

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

ASSOCIATED PRODUCE DISTRIBUTORS,	)	
	)	
Respondent,	)	Case Nos. 79-CE-101-SAL
	)	79-CE-102-SAL
and	)	
	)	
UNITED FARM WORKERS OF	)	
AMERICA, AFL-CIO,	)	6 ALRB No. 54
	)	
Charging Party.	)	

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DECISION AND ORDER

On April 30, 1980, Administrative Law Officer (ALO) Leonard M. Tillem issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions and a supporting brief, and General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions<sup>1/</sup> and briefs, and has decided to affirm the rulings, findings<sup>2/</sup> and conclusions of the ALO and

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<sup>1/</sup> Respondent argues that the ALO erred in granting General Counsel's motion to quash the subpoena directed to Marshall Ganz. Our reading of the record indicates that the ALO quashed the subpoena on the ground that the testimony of Ganz was not relevant to the proceeding. Under Section 20250(d) of the Board's Regulations, an ALO may properly quash a subpoena if the testimony sought to be produced does not relate to a question in the proceeding. In addition, Respondent contends that the ALO made gratuitous remarks which indicate his bias towards the union. Respondent has not supported its allegations by citations to the record and our independent review of the record has not disclosed any such comments.

<sup>2/</sup> Although we affirm the ALO's finding that Respondent enabled undocumented workers to return to its employ without undue difficulty after being deported by the INS, we reject his finding that Respondent had established a rule which allowed rehire in such cases only if the employee applied for rehire within three working days.

adopt his recommended Order, as modified herein.

ORDER

By authority of Labor Code Section 1160.3", the Agricultural Labor Relations Board hereby orders that Respondent, Associated Produce Distributors, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or failing or refusing to rehire, any agricultural employee, or otherwise discriminating against any agricultural employee for engaging in union activity.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code Section 1152.

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

(a) Immediately offer Arturo Coriel, Luis Robles, Francisco Ledesma Gutierrez, Valentino Serrano Estrada, Salvador Gomez Hernandez, Jose Gonzales, Preciliano Torres, and Alvaro Aquino Estrada reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges.

(b) Make whole each of the above-named employees for any loss of pay and other economic losses he has suffered as a result of Respondent's discrimination against him, according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(c) Preserve and, upon request, make available to

this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back pay period and the amount of back pay due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

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

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees 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.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved. Dated: October 2, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by discriminating against our employees. The Board has ordered us to post this Notice and to mail it to those who worked for us at anytime between May 1, 1979, and the present. We will do what the Board has ordered and also tell you that the Agricultural Labor Relations Act is a law which gives all farm workers these rights:

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

Because it is true that you have these" rights, 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.

WE WILL NOT discharge, lay off, refuse to rehire, or otherwise discriminate against any employee with respect to his or her hire or tenure of employment because of his or her membership in or activity on- behalf of the UFW or any other labor organization.

WE WILL OFFER Arturo Coriel, Luis Robles, Francisco Ledezma Gonzales, Valentine Serrano Estrada, Salvador Gomez Hernandez, Jose Gonzales, Preciliano Torres, and Alvaro Aquino Estrada their old jobs back and we will pay them any money they lost, plus interest computed at 7 percent per annum, as a result of their discharge.

Dated: ASSOCIATED PRODUCE DISTRIBUTORS

By: \_\_\_\_\_  
Representative Title

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Associated Produce Distributors .  
(UFW)

6 ALRB No. 54  
Case Nos. 79-CE-101-SAL  
79-CE-102-SAL

ALO DECISION

The ALO concluded that Respondent violated Section 1153 (c) and (a) of the Act by refusing to rehire Jose Gonzales, Francisco Ledezma Gutierrez, Arturo Coriel, Luis Robles, Preciliano Torres, Salvador Gomez Hernandez, and Valentine Serrano Estrada because of their support for and activities on behalf of the UFW, and by discriminatorily discharging Alvaro Aquino Estrada because of his union activities.

As an affirmative defense, Respondent argued that the alleged discriminatees were picked up by the Immigration and Naturalization Service (INS) as undocumented workers and that it has a policy of not employing persons without documents. However, the evidence established that Respondent knowingly hired undocumented workers, that at times it warned its employees of impending INS raids, and that it knowingly hired workers who previously had been deported. Accordingly, the ALO found that the reasons advanced by Respondent were pretextual.

Respondent also contended that the knowing employment of undocumented workers could subject it to criminal liability under the Federal Labor Contractor Act. 7 U.S.C. § 2041 et. seq. As Respondent did not show that it was subject to the jurisdiction of the Federal Farm Labor Contractor Act, the ALO rejected that argument.

At the hearing and in its exceptions, Respondent moved to disqualify the ALO based on bias and incompetence, citing three acts of alleged misconduct to show the ALO's bias: that the ALO improperly quashed a subpoena, that he erred in refusing to grant immunity to Respondent's witnesses, and that he made gratuitous remarks during the hearing.

BOARD DECISION

The Board affirmed the ALO's conclusion that Respondent violated Section 1153 (c) and (a) of the Act by discriminatorily discharging one employee and refusing to rehire seven others.

The Board held that the ALO did not err in granting General Counsel's motion to quash a subpoena on relevancy grounds or in refusing to grant immunity, and that Respondent's contentions concerning gratuitous remarks made by the ALO are not supported by the record.

REMEDIAL ORDER

The Board issued a cease-and-desist order, requiring Respondent to read, post, distribute and mail a remedial Notice to Employees. The Board also ordered Respondent to offer the eight

discriminatees full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of pay or other economic losses incurred as a result of Respondent's discriminatory conduct.

\* \* \*

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

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STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD



In the matter of:

ASSOCIATED PRODUCE DISTRIBUTORS,

Respondent,

And

UNITED FARM WORKERS OF AMERICA,  
AFL-CIO

Case Nos. 79-CE-101-SAL  
79-CE-102-SAL

DECISION

Charging party,

Elise Manders,  
For the General Counsel

Laurie A. Laws of  
Dressier, Stoll, Hersh & Quesenbery,  
for the Respondent

STATEMENT OF THE CASE

Leonard M.. Tillem, Administrative Law Officer.

This matter was heard before me on September 4, 12, 13, 17, 18, and 19, 1979, in Salinas and Watsonville, California. The complaint, dated 15, 1979, was served by mail on ASSOCIATED PRODUCE DISTRIBUTORS (hereinafter "Respondent") on June 8, June 13, June 22, July 5, July 6, and July 15, 1979 by the Charging Party, United Farm Workers of America, AFL-CIO (hereinafter "UFW"). Respondent's answer to the complaint filed with the Agricultural Labor Relations Board (hereinafter "Board") denied it had committed any unfair labor practices in violation of the Agricultural-Labor Relations Act (hereinafter "Act").

The complaint was amended at hearing on September 17, 1979, to



add the name Valentine Serrano Estrada to the list of those persons whom the complaint alleges that Respondent refused to rehire because of their support of the UFW.

During the course of the hearing, and pursuant to contract negotiations between the Respondent and UFW, a motion to dismiss as to those cases reflected by Nos. 79-CE-145-SAL, 79-CE-152-SAL, 79-CE-174-SAL, 79-CE-189-SAL, 79-CE-190-SAL, and 79-CE-193-SAL was made. The charges reflected by those case numbers contained in paragraphs 6 through 11 of the complaint, were dismissed by order of the Administrative Law Officer on February 8, 1980.

By its answer, Respondent admitted that it was at all times material to the complaint, an agricultural employer within the meaning of Section 1140.4(c) of the Act doing business in the County of Monterey, State of California, and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

After the dismissal of the charges set out above, the two remaining paragraphs of the complaint charging unfair labor practices allege that Respondent refused to rehire Guadalupe Cruz, Salvador Gomez, Jesus Garcia, Roberto Martinez, Luis Robles, Preciliano Torres, and Valentine Serrano Estrada because of their support for the UFW, and discharged Alvara Aquino Estrada because of his support for and activities on behalf of the UFW. In its answer, Respondent presented as an affirmative defense to these charges that those persons were picked up by the United States Immigration and Naturalization Service (hereinafter "INS") as undocumented workers and that Respondent has a policy of not employing undocumented workers. Respondent stated as a further affirmative de-

fense that "knowing employment of undocumented workers could subject it to criminal liability under the Federal Farm Labor Contract or Act. 7 U.S.C. Section 2041 et. seg."

All parties were given full opportunity to participate in the hearing and after its close, General Counsel and Respondent each filed SL brief in-support of its position. Upon the entire record, including any observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

#### FINDINGS OF FACT

##### I. Jurisdiction

Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act doing business in the State of California. The UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

##### II. The Alleged Unfair Labor Practices

The complaint as amended after the dismissal of paragraphs 6 through 11 by order of the Administrative Law Officer herein, alleges that Respondent violated Sections 1153(a) and (c) of the Act by its refusal to rehire seven of its employees because of their support for the UFW and by its discharge of one of its employees.

##### III. The Facts

A. Background; Respondent harvests and packs broccoli and has its principle place of business in Castroville, California. Respondent uses its own machinery in these operations though the actual harvesting is- done on property not owned by Respondent. No testimony was given at-the hearing to further clarify the nature of the Respondent's

operations since Respondent's witnesses refused to testify unless granted immunity from prosecution under federal law. The question of immunity for Respondent's witnesses is discussed below.

Rosalia Gonzales, Respondent's payroll clerk-who had worked for Respondent since 1974, testified that she was familiar with Respondent's policy not to hire illegal aliens. She testified that this policy had been in effect since 1977 and that she became aware of it through Steve Storm, one of Respondent's field supervisors who began working for Respondent in 1977.

Gonzales testified that prior to January 1979 when the Respondent's contract with the union expired/ all of its employees were hired through the union hall. Employees were dispatched from the union to Respondent for employment. Gonzales testified that everyone filled out an application card when hired by Respondent.

Gonzales testified that she only became aware that the immigration service had picked up persons from Respondent's fields after it had occurred through information the foreman placed in the daily records she received. Gonzales testified that when she received knowledge that people had been picked up as illegal aliens she placed this information in her employment records. Gonzales testified she knew of no company policy to the effect that if any illegal alien was picked up by the INS the Respondent would rehire him if he returned in three days.

#### B. Testimony of Arturo Coriel

Arturo Coriel is Roberto Martinez in the complaint. Coriel testified that he first was employed by Respondent in February 1978 to cut broccoli. At the time of his hire he was not asked for proof

of United States citizenship. In August 1978 Coriel was picked up by the INS in view of his foreman, Carlos Palacios. Coriel returned to Respondent's employ and when he was rehired was told by Palacios and one "El Borrego" that he could have his old job back if he used a different name. "El Borrego" is the nickname for Ramon Jimenez, one of Respondent's supervisory employees. However, Coriel did not change his name on that occasion but did so later after being picked up in November of 1978 by the INS when he began working under the name "Roberto Martinez." Coriel testified that he changed his name in November 1978 because he was told by his supervisors that, he could return to work if he changed his name. The testimony is conflicting regarding when and why Coriel changed his name; at one point he testified that on returning to work in November 1978 Respondent did not know he had been picked up by the INS and at another point, his testimony indicates that he was asked to change his name upon his return to work in November 1978 because he had been picked up by the INS.

Coriel was picked up for the third time by the INS in April 1979 while at work for Respondent in Crew No. 2. Three days later he returned to Respondent to ask for his job back and was told that he could not have it because he had been arrested by the INS.

Coriel testified that when he was picked up by the INS in April 1978, seven or eight other employees were picked up at the same time and that these same employees returned at the same time as he to request their jobs back and that none of them were rehired. Coriel testified that he was not a citizen of the United States and when Cesar Chavez visited Salinas in March 1979 he left the fields without permission from

Respondent during work hours to see Chavez.

C. Testimony of Luis Robles

Luis Robles testified that he was first employed by Respondent in July 1978 cutting broccoli under the supervision of Carlos Palacios. Robles testified that he was not a United States citizen, that when hired he was a member of the UFW, and that upon his hire he did not tell Palacios that he was an illegal alien.

During his employment with Respondent, Robles testified he showed his support for the UFW by placing flags on some of the machinery used in the cutting of broccoli. These flags showed the Eagle which is a symbol of the UFW. In addition, Robles left the fields when Cesar Chavez came to Salinas with the rest of Crew No. 2, the same crew for which Roberto Martinez worked.

Robles testified that he was picked up by the INS in late April 1979 while working in Respondent's fields and that he returned in two days and sought his job back but that Respondent refused to give it to him. Robles spoke of a rule of which he had learned from one of Respondent's supervisors and a foreman of allowing employees picked up by the INS to have their jobs back if they returned within three days. Robles testified that El Borrego told some of Respondent's employees on an occasion when they were in the fields, that the INS was right on the other side of the freeway and that the employees should hide. Robles testified that a similar incident occurred in Boronda when one of Respondent's employees whom Robles identified as "Steve" told El Borrego that "the immigration was on the way and so if there were some illegals he could tell them to go and hide because immigration was on

the way." (I, 82).

D. Testimony of Francisco Ledesma Gutierrez

Francisco Ledesma Gutierrez is Jesus Garcia in the complaint. Gutierrez testified that he went to work for Respondent in late June 1978 in Crew No. 2 under the supervision of Carlos Palacios cutting broccoli. Gutierrez testified that when he was hired, Palacios gave him a card to fill out and when told by Gutierrez that he did not know how to do it, Palacios filled in the card; that Palacios asked for Gutierrez' green card and was told by Gutierrez that he did not have one; that Palacios then asked if Gutierrez was illegal to which Gutierrez replied in the affirmative; and, that Palacios then told him that he would write on the card that Gutierrez was a United States citizen.

Gutierrez further testified that he is a member of the UFW, that while employed with the Respondent, he demonstrated his support for the union by placing flags on the broccoli cutting equipment approximately four times, and that he stopped work without obtaining Respondent's permission when Cesar Chavez visited Salinas.

Gutierrez testified that he was picked up by the INS in April 1979 while working for Respondent and later returned to get his job back but was refused employment. Gutierrez further testified that the reason given him for refusing to re-employ him by Respondent was that he was illegal. Robles stated that when he returned to his job he was in the company of Guadalupe Cruz, Arturo Coriel, Jesus Garcia and Preciliano Torres. He stated there were others in the group but that he could not remember their-names.

E. Testimony of Valentine Serrano Estrada

Estrada testified that he was first employed by Respondent

in May 1978 cutting broccoli in Crew No. 2 under the supervision of Carlos Palacios. When hired he was asked for proof of United States citizenship. Estrada told the foreman that he was illegal and was asked by the foreman whether he should put down that Estrada was a citizen or immigrant. Estrada told the foreman to put down that he was a citizen.

Estrada testified that he was a UFW member at the time he worked for Respondent and showed his support for the union by stopping work when Cesar Chavez came to Salinas and by placing flags on the broccoli cutting equipment.

Estrada testified that he was picked up by the INS while working for Respondent in view of his foreman and that others in Respondent's employ, including Preciliano Torres, were picked up at the same time. Estrada further testified that after having been picked up he attempted to return to work but was told that he could not have his job back by a foreman named Manuel. Estrada testified that he was told while working for Respondent in Salinas, that Respondent did not want illegals any more.

Estrada testified that he was told to leave work temporarily by Carlos Palacios because the INS was coming. Estrada testified that the entire crew he was working with left the field when Cesar Chavez visited Salinas and did not return to work that day. Permission to leave was not sought from Respondent. Estrada further testified that there were more than ten persons in the crew in which he worked, Crew No. 2.

F. Testimony of Salvador Gomez Hernandez

Salvador Gomez Hernandez is Salvador Gomez in the com-

plaint. Hernandez testified that he first began working for Respondent in February 1978 cutting broccoli under the supervision of Cruz Gomez in Crew No. 2. Cruz Gomez was succeeded by Carlos Palacios as Hernandez' foreman. When he was first hired, Hernandez testified he was not asked for proof of United States citizenship.

At the time he was hired and during his employ he was a member of the UFW and showed his support for the union when Cesar Chavez came to Salinas in March 1979 by leaving with his entire crew of approximately twenty-eight workers to greet him Hernandez testified that permission was not obtained from Respondent prior to leaving the fields though he thought that Respondent knew that the employees were going to stop work. In addition, Hernandez participated in the placement of flags showing the symbol of the UFW on broccoli cutting equipment.

Hernandez testified that he was picked up by the INS in April of 1979 while employed with Respondent. Hernandez testified that his foreman saw the INS pick him up. Subsequently, Hernandez testified he attempted to return to work for Respondent but was informed that he was fired. Respondent's explanation for firing Hernandez, given him by a supervisor named Ramon, was that he was illegal and that Respondent would not give him a job. The supervisor indicated that he received directions not to re-employ Hernandez from Steve, the person in the position above Ramon.

Hernandez testified there were three days between the time he was picked up by the INS and the time he returned to work and that seven or eight persons were picked up with him. Hernandez further testified that approximately half of his crew of twenty-eight were il-



legal aliens and that the seven or eight picked up in April 1979 by the INS were all illegal.

Hernandez testified that on his crew everyone was a member of the UFW and that all members of his crew carried a flag when the flags were placed on the broccoli cutting equipment. Hernandez further testified that when he returned to work, those on the crew that had been picked up by the INS had been replaced by new people. Hernandez testified that when he returned to obtain his job back, the supervisor with whom he spoke, in response to Hernandez' assertion that new people employed to take the place of workers picked up by the INS were illegal, responded that he knew they were illegal but that he had no problem with them.(II, 17).

G. Testimony of Jose Gonzales

Jose Gonzles is Guadalupe Cruz in the complaint. Gonzales first began working for Respondent in February-1978 cutting broccoli in Crew No. 2 under the supervision of Carlos-Palacios. When first hired he was not asked for proof of United States citizenship.

Gonzales testified that he was a member of the UFW and was initially hired to work for Respondent through the union's hiring hall. During his employ he showed support for the UFW by leaving the fields when Cesar Chavez visited Salinas in March 1979. Gonzales testified that when he left the fields, work was in progress and that all workers in his crew, some twenty-four or twenty five, left in the morning and did not return that day.

Gonzales testified that Palacios and El Borrego saw him being picked up by the INS in June 1978 while he was working. He re-

turned to Respondent's employ four days later having been taken by the INS to Mexicali from whence he returned. Upon his return, Respondent did not want to give him work but he was finally re-employed.

When he first began working for Respondent he worked - under the.- name of Celedino Barraza and when he returned after having been picked up by the INS, he worked under the name Conrado Navarro. Gonzales changed his name because he was told by Carlos Palacios and El Borrego he could not work under his previous name since he had been picked up by the INS and must have a new name and social security number.

Gonzales was again picked up by the INS in April 1979 when he was working in Respondent's fields. After this pickup he returned and asked for his job back but Respondent did not want to give it to him. The testimony is unclear exactly how long it was after Gonzales was "picked up that he returned to work. Gonzales testified that Respondent: told him the reason he couldn't have his job back was because he had been picked up by the INS.

When Gonzales was picked up by the INS in April 1979, eight or nine others working for Respondent were picked up as well. Gonzales further testified that he, Jesus Garcia, Luis Robles, Salvador Gomez, Roberto Martinez and Preciliano Torres all came back and asked for work at Associated Produce at the same time.

Gonzales testified that on two different occasions he was warned, while at work, by a foreman and a supervisor named Ramon to leave the fields because the INS was coming.

#### H. Testimony of Alvaro Aquino Estrada

Estrada testified that he first began working for Re-

spondent in 1978 cutting broccoli in Crew No. 2. The foremen of Crew No. 2. were Carlos Palacios and Manuel, also called the "Puerto Rican" by some crew members. His supervisors were Steve, Jeff and El Borrego. Jeff is Jeff Hitchcock. When first hired, Estrada worked under the name of Francisco DeLeon and was a member of the UFW.

While working for Respondent, Estrada showed his support for the UFW by displaying a flag with the UFW emblem while in the field. Also, when Cesar Chavez came to Salinas, Estrada stopped working without asking permission, and marched through the town with him. Estrada testified that he had always shown his support for the UFW that when he met. workers who did not know about the union he would explain it to them\* and that when Crew No. 3 was formed, he was the worker most familiar with the union and explained its functions to other workers in the crew. These co-workers made him the representative from Crew No. 3 on the second of the three to four days he worked. He was selected for this position in the presence of one of the crew supervisors, Manuel, the Puerto Rican. The function of the crew representative is to give the. crew information regarding the union, work benefits and safety conditions.

Estrada testified that during the three work days he worked with the crew there was disorder because no one knew about a broccoli crew., (Ill, 39). Estrada tried to "fix [the} crew up, to organize it, to tell them about the union and about some work-related matters." (Ill, 39).

Estrada testified that he was picked up by the INS while working for Respondent in 1978 within view of Carlos Palacios to whom he turned over his work equipment. After having been picked up he

returned to seek his job back and was rehired. He testified that upon this rehire he was recognized and given his job back by Carlos Palacios and El Borrego. Upon his return to work he took the name Marcial Herrera and changed his social security number. Nothing was said to him by either Palacios or El Borrego about his change in name and social security number.

Estrada was again picked up by the INS in April 1979 while working for Respondent with seven or eight others of Respondent's employees. He returned on the third work day after having been picked up seeking his job back. Estrada testified that when he initially returned after having been picked up by the INS in 1979, Respondent would give him no reason why it would not rehire him. Estrada testified that he picked up his check and left but actually returned to Respondent's employ a few days later when he rose early and found a truck waiting for employees of Respondents in Salinas. The Puerto Rican offered Estrada work, he got into the truck, and he was taken out to Respondent's fields where he worked in Crew No. 3.

Estrada testified he worked in Crew No. 3 for three or four days during which time Steve and El Borrego became aware of his presence in the crew. Steve told the crew's foreman, the Puerto Rican, that the INS had picked Estrada up. Estrada further testified that previous to his rehire, before he was picked up by the INS in April 1979, there had not been a third crew working in Respondent's fields and that this third crew contained all new employees who were working the day the Puerto Rican offered Estrada a job in the crew.

On his third or fourth day in Crew No. 3, after work, the

the Puerto Rican, told Estrada that he had orders from Steve and El Borrego that Estrada could not work because he did not have papers. When Estrada told the Puerto Rican that he would go to the union and tell it he had been fired without reason, El Borrego said that Estrada could go ahead and complain but that the union would not help him.

Certain findings of fact may be drawn from the testimony herein: (1) all eight employees named in the two charges against the Respondent were picked up by the INS in late April 1979 while working in Respondent's fields; (2) all eight returned shortly after having been picked up to seek re-employment with Respondent; (3) Respondent refused to re-employ all eight; (4) the reason Respondent gave, when it gave a reason for its refusal to re-employ, was that it would not employ illegal aliens; (5) all eight of the employees named in paragraphs 4 and 5 of the complaint showed their support for the UFW by leaving work early one morning, March 1979 to follow Cesar Chavez when he visited Salinas and none of them sought or-obtained permission from Respondent's supervisors prior to leaving the field, though all members of Crew No. 2, the crew in which all eight worked, stopped work to see Chavez; (6) at least six of the eight of the employees showed their support for the union by placing UFW flags on the broccoli cutting equipment; and (7) one of the eight employees, Alvaro Aquino Estrada, further demonstrated his strong support for the union by passing on to his fellow employees information about the advantages of unionization and was elected to represent Crew No. 3.

I further find that Respondent knowingly hired illegal aliens and rehired them again after they had been picked up by the INS and

transported across the border. In addition, I find that Respondent had a rule which enabled illegal aliens to return to its employ without undue difficulty if the employee picked up managed to return from Mexico to Salinas within three working days from the time he was picked up. IV. The Declaration

The testimony of Arturo Coriel, Salvador Gomez Hernandez, Francisco Ledesma Gufcierrez, Guadalupe Cruz, and Luis Robles is not inconsistent with the declaration signed by them on May 1, 1979, with the exception that all five, to some extent, gave confused testimony regarding the date on which the INS picked them up in April 1979 and the number of days between that pickup and the time they returned to Respondent and were told that they could not have their jobs back. Despite this confusion, I nevertheless find their testimony regarding the INS pickup and the failure of Respondent to rehire them credible.

#### ANALYSES AND CONCLUSIONS OF LAW

##### I. Immunity for Respondent's Witnesses

Respondent's counsel sought immunity for four employees which it planned to have testify. Those employees were Steve Storm, Jeffry Hitchcock, Ramon Jimenez, and Carlos Palacios. Hitchcock was called as a witness by Respondent, and after having been sworn, sought immunity prior to giving any testimony. Immunity was denied and a ruling made at hearing, upon the representation of counsel for Respondent, that immunity would be sought for the other three employees prior to the giving of any testimony, that they as well as Hitchcock would be denied immunity as well. (IV, 72).

Subsequently, Hitchcock was called by the General Counsel as its witness. Again he refused to testify without a grant of immunity. Immunity was not granted and Hitchcock did not testify (V, 24-25).

Section 1151.2 of the Act, specifies when a witness becomes immune from prosecution as a result of testifying:

However, no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 1151.2 clearly establishes that a witness must be compelled to testify after having claimed his privilege against self-incrimination in order to obtain immunity. None of Respondent's witnesses were subpoenaed by General Counsel, and none of them took the stand and were compelled to testify after having claimed the privilege against self-incrimination. Only Jeffry Hitchcock was called to the stand by General Counsel as its witness and he refused to testify when asked the first question. His testimony was not thereafter compelled.

Respondent's counsel sought immunity for four witnesses prior to the illicitation of any testimony from them. The privilege against self-incrimination may not be urged by a witness until a question has been put to him after being sworn, the answer to which would tend to incriminate him. Fielder v. Berkeley Properties Co., 23 Cal.App.3rd 30, 39 (1972).

That an essential ingredient in obtaining immunity is the

compelling of testimony is clear from Escamilla v. Superior Court, 271 Cal.App.2d, 730 (1968). In Escamilla, a wife voluntarily appeared at her husband's unemployment insurance hearing, acting as his interpreter. She was called to the stand by her husband's attorney to testify, her own attorney objected to her giving testimony, and the referee ordered her to answer. The Court of Appeal held that she had been granted immunity from state charges relating to the testimony she was compelled to give. Respondent has relied on Escamilla in its argument that its witnesses should have been granted immunity. However, it is clear from Escamilla that an essential predicate to the granting of immunity is being to compelled to testify and it is equally clear that Respondent's witnesses were never compelled to testify over their objection.

## II. Respondent's Response to General Counsel's Subpoena for Certain Records During Hearing

During the hearing on September 18, 1979, General Counsel requested from the Administrative Law Officer and received a subpoena for all file jackets of employees employed at Respondent's facility since 1977. At the hearing on September 19, 1979, Respondent's counsel moved to quash the subpoena. That motion was denied and Respondent's counsel refused to initially state whether she would comply with the subpoena. The records to which that subpoena pertained were in the hearing room. Respondent's counsel, after having been repeatedly asked by the Administrative Law Officer, stated that she would comply with the subpoena and produced the records for inspection by the General Counsel.

Respondent continues, in its post-hearing brief, to object to the denial of its motion to quash its subpoena, though the grounds



are not entirely clear. Section 20250 of Title 8 of the California Administrative Code sets out the procedure to be followed by a witness who refuses to respond to a subpoena and by the Board in seeking to require a response. Section 20250(e) provides that the Board, upon the request of the Administrative Law Officer may seek an order requiring that a person provide information refused. Obviously, such an order is unnecessary if the person ordered to provide information responds. In the instant situation, the Respondent's counsel produced the documents sought by the subpoena and it was unnecessary to take further steps to require production.

### III. The Unfair Labor Practices Charged

The complaint alleges violations of Sections 1153(a) and (c) of the Act in Respondent's refusal to rehire seven of its employees and of its discharge of an eighth employee.

In order to establish a violation of Section 1153(c) of the Act, the general Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the refusal to rehire. See Borin Packing Co., Inc., 208 NLRB No. 45, 280-81(1974) It is clear that an employer may refuse to re-employ an employee for any reason, just or unjust, so long as anti-union motivation is not the true reason for the discharge or refusal to re-employ. See Lu-ette Farms, 3 ALRB No. 38, 11 (1977); Hansen Farms, 3 ALRB No. 43, 26 (1977).

Discriminatory conduct which is motivated by anti-union animus and having the foreseeable effect of discouraging union membership violates Section 1153(c) of the Act. Discrimination to discourage union membership does not require specific evidence of an employer's

intent or effect on an employee; if discouragement of union membership is the natural consequence of an employer's action, intent will be presumed. Jesus Martinez, 5 ALRB No. 51, 10 (1979). In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967), the Supreme Court held some conduct is so inherently destructive of employee interests that it may be deemed proscribed without a need of proving an improper motive. Proof of anti-union animus is not necessary if it may be reasonably concluded that the employer's discriminatory conduct was inherently destructive of important employee rights.

The Respondent refused to rehire eight of its employees, stating as its reason their status as an illegal alien. The employees which Respondent refused to rehire were union members who had shown their active support for the union less than two months before the employer refused to hire them by participating in a march with Cesar Chavez and by placing union flags on Respondent's broccoli cutting equipment. The evidence also shows that Respondent's ostensible reason for its failure to rehire these employees, their illegal alien status, was mere pretext. Respondent knowingly hired illegal aliens and, indeed, would rehire them after they had been picked up by the INS upon their return to this country.

Failure to rehire employees on account of their status as union members or their activities on behalf of the union is a clear violation of Sections 1153(a) and (c) of the Act; it constitutes discrimination in regard to hire or tenure of employment which has as a natural consequence, the effect of discouraging union support or membership, thus restraining employees from exercising their rights to join or assist

labor organizations. See Louis Caric & Sons, 6 ALRB No. 2, 3 (1980).

The evidence shows that Respondent was aware of the active support the employees in Crew No. 2 gave to the UFW. I find that Respondent refused to rehire Guadalupe Cruz, Jose Gonzales, Salvadore Gomez (Hernandez), Jesus Garcia (Francisco Ledesma Gutierrez), Roberto Martinez (Arturo Coriel), Luis Robles, Preciliano. Torres, and Valentine Serrano Estrada, because they were active supporters of the UFW. The unrefuted evidence that Respondent's supervisors hired them knowing of their illegal alien status and, on occasion, rehired them after their return from Mexico after being deported by the INS directly conflicts with Respondent's contention that its refusal to rehire these persons was grounded in their illegal alien status.

The General Counsel has the burden of establishing a prima facia case in seeking to establish that a failure to rehire violates Section 1153 (g-) of the Act. Once General Counsel has proven that Respondent has engaged in discriminatory conduct which could have adversely affected employee rights to some extent, "the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him,," NLRB v. Great Dane Trailers Co., Inc., 338 U.S. 26, 34 (1967). General Counsel has established a prima facia violation of the Act and Respondent has not offered a credible explanation for the refusals to rehire. The only explanation given by Respondent for its conduct, that the employees involved were illegal aliens, is inconsistent with its practice of knowingly hiring illegal aliens. See Desert Automated Farming/Marshburn Farms, 4 ALRB No\* 99 (1978).

Because Respondent failed to rebut the General Counsel's \_\_\_ prima facie showing that its refusal to rehire the seven employees was in retaliation for their support for the union, I conclude that the refusal to rehire violated Section 1153(c) of the Act and because it interfered with its employees' exercise of rights guaranteed by the Act violated Section 1153(a) as well. These findings are made with regard to Preciliano Torres as well as the seven other employees named in paragraph 4 of the complaint. See George Lucas and Sons, 5 ALRB No. 62 (1979) in which the Board held there was no need for every victim of every alleged unfair labor practice to testify where there was evidence available from other sources sufficient to prove that a violation occurred.

The foregoing discussion pertains to the discharge of Alvaro Aquino Estrada as well, and I find that Respondent's discharge of him similarly violated Sections 1153(a) and (c) of the Act. The only difference between Respondent's treatment of Estrada and the seven other employees it refused to rehire is that he was mistakenly rehired only to be discharged three or four days later, ostensibly because he was an illegal alien. Estrada had been picked up by the INS and returned to the Respondent's employ before and had, in fact, changed his name to return to Respondent's employ. Respondent's reason for its discharge of Estrada, that he was an illegal alien, was a mere pretext to rid itself of a union supporter who had, in the three days previous to his discharge, made a point of informing new employees in Crew No. 3 of the advantages he thought were to be gained by support of the UFW. Respondent failed to rebut the General Counsel's prima facie showing that its discharge, of Estrada was in retaliation for his support of the UFW. I conclude this discharge

violated Section 1153(a) and (c) of the Act.

Respondent has attempted to argue that its action in refusing to rehire seven of its employees and its discharge of another was not illegal under the Act because the employees, by virtue of their illegal alien status, were engaging in unprotected activity. Without considering whether status itself is an unprotected activity, it is clear that illegal aliens may be considered employees under the meaning of the Act. NLRB v. Apollo Tire Co., Inc., 102 LRRM 2043 (1979); Amay's Bakery & Noodle Co., Inc., 227 NLRB No. 38, 214 (1976).

While an employer may have a policy of not hiring illegal aliens pursuant to which it may discharge an employee, it may not discharge an employee because he is a union supporter and then argue that the discharge was not violative of the Act because the employee was an illegal alien.. Respondent ignores the true issue here, whether it discriminated against the eight employees because of their union membership. The fact that the employees were also illegal aliens does not thereby excuse Respondent's treatment of them if the treatment was discriminatorily motivated.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153(a) and (c) of the Act, I recommend that Respondent cease and desist therefrom and take the following affirmative actions designed to effectuate the policies of the Act;

Reinstatement with back pay and full seniority and other rights to Arturo Coriel, Luis Robles, Francisco Ledesma Gutierrez, Valentine Serrano Estrada, Salvadore Gomez Hernandez, Jose Gonzales, Preciliano Torres, and Alvaro Aquino Estrada from April 30, 1979 to the present;

2. Reinstatement with back pay and full seniority and other rights to Alvaro Aquino Estrada from May 7, 1979 to the present; and
3. Notice of the violations and remedies and of the rights of the employees protected by law will have to be posted, mailed and read to the employees of the Respondent.

Upon the bases of the entire record, the findings of fact, and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended Order:

ORDER

Respondent, Associated Produce Distributors, its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) failing or refusing to rehire or discharging any employee, or otherwise discriminating against them in regard to his hire or tenure of employment or any term or condition of employment, because of such employee's membership in, or activities on behalf of the United Farm Workers of America, APL-CIO, or any other labor organization;

(b) in any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Labor Code Section 1152. :

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

(a) immediately offer Arturo Coriel, Luis Robles, Francisco Ledesma Gutierrez, Valentino Serrano Estrada, Salvadore Gomez Hernandez, Jose Gonzales, Preciliano

Torres, and Alvaro Aquino Estrada reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges. Make each of them whole for any loss of pay or any other economic losses, plus interest thereon at a rate of 7% per annum, he has suffered as a result of Respondent's failure or refusal to rehire him;

(b) reserve, and upon request, make available to the Board or its agents for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reinstatement of the above-named employees under the terms of this Order;

(c) Sign the Notice to the Employees attached hereto and after its translation by a Board agent into appropriate languages, reproduce sufficient copies of the notice in each language for the purposes set forth hereinafter;

(d) distribute copies of the attached notice in appropriate languages to all present employees and to all employees hired by Respondent during the ninety-day (90) period following the issuance of this decision;

(e) mail copies of the attached notice in all appropriate languages within three (3) days after issuance of this Order, to all employees;

(f) post copies of the attached notice in all appropriate languages in conspicuous places on its property, including

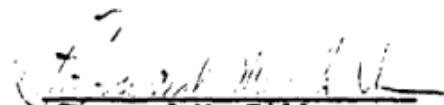
places where notices to employees are usually posted/ for a ninety (90) day period to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the notice which may be altered/ defaced, covered or removed;

(g) arrange for a Board agent or a representative of Respondent 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 of employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all: non-hourly wage employees to compensate them for time lost at this reading and the questions-and-answer period; and,

(h) notify the Regional Director, in writing, within thirty (30) days after the date of issuance of this Order what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter, in writing, what further steps have been taken in compliance with this Order.

Dated:

April 30, 1950



Leonard M. Tiljem  
Administrative Law Officer



NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its facts, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. He has told us to send out and post this notice.

We will do what he has ordered and also tell you that:

The Agricultural Labor Relations Board 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; and
5. To decide not to do any of these things.

Because this is true we promise that:

WE WILL NOT do anything in the future that forces you to do or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT fail or refuse to rehire or discharge or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL offer Arturo Coriel, Luis Robles, Francisco Ledesma Gutierrez, Valentine Serrano Estrada, Salvadore Gomez Hernandez, Jose Gonzales, Preciliano Torres, and Alvaro Aquino Estrada their jobs back and will reimburse each of them for any pay or other money they lost because we failed or refused to rehire them or discharged them.

Dated:

ASSOCIATED PRODUCE DISTRIBUTORS

By \_\_\_\_\_  
(representative) (title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the STATE OF CALIFORNIA.

DO NOT REMOVE OR MULTILATE