at the end of the rows, waiting to start work. Before they started to work he heard Berra say, "Now, are you happy that the UFW won?" Berra said something to the effect that he was blaming them as leaders of the people to get them to vote for the UFW. At that point Ramos said: "How come you blame us. There are three crews working in this company."

Jacinto testified he went to work about 5:30 A.M. and he heard Berra say: "Are you satisfied, Boys?" He was talking to everyone. No one said anything. Ramos, Ragudo, Gonzalo were present together with about 30 workers.

Jacinto described Berra's face when he spoke as being a little bit different, but not too much, "it wasn't the same as his regular face. Berra remained at the location about one hour but Jacinto didn't see if he talked to anyone because he was in the field.

Ramos' version of what occurred that morning was that he met Berra before the start of work and Berra said: "Good morning, boys. Are you happy you won the election?" Berra then said he blamed Steve and him for the election results. Up to that time Ramos had been unaware of the election results.

Ramos executed an affidavit sworn to the 5th day of February, 1976, for the ALRB agent and the same was entered in evidence as R. No. B. On Page 7 and 8 of the same, the following is set forth: "The day after the election Berra was asking us if we were happy that the UFW won. I did not respond as I had not voted."

Ragudo described Berra's voice as being kind of mad and disgusted and said his lips trembled with anger.

Ragudo furnished a Board agent with an undated statement entered in evidence as R. No. C. Paragraph No. 4 therein reads as follows:

"The day following the election in the morning before work started I just picked a box to go pick grapes in the field on Ave. 112 close to 208 when Berra asked Sylvester and I in a trembling voice that you are glad you won now the election. I said why do you blame us there are three crews in here. He drove away in his pick-up without answering."

Berra testified that the conduct of the elections made him angry a bit that day and he remained angry into the next day (September 12) and he found out the results of the election in mid-morning. He spoke to the crews, including the members of the Ramos' crew but he couldn't recall what he said. On cross examination he stated that he said nothing about the results of the election.

Bono also testified that he learned of the election results in mid morning.

6. The Certification of the UFW

The tally of ballots cast in the representation election showed that the UFW had won. The employer filed objections subsequent to September 17, 1975. They were technically defective for reasons set forth in a letter dated December 5, 1975 (G.C. No. 9) The employer was given an additional week to file "procedurally correct objections." The refiled objections were again untimely filed and they were dismissed. An Order of Dismissal was then entered and served. (G.C. No. 7). On January 2, 1976 the Board's Regional Counsel advised A. A. Caplan & Associates, Kaplan's labor adviser and negotiator that they had not filed a request

for review and Kaplan was advised it had three days to file an appeal from the Regional Director's dismissal of the Petition." (G.C. No. 8). By letter dated January 12, 1976, the Regional Director informed the UFW and the respondent that because the latter had not appealed from the dismissal of the Employer's Petition on Objections and in that the Board had previously dismissed the Teamster's Petition of Objections and in view of the fact that no objections were filed to the Regional Director's Report on Challenged Ballots which disposed of challenges to certain voters, the challenges were therefore insufficient to affect the outcome of the election. The Regional Director issued the Certification of Representatives certifying the UFW as the exclusive representative for Kaplan's agricultural employees employed in Kern and Tulare Counties. (G.C. Exh. Nos. 10 and 11),

7. The Motivation of the Respondent with Respect to the Discharge of Ramos and the Termination of the Employment of the Members of His Crew.

Briefly, respondent contends that Ramos was discharged only for business reasons and that the discharge was not discriminatorily motivated, that is, it was not motivated by an anti-union purpose as to Ramos and his crew. Custom and practice dictated that the discharge of Ramos automatically worked a discharge of the crew.

Although the respondent maintains that Ramos was a poor crew boss in that he failed to supervise his crew properly, it never asserted that the crew itself was not competent.

On the contrary Bono, Sr., who was in charge of quality

control during the harvest season, testified that the other crews were not better than those of Ramos, only that they had better supervision. At another point in his testimony he remarked that the crew was capable - "only lousy supervision."

Gonzalo testified that during the 1976 harvest while picking Emperor grapes, he heard Berra remark that "there was no crew better than the Ramos' crew."

Bono testified that Berra and he both talked to Regaspi before he was hired as the crew boss to replace Ramos. Although Bono said that he never discussed with Regaspi as to who he could or could not hire, he probably had told Regaspi that he had been satisfied with the Ramos' crew.

Kaplan argues that its gripe was with Ramos' failure to carry out his duties as a supervisor, that is, that he was deficient in maintaining quality control. The crew was competent, but Kaplan maintained that Ramos was not.

The respondent vigorously maintains that Ramos was discharged only because he was a poor supervisor who adversely affected its business and that neither the discharge of Ramos nor the termination of the crew's employment was discriminatorially motivated.

Bono Sr. testified that in 1973 Ramos did a good job but his work deteriorated in 1974 and showed no improvement in 1975. Berra stated that he had received instructions in 1974 and 1975 that he should discharge Ramos and in 1974 he talked Bono into keeping Ramos on. Because of Ramos, inability to properly

supervise his crew, Berra testified that in 1975 he had warned Ramos in the presence of Bono, Sr., that he would have to let him go if he didn't straighten out.

Berra also stated that he never knew Ramos belonged to the UFW. Ramos never showed him a union card or told Berra he was a member.

Berra attributed the poor quality of the grapes picked by the Ramos' crew to the fact that Ramos, instead of devoting himself to supervision, engaged in picking grapes and therefore was not in a position to watch the crew and the quality of the grapes they were picking. Berra said he observed Ramos picking grapes about 24 times. In general, Berra testified that Ramos' work performance became progressively worse in 1975 and was decidedly poorer than that of the other crew bosses.

The thrust of this testimony to the effect that Ramos often picked grapes with his family who were members of his crew, was countered by testimony of crew members who denied the same.

With respect to most varieties of grapes, wages were calculated on the basis of an hourly rate plus a piece rate. The crew received their hourly rate plus 25 cents per box and the crew boss received his hourly rate plus 3 cents for every box picked by his crew members. Because the workers pooled their wages for the purpose of computing piece rates and bonuses, it is difficult to conceive how Ramos could have substantially bettered his earnings by picking or pruning with his family.

Then, too, the work of picking was extremely arduous and hardly preferable to supervising. Bono, Sr., testified that "going under vines is hard work" and he wouldn't do it.

Bono and Bono, Sr. joined Berra in criticizing Ramos' work as a supervisor. Bono said that Ramos, when told that his work during the harvest season was unsatisfactory, usually responded with "I'll do better." Bono, Sr. testified that he warned Ramos in 1975 that if he couldn't improve he would be discharged.

Manual Fuentes, a member of Ramos' crew, testified that after the election Bono and Berra stepped up the frequency of their examinations of the packed boxes and instead of the former practice of permitting or requiring the pickers to reconstitute "bad" boxes by replacing rotten or off color grapes, the contents of the boxes would be thrown to the ground. Gonzalo related one such incident which occurred in October, 1975, when Bono dumped an entire box which he had packed.

In support of respondent's contentions that Ramos' performance as a crew boss was far below par, certain sales and other related documents were introduced in evidence which purported to show that Kaplan sustained monetary loss because customers rejected shipments or secured substantial downward adjustments in the sales prices due to the inferior quality of grapes picked by Ramos' crew.

The method of proof in each instance was substantially the same. The origin of the grapes in question was traced to

Ramos through field memos (R. No. H-1), storage receipts (R. No. H-2), pallet cards (R. No. H-3), memos (R. No. H-4), and manifests (R. No. H-5).

Most shipments went from the Mountain View Cold Storage to the Los Angeles store warehouse of Kaplans and then to the customers, but some were sent from the Mountain View directly to the customers.

Bono testified that as a rule boxes are not checked when they are shipped to a customer. However, if one box contains rotten grapes or grapes not up to specifications, all other boxes in that lot are promptly checked.

He stated that he had segregated 19 such problem situations of which 10 were not traceable, one was not attributed to Ramos and eight concerned grapes picked by Ramos' crew.

Nine series of exhibits relating to sales to customers of "bad" grapes picked and packed by Ramos' crew or allegedly to have been so picked and packed, were offered in evidence.

The first was a sale in November, 1975, of 40 boxes of Italias to Fedco. The exhibit series was marked as R. No. I. The price was reduced to \$1.00 per box. The original shipment covered a lot of 360 boxes. There is no evidence that other customers who purchased the balance of 320 boxes complained or that they paid less than the then prevailing market price.

The second was a document marked R. No. J for identification. It was not admitted in evidence because it was prepared in May, 1977, and was not kept in the regular course of business

The third was a sale in October, 1975, of 1350 boxes of Thompson seedless at \$4.75 per box to Market Basket. The shipment was returned because of poor quality. The boxes were later resold for an average price of \$1.27 per box (R. No. K).

The fourth was a sale of 400 boxes to Lucky Stores of Emperors at \$4.00 per box. The customer received a price reduction of \$.50 per box. There was no testimony by Lucky as to the reason for the allowance (R. No. M series).

The fifth was a sale of Almerias in December, 1975, to Lucky Stores. This shipment was rejected (R. No. N series).

The sixth was a sale in December, 1975, of 100 boxes of Italias to Vernon Meat Land at a price below the prevailing market price (R. No. O series).

The seventh was a sale of 81 boxes of Italias and 63 boxes of Thompson Seedless to Vernon Meat Land in December, 1975, at \$1.00 per box, a price obviously far below the then prevailing wholesale market price (R. No. P series).

The eighth was a sale of 60 boxes of Almerias to Tom Nakamura. The driver noted that the customer rejected the grapes because he did not like them. The entire lot consisted of 270 boxes and the balance of 210 boxes were sold for \$4.50 per box. The exhibits relating to this transaction were originally marked as R. No. Q for identification but were offered by General Counsel and marked G.C. No. 17 in evidence.

The ninth was a sale of 720 boxes of Almerias in December, 1975 to Alien Corin. The shipping memo referred to "Kapko",

the second quality Kaplan label whereas the pallet cards described them as "Vine King", Kaplan's first quality label. The exhibit series was marked R for identification and General Counsel offered them in evidence and it was marked as G.C. No. 18

8. The Discharge of Ramos and his Crew.

In December, 1975, Ramos' crew was engaged in pruning operations and payrolls of December 5, 12, 19 and 22 (G.C. Nos.4/ 3A, 3B, 3C) list the employees on these payrolls.^{4/}

All of the crews and their respective crew bosses were laid off on December 22 and Ramos was told by Berra to return on January 3, 1976. Layoffs during these holiday periods were customary.

fn 4. The name of Agapito Andres appears on the payroll for November 30, 1975, but not on the December, 1975 payrolls. He testified that he worked in Ramos' crew that month but used the name of his daughter Zenida Andres. Her name appears on the December, 1975 Ramos' crews' payrolls.

The name of Angel Jacinto appears on the November 20, 1975 payroll but not on the December, 1975 payrolls. He testified that he worked in Ramos' crew in December, 1975, but used the name of his uncle Pablo Asuncion. The latter's name appears on the December 5 and 19, 1975 payrolls. Jacinto received pay checks payable to Pablo Asuncion.

Steve Ragudo's name appears on the November 20, 1975 but not on the December, 1976 payrolls. He testified that he worked in December, 1975 in Ramos' crew but that he and John Ramos were partners in pruning and the latter's pay checks covered the vines Ramos and he pruned.

Ramos testified that because he hadn't heard from Berra, he telephoned him on January 2 about going back to work. Berra told Ramos that Bono had decided that only one crew would finish the pruning so he was not needed but if he had any questions he should call Bono.

Ramos said he called Bono who complained about the rotten grapes his crew picked and said he would call Ramos the following Saturday. The conversation lasted about ten minutes and a great part of the conversation was devoted by Ramos to the defense of his crew. On the following Monday, Ramos found out that Regaspi had been hired. Bono did not telephone Ramos.

Bono's version of what occurred didn't differ too greatly from Ramos' as to the contents of the conversation except that Bono testified that it took place in his office and not over a telephone.

Ramos testified that later in 1976 he again approached Berra and Bono for employment but he received inconclusive answers. They denied any such conversations.

Raguda said that on January 3, 1976 he learned that only one crew would complete the pruning operation. When Ramos told Ragudo that he had been discharged he did not give him the reason for the same but thereafter he did say that it may have been for union activities in that he favored Chavez.

Ramos stated that in a telephone conversation with Bono he asked him whether members of his family could be hired and

specifically as to Ragudo and Severo Pascual. Bono told him that workers like Ragudo and Pascual could go back to work for Kaplan any time.

Gonzalo said that on January 6, Ramos told him that Kaplan had hired a new crew boss. He later applied for employment at Kaplans and had been rehired. He also testified that during the harvest season, 1976, while he was picking Emperors, Berra remarked to him that there is no crew better than Ramos' crew.

Andres testified that he was hired after he applied for employment. Ignacio Robles said that he was hired by Berra in 1976.

No evidence was adduced that any former member of Ramos' crew was denied employment if application for work had been made.

Mary Ramos, the wife of Ramos, testified that she had worked in her husband's crew in 1974 and 1975. A long standing member of the UFW, she attended the June meeting in her home at which UFW authorization cards were signed. She checked off 23 names of the 33 in paragraph 7(b) of the complaint as having been present at that meeting.

Many members of the crew contacted her when they had not been recalled and she informed them that her husband was no longer a crew boss because of Kaplan's dissatisfaction with his work in that the crew had picked rotten grapes. However, when she had a conversation with her husband shortly

thereafter, her husband told her he thought the real reason Bono fired him was because of his union activities. During the years while working in her husband's crew she heard Berra criticize him because of the way members of the crew were working. The frequency of such criticisms varied from once a week to twice a day. More infrequently she heard commendations from Berra, such as, "I didn't think we could get so much out of this block."

The unfair labor charge. (G. C. No. 1A) was filed by the UFW on January 13, 1976 and was served on the respondent on January 12, 1976. As of that time Kaplan knew of the nature of the charge but no effort was made to recruit or advise the discharged crew members that they could return or apply for employment.

9. The Hiring of Regaspi.

Regaspi was hired as a crew member on January 6 to replace Ramos. Prior thereto, Regaspi had never worked as a crew boss for Kaplan or any other employer. He had been employed as an agricultural worker in 1974 and 1975 by Konda Bros, and Jack Zaninovich. He couldn't remember where and for whom he worked in 1973. Although he stated he worked for Kaplan before 1976 in a non-supervisory capacity, he couldn't place the time.

Berra contacted him by phone about working as a crew boss for Kaplan. Berra did not ask him if he had previously

worked as a crew boss but inquired whether he knew how to prune, keep time records and make payrolls. Berra told him to call Bono to get instructions as to what was to be done in the fields and Regaspi called Bono that same evening. Bono told him to meet him at the ranch the following day and also asked him as to his knowledge of time keeping and pruning. He was not asked if he had ever worked as a crew boss before.

Berra had told Regaspi to look for a crew of 15 but he couldn't find that many. The witness seemed confused and his memory was vague but by reason of testimony of others, it would appear that Regaspi was contacted and hired on January 6. He had been a member of the UFW at one time and he had joined the Teamsters in 1974 or 1975 because Konda Bros, and Jack Zaninovich "were with the Teamsters".

Regaspi testified that neither Bono nor Berra told him who to hire or not hire or to hire from a particular source.

Regaspi was questioned as to each of the workers in his crew as of the time he commenced working at Kaplans. A fair number of the 23 named individuals were recruited by Regaspi, yet the former members of Ramos' crew were never contacted by him. Furthermore, a number of the individuals who were hired during the first payroll periods had worked for Konda Bros. or Jack Zaninovich and may have been members of the Teamsters.

Bono testified that although he never discussed with Regaspi who he could or could not hire, he probably told him he

was satisfied with Ramos' crew. Bono did not furnish Regaspi with their names and addresses.

An examination of the payrolls discloses the following:

G. C. No. 5 contains among other data, the first three payrolls for the Regaspi crew for the pay periods ending January 8, 15 and February (?), 1976. The payroll period ending January 8 shows work days on January 7 and January 8. Eleven employees worked on January 7. None of their names appear on the December, 1975 payroll records of Ramos' crew. Thirteen employees worked on January 8. None of their names appear on the December, 1975 payroll records of Ramos' crew.

The same holds true for the 15 names appearing on the payroll records for the week ending January 15 and the 19 names on the February (?) payroll records. Thus, none of the allegedly discharged employees worked for Regaspi in the pruning operation.

Of the 33 names of the allegedly discharged employees, 10 appear on the 1976 Regaspi crew payrolls: (R. No. F-1); two on the 1976 Santiago payrolls and two on the 1976 Macabalin payrolls. There is some duplication of names appearing on two crew bosses' payrolls.

On April 20, 1977, respondent mailed letters to the 33 former employees advising each of them that they had not been discharged and that they "will be put back to work at such time as work becomes available for this coming season" and that they

should report to a crew boss as to their availability.

Letters addressed to Fuentes, Pablo Aguilar, Manuel Miguez and Guillermo Savala were returned "addressee unknown". Miguez and Savala had, however, worked for Kaplan in 1976.

II. ANALYSIS AND CONCLUSIONS

The issues in this case are those raised by the respondent when it denied the allegations set forth in Paragraphs 7(a) and amended Paragraph 7(b) of the complaint all as set forth previously in this decision under the heading: "B. The Alleged Unfair Labor Practices and the Pleadings."

Ramos, a supervisor within the meaning of Section 1140.4 (j) of the Act, was the crew boss of the 32 employees listed in Paragraph 7(b), as amended. As a crew boss, in accordance with the custom and practice in the industry including Kaplan, his discharge on or about January 3, 1976, automatically worked a discharge of the members of his crew.

The respondent contends that the discharge of Ramos was solely the result of a business decision predicated on its determination that Ramos was an inadequate supervisor who failed to maintain that degree of quality control which constituted the major part of his duties.

General Counsel argues that even if Ramos were an inadequate supervisor, his discharge would still be discriminatory "if motivated by a dominant anti-union animus or that in

the absence of his union activities or the union activities of the members of his crew, he and they would not have been discharged. General Counsel maintains the action of the respondent in discharging Ramos was a pretext to effect the termination of employment of the 32 pro-UFW crew members and was motivated for the purpose of discouraging membership in the UFW and penalizing them for engaging in protected activities.

The pertinent sections of the Act are as follows:

1152. "Employees shall have the right of self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all of such activities ..."
1153. "It shall be an unfair labor practice for an agricultural employer to do any of the following:
- (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.
 - (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

Section 1148 provides for the use of applicable MLRB precedent and references will be made in this decision to them. Section 1152 parallels Section 7 of the NLRA, Section 1153 (a) and (c) tracks Section 8 (a) (1) and 8 (a) (3) of the NLRA.

In Rohr Industries, Inc., 220 NLRB No. 162, 90 LRRM 1541 (1975) the Board affirmed the rulings, findings and conclusions of the ALJ without modification. At page 1035, 1936, he summarized the law as it relates to discriminatory

treatment directed against supervisors as follows:

"The national Labor Relations Act, through Sections 2 (3) and (11) and 14(a) specifically withholds from supervisors the comprehensive protection which it provides for employees, statutorily defined. Nevertheless, this Board has held with judicial concurrence that a respondent employer's conduct which prejudiciously or detrimentally affects supervisors' interests may constitute a proscribed unfair labor practice where it directly infringes on certain statutorily guaranteed rights of employees. For example: The Board has held that concerned employers may not lawfully discharge... supervisors...because such conduct would provide a pretext for the termination of rank and file participants in concerted activity for mutual aid or protection.With respect to discharges of supervisors calculated to provide their employer with a pretext for employee terminations, see *Pioneer Drilling Co.*, 162 NLRB 918, 923-924 (1967), enfd. as modified 391 F. 2d 961, 962-963 (C.A. 10, 1968); *Krebs v. King Toyota, Inc.*, 197 NLRB 462, 463, fn 4. Board and Court decisions in these cases, have been bottomed primarily upon the proposition, inter alia, that discriminatory treatment against supervisors would likely generate fears within the concerned employer's rank and file worker complement that like conduct by them would lead to some like retaliation. However, discharges or discipline directed against supervisors have likewise been found subject to statutory proscription because such conduct persuasively demonstrates the concerned employer's determination to forestall or combat unionization, thus calculatedly interfering with, restraining and coercing employees with respect to their exercise of rights statutorily guaranteed. See *Fairview Nursing Home*, 202 NLRB 318 (1973), fn 2; *Hecks, Inc.*, 170 NLRB 178, 184 (1968), fn 8 in this connection."

In *Krebs v. King Toyota*, supra, NLRB Board Member Kennedy dissented in part but he did approve the rationale used by the ALJ in *Rohr Industries, Inc.*, quoted above. Board Member Kennedy stated that he agreed with the majority decision except that part which found that the discharge of Supervisor Gallenz violated Section 8(a)(1) of the Act. He went on to say:

"It is well established that the discharge of a supervisor for engaging in union activities is not unlawful (citing cases). However, in certain circumstances the Board and

the courts have found that the discharge of a supervisor is violative of Section 8 (a)(1) of the Act where it interferes with, restrains, or coerces rank-and-file employees in the employment of their rights secured under the statute.. Thus an employer has been found to have violated Section 8 (a)(1) by discharging a supervisor because ... the employment of the rank-and-file employees was dependent on the employment of the supervisor and the employer discharged the supervisor not because of his own pro-union activities but in order to get at the pro-union rank-and-file employees." (citing Pioneer Drilling Co., Inc. v. NLRB, 291 F. 2d 961, 67 LRRM 2956 (C.A. 10).

In Pioneer Drilling Co., Inc., supra, the employer's conduct was motivated, not by the pro-union activities of the supervisors-drillers but by that of the rank-and-file employees. The supervisors became not the object but the conduit for the employer's unlawful acts. See also Russell Stover Candies v. NLRB, 94 LRRM 3036, (C.A. 8, 1977). Leatherwood Drilling Co., 180 NLRB No. 141; 73 LRRM 1327 (1920), on which respondent relies is actually consistent with the rationale enunciated in Pioneer Drilling.

Pioneer Drilling Co., Inc. vs. NLRB, supra, is almost on all four with the case at bar. There, too, the discharge of the driller-supervisor automatically worked a discharge of his crew. This was the industry practice just as it is in the grape growing industry, which includes Kaplan. The discharge of a crew boss means the automatic discharge of his crew. The presence or absence of union activities on the part of the supervisor is irrelevant where the employer's target is the protected union activities of his non-supervisory employees. The supervisor, read crew boss, may be a mere conduit, and the discharge of Ramos only a pretext to weaken the UFW by discharging a strong

UFW crew. This would chill union activities among respondent's employees and most important, adversely affect the bargaining strength of the UFW in the collective bargaining process.

Bono testified that on or about November 18, 1975, Mr. Caplan, respondent's labor adviser, told him that he had no doubt that the UFW would be certified and he formed the same opinion. After September 11, 1975 and before January 6, 1976, Bono never considered that anything could be done to change the results.

The implication is clear. Sooner or later the respondent would have to bargain in good faith with the UFW and a mass discharge would be demoralizing and would sap the strength of the union. However, it would be necessary to prove that Kaplan's motivation in discharging Ramos was to interfere with the crew members' Section 1152 rights. In a real sense, the target would not be confined to the Ramos' crew members, but would extend to all agricultural employees at Kaplan's, because its discriminatory motives would have a chilling effect on all of them.

Labor Code Section 1140.4(j) adopts virtually the same definition for the term "supervisor" as is contained in Section 2(11) of the NLRA.

Although, generally speaking, a supervisor may be discharged with or without cause or reason subject to restrictions, many of which are set forth in Rohr Industries, Inc., Supra,

there can be no question that an employer can discharge a supervisor who engages in prohibited conduct set forth in Sections 1153 (a), (b) and (c) of the Act. This would include the supervisor's active participation in an organizing drive on behalf of one union in a "two union", "no union" situation. This is conceded by General Counsel in his brief and he rightly states that respondent at no time contended that Ramos was discharged for engaging in such pro-UFW activities. Thus, the distinctions General Counsel seeks to draw between a supervisor's activities on, and his activities off the job, or between voluntary and involuntary pro-UFW activities by the Ramos' crew members are without merit but in any event, they are moot because Kaplan has never stated that the reasons for discharging Ramos were other than that he was a poor supervisor.

Kaplan's discriminatory intent or motive as to the members of Ramos' crew is one of the prime issues in the case. It is axiomatic that Section 1153 (c) of the Act did not limit respondent's right to discharge Ramos for economic reason or for no reason at all, provided that such discharge was not a pretext to discharge the members of Ramos' crew because it wanted to discriminate against them in regard to tenure of employment in order to discourage membership in the UFW. A wholesale discharge, even if the employees could return to work on application, could be deemed to discourage membership in the UFW. So, too, a weakening of the UFW as the agent for the agricultural employees for purposes of collective bargaining

could likewise be deemed to discourage membership in that labor organization.

Even if Kaplan had a lawful (economic or business) reason for discharging Ramos, this would not entitle the respondent to do so if a true and substantial intent or motive were the destruction or weakening of the employees' union, the UFW, or discouraging the employees from engaging in other activities protected by law.

The instant case, by and large, turns on whether Ramos was discharged solely because of economic reasons in that he failed to carry out his job duties as a crew boss by not maintaining the necessary quality control over his crew or because a substantial reason for the discharge of Ramos was due to the union animus of Kaplan seeking to rid itself of the Ramos pro-UFW crew, chill union activities and handicap the UFW in the exercise of its functions as a labor organization.

It has been said that "business" or "economic" justification is only another label for a specific type of motive. The law is not too clear as to the quantum of anti-union animus which need be shown and one circuit has held that if improper motive contributed in some part, that is sufficient, S.A. Healy Co. v. NLRB, 435 P.2d 314 (C.A. 10, 1970), and circumstantial as well as direct evidence may be relied on. Lapeer Metal Products, Co., 134 NLRB 1518, 49 LRRM 1380 (1961). The quantum of the anti-union motive or animus must be dominant or controlling, NLRB v. Circle Bindery, Inc., 536 F2d 447, 92 LRRM 2689 (C.A. 1, 1976); the general rule however, is that

it must be "a factor" in the employer's decision. Neptune Water Meter Co. v. NLRB, F. 2d , 94 LRRM 2513 (C.A. 4, 1976).

An affirmative showing of the employer's unlawful motivation is necessary in order to establish a Section 8 (a)(3) violation, unless the employer's conduct is inherently destructive of Section 7 rights, or serves no substantial business end and has a comparatively slight adverse effect on employees rights NLRB v. Great Dane Trailers, Inc., 388 US 26 (1967).

There is no need to retrace the testimony adduced at the hearing and the exhibits put in evidence. On review it would appear certain essential findings of fact have been made. Kaplan is a Section 1140(c) agricultural employer, the UFW is a Section 1140.4 (f) labor organization, Bono, Berra, Bono Sr., and the crew bosses are Section 1140.4 (j) supervisors. Bono and Berra hire the crew bosses and they in turn hire their respective crew members who are Section 1140.4(b) agricultural employees. Crew members are automatically discharged if their crew boss is fired or quits in which event they must apply to crew boss for employment if they desire to work again for Kaplan. The work is seasonal for both the crew bosses and the crew members. Picking and packing grapes is the longest seasonal occupation and Ramos has seniority among the three crew bosses having been initially employed in early 1972.

The UFW and Kaplan were parties to a three year collective bargaining agreement which expired on April 14, 1973.

During this period there was at least one occasion involving the failure or refusal of the UFW to provide sufficient help and thus caused some friction between the UFW and Kaplan.

Following the expiration of the contract, the UFW conducted mass picketing on an intermittent basis for approximately two years. Rock throwing, broken windshields, flat tires and name calling fueled the antagonisms of the respondent to the UFW.

The UFW then entered on an organizational drive which culminated in a representation election held on September 11, 1975.

There was credible testimony that during this period, organizers from both the Teamsters and the UFW entered on the property of the respondent.

Prior to the election, Berra at the request of Bono released Ramos' crew during work hours to listen to Bono who, after identifying himself as a long time Teamster member, urged the workers to vote for the Teamsters. He contrasted the Teamsters who obtained "good benefits" for their members to the UFW which did not provide "good benefits." Ramos took issue with Bono and cited the case of Ragudo who had been operated in both eyes at the expense of the UFW. Bono's talk was a privileged lawful exercise of free speech. Ramos, Ragudo, Gonzalo and Jacinto credibly confirmed that Bono urged the employees to vote for the Teamsters. Bono admitted he

addressed the crew but said he had urged the employees to vote "no union". I find Bono's testimony in this respect not credible

Ramos actively participated in the UFW's drive for certification, attended UFW meetings and permitted his home to be used on one occasion when authorization cards were distributed for signatures. Peter Velasco, a UFW organizer, testified that the strongest pro-UFW crew among the three was that of Ramos.

About August 9, 1975 the UFW ran a combination barbecue/ meeting at Murry Park, Porterville, at which time a three man delegation was elected to attend the UFW's forthcoming convention to be held in Fresno. Two of the three delegates were Ragudo and John Ramos, both members of Ramos' crew.

Testimony was given by Sam Gonzalo that on the morning following the barbecue, Berra inquired as to how the barbecue went and who were elected delegates. Ragudo also testified that Berra asked about the barbecue.

Berra denied that he had any knowledge about the barbecue in 1975. I find that Gonzalo was a credible witness and that this incident is proof that respondent was aware of the involvement of its employees and particularly the members of Ramos' crew in UFW activities. In light of the open stand taken by Ramos during the Bono speech and the fact that Berra had advance knowledge of the barbecue and that delegates to the UFW convention would be elected there, it is a fair inference that Kaplan had knowledge of the pro-UFW activities of the members

of the Ramos crew.

The antipathy of the respondent to Ramos and his crew for their pro-UFW activity is illustrated by the events which occurred in the early morning hours of September 12, the day following the one on which the representation election was held.

The credible testimony of various witnesses described an angry Berra blaming Ramos and Ragudo for the UFWs election victory. Berra, on cross examination stated that he had said nothing about the results of the election. He also testified that he did not learn of the results of the election till mid-morning of that day. In light of the tension which is always created among interested parties, it is incredible that Berra would wait until mid-morning to learn the election results. I find Berra's denial of the language attributed him not credible

The forgoing is further proof that Berra not only knew about the pro-UFW activities of Ramos and his crew but that his behavior that day demonstrated that the subsequent discharge of Ramos and his crew members was discriminatorily motivated.

The hiring of Regaspi as the replacing crew boss for Ramos and the apparent pattern governing the hiring of his crew and the assiduous avoidance of hiring former members of the Ramos crew, fully supports the conclusion that the discharges were at least partly and substantially discriminatorily motivated,,

Regaspi was hired even though he had never held a job as a crew boss prior to that time. In fact he was not asked by

Berra or Bono if he had acted in that capacity before. It is apparent that some one must have filled in Bono and/or Berra as to Regaspi's background and union predilections. He had worked most recently for two ranches, Konda Bros, and Jack Zaninovich which he believed had collective bargaining agreements with the Teamsters. Because Regaspi had no ready crew of his own and he had to acquire a competent crew on one day's notice, it would be most logical to assume that he would contact the former members of the Ramos pruning crew because that was the same kind of work that Regaspi was scheduled to do at that time. His failure to do so indicates an anti-union animus.

Bono testified that although he never discussed with Regaspi who he could or could not hire, he probably told Regaspi that he was satisfied with the Ramos crew. He said he did not furnish Regaspi with their names and addresses.

Regaspi hired many of his crew by contacting them rather than the reverse. Many of the hires had worked for Konda Bros, and Jack Zaninovich. On the other hand, while ten out of the 32 former members of the Ramos crew were hired in 1976 by Regaspi, none were hired during the first three Regaspi payroll periods. This circumstantial evidence overwhelmingly demonstrates that the discharge of Ramos was substantially motivated by a desire to retaliate against the Ramos crew members for their pro-UFW activities, discourage membership in the UFW and weaken it as an effective collective bargaining agent.

Turning to respondent's defense that Ramos was discharged solely for business reasons and that the consequent terminations of his crew were in accordance with custom and practice, I note that the criticism of Ramos by Bono, Bono Sr., and Berra accelerated after the September 11 election. The nine incidents involving sales also occurred in this period. Rather than again analyzing the evidence and the documents, it is apparent that some of the gripes in question could not definitely be traced to the Ramos crew. Also the total quantity involved in the sales were minimal compared to the tens of thousands picked by the Ramos crew in the harvest season. Again the evidence as to the quality of the grapes in most instances was of a hearsay variety and no customer testified as to the quality of the grapes which it rejected or on which it received a price reduction. Further, damage to the grapes could have occurred after they left the fields but even assuming that there was some justification for dissatisfaction with Ramos' performance as a crew boss, that would not preclude a finding that there was substantial evidence that the Ramos crew members were discharged through the mechanism of discharging Ramos, because they had engaged in pro-UFW activities.

I find that there is substantial credible probative evidence that the 32 individuals listed in paragraph 76 of the complaint as amended was discriminatorially motivated and constituted unfair labor practices within the meaning of Sections 1153 (c) and (a) of the Act.

I find that there is substantial credible probative evidence that the discharge of Ramos constituted an unfair labor practice within the meaning of Section 1153 (a) of the Act.

The fact that Ramos at the time of his discharge did not assign any reason for it other than that he was told that it was because of respondent's dissatisfaction with his work as a supervisor and therefore he assumed this was so, would not preclude him from concluding at a later time that the discharge was motivated by anti-UFW reasons. Mary Ramos testified that within a matter of a few days he viewed the reason for his discharge in a new light. Her testimony was credible and was substantiated by the filing of the unfair labor charge on January 13, 1976.

Reference has been heretofore made in fn. 4 to the testimony of Andres, Jacinto and Ragudo regarding the fact that their names did not appear on the December, 1975 payroll records even though they worked before and during that month. In Valdora Produce Co., 3 ALRB No. 8, p. 4, the Board stated, "The Regional Director noted that it is common practice in agricultural employment for one family member to receive in his or her name the paycheck representing the cumulative efforts of two or more family members."

The hiring of Regaspi and the manner in which he hired his crew fully demonstrates the discriminatory motivation of the respondent towards the Ramos crew and the UFW.

CONCLUSIONS OF LAW

1. Respondent is an agricultural employer within the meaning of Section 1440.4 (c) of the Act.

2. The UFW is a labor organization within the meaning of Section 1140.4 (f) of the Act.

3. The 32 employees of the respondent whose names are listed in Paragraph 7(b) of the complaint, as amended, are agricultural employees within the meaning of Section 1140.4(b) of the Act.

4. The respondent has engaged in unfair labor practices within the meaning of Sections 1153(c) and (a) of the Act by discharging on January 3, 1976, the 32 employees listed in Paragraph 7(b) of the complaint, as amended.

5. The respondent has engaged in unfair labor practices within the meaning of Section 1153(a) of the Act by discharging Silvestre Ramos on January 3, 1976.

6. The respondent has interfered with, restrained and coerced its agricultural employees in the exercise of their rights guaranteed in Section 1152 of the Act in that it has engaged in unfair labor practices within the meaning of Sections 1153(a) and (c) of the Act by discharging on January 3, 1976 the 32 employees listed in Paragraph 7(b) of the complaint, as amended, and by discharging Silvestre Ramos on January 3, 1976

THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices in violation of Sections 1153 (a) and (c) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to the provisions of Section 1160.3 of the Labor Code, I hereby issue the following recommended:

ORDER

The respondent Kaplan Fruit and Produce Co., Inc., also known as Kaplan Ranch, its officers, partners, agents, successors and assigns, shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement the type of which is authorized by Section 1153(c) of the Act.

(b) Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging, laying off, refusing to hire, or in any other manner discriminating against individuals in regard to their hire or tenure of employment, or any term or condition of employment, except as authorized by Section 1153 (c) of the Act.

2. Take the following affirmative action:

(a) Offer to the 33 employees listed at the foot of this order in an Appendix A which Appendix shall be deemed to be incorporated into this Order by reference, immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges and without regard to any terms, conditions, or restrictions contained in a letter dated April 20, 1977 from respondent to each of these employees, and to make them whole for losses they may have suffered as a result of their terminations by payment to them of a sum of money equal to the wages they each would have earned from the date each of them would have been recalled had they not have been discharged on January 3, 1977, to the date on which each of them was reinstated or April 20, 1977, which ever is later, less their respective net earnings, together with interest thereon at the rate of 7% per annum, such back pay to be computed in accordance with the formula adopted by the Board in Sunny-side Nurseries, Inc., 3 ALRB No. 42 (1977).

(b) Offer Silvestre Ramos immediate and full reinstatement to his former or equivalent job as crew boss, without prejudice to his seniority or other rights and privileges and

to make him whole for losses he may have suffered as a result of his termination by paying to him a sum equal to wage(including bonuses) he would have earned from January 3, 1976 to the date of reinstatement. In determining back pay he shall receive a sum equivalent to the highest daily wage received by any crew boss, from January 3, 1976 to the date of reinstatement, less his respective net earnings, together with interest thereon at the rate of 7% per annum, such back pay shall be computed as set forth above as the same may be modified by the formula adopted by the Board in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay due to the foregoing named employees.

(d) Mail, post and read the attached notice which is to be in English, Ilicano and Spanish languages, to employees in the manner set forth below:

(1) Furnish the regional director for the Delano region, for his or her acceptance, copies of the notice, accurately and appropriately translated.

(2) Mail copies of the notice printed in English, Ilicano and Spanish, to all agricultural employees employed by the respondent in 1975, 1976 and 1977 up to the date of mailing, (The notices are to be mailed to the employees' last known

addresses, or more current addresses if made known to Respondent.) The notice is to be mailed within 20 days from the time respondent initially complies with this decision and order.

(3) Post the notice in one or more prominent places at each of Respondent's ranches, in any area frequented by employees or where other notices are posted by Respondent, for a period of six months following Respondent's initial compliance with this order.


(4) Have the notice read in English, Ilicano and Spanish by a company representative or Board agent to all current employees on company time, and, if the notice is read by a Board agent, afford said agent the opportunity to answer employees' questions concerning the Act.

(5) Furnish such proof as requested by the regional director, or agent, that the notice has been mailed and made known in the required manner.

(6) Give the UFW the names and addresses of all past and current employees who, as set forth above, are to receive the notice,, Give the UFW copies of the notice, as well as make available to the UFW for six months access to located bulletin boards where the notices are posted so as to allow the UFW to post notices and the like.

(7) Notify the regional director of the Delano Regional Office within 20 days from the time respondent initially complies with this decision and order.

Dated: November 16 , 1977


ERNEST FLEISCHMAN
Administrative Law Officer

APPENDIX A

To be incorporated in Paragraph 1(a) of ORDER

Jose Alcantar, Pablo Aguilar, Agapito Andres, Zenaida Andres, Miguel Caballeno, Adelaido Duran Sr., Adelaide Duran Jr., Cesario Duran, Lucy Gonzales Duran, Fortunate Edralin, John Ferrel, Manuel Fuentes, Semion Gonzalo, Manuel Iniguez, Angel Jacinto, Ricardo Lima, Guadalupe Medina, Augustin Mora Jr., Augustin Mora Sr., Jerry Nugui, Severo Pasqual, Reugio Platos, Steve Ragudo, John Ramos, Guillermina Robles, Ignacio Robles, Rudolfo Rodriguez, Felipe Santos, Julian Santos, Jesus Soto, Francisco Villareal, Ben Wall.

APPENDIX B

NOTICE TO EMPLOYEES

After a trial where each side had a chance to present their facts, the Administrative Law Officer of the Agricultural Labor Relations Board found that Kaplan Fruit and Produce Co., Inc. also known as the Kaplan Ranch, violated the Agricultural Labor Relations Act, and has ordered it to notify all its employees employed in 1975, 1976 and up to the date of this notice that the violation will be remedied and that employees' rights will be respected in the future. We will do what has been ordered and also tell you that:

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 choose whom they want to speak for them;
- (4) to act together with other workers to try to get a contract or to help or protect one another;
- (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 OFFER Jose Alcantar, Pablo Aguilar, Agapito Andres, Zenaida Andres, Miguel Caballeno, Adelaide Duran Sr., Adelaide Duran Jr., Cesario Duran, Lucy Gonzales Duran, Fortunate Edralin, John Ferrel, Manuel Fuentes, Semion Gonzalo, Manuel Iniguez, Angel Jacinto, Ricardo Lima, Guadalupe Medina, Augustin Mora Jr., Augustin Mora Sr., Jerry Nugui,

Severo Pasqual, Reugio Platos, Steve Ragudo, John Ramos,
Guillermina Robles, Ignacio Robles, Rudolfo Rodriguez, Felipe
Santos, Julian Santos, Jesus Soto, Francisco Villareal, Ben Wall
and Silvestre Ramos their old jobs back and we will pay each of
them any money they lost because we discharged them.

KAPLAN FRUIT AND PRODUCE CO., INC.
(KAPLAN RANCH)