

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

C. J. MAGGIO,)	
)	
Respondent,)	Case Nos. 79-CE-171-SAL
)	79-CE-221-SAL
and)	
)	
UNITED FARM WORKERS)	6 ALRB NO. 62
OF AMERICA, AFL-CIO,)	
)	
Charging Party)	
)	

DECISION AND ORDER

On May 16, 1980, Administrative Law Officer (ALO) Mark E. Her in issued the attached Decision in this proceeding. Thereafter, both General Counsel and Respondent each timely filed exceptions- ' and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and supporting briefs, and has decided to affirm the ALO's rulings, findings, and conclusions only to the extent consistent herewith.

We find merit in Respondent's exceptions to the ALO's conclusion that by laying off a work crew on June 18, 1979, and July 3, 1979, and by terminating employee Juan Rodriguez on the latter date, Respondent violated section 1153 (a) of the

^{1/}Respondent has excepted to certain credibility resolutions made by the ALO. It is the Board's established policy not to override an ALO's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. Adam Dairy dba Rancho dos Rios (1978) 4 ALRB No. 24; Standard Drywall Products (1954) 91 NLRB 544 [26 LRRM 1531]. We have carefully examined the record and find no basis for reversing his credibility resolutions.

Agricultural Labor Relations Act (Act).

On June 18, 1979, Juan Rodriguez arrived at work at approximately 6:30 a.m. While he was waiting for the workday to begin, another member of the crew placed a United Farm Workers of America, AFL-CIO (UFW) flag upon the rear of Respondent's stitcher truck. The stitcher, Mike Grimley, noticed the flag on the truck and removed it. Rodriguez replaced the flag.

Supervisor Garcia arrived 20 minutes later and told the crew it would not work unless the flag was removed. The crew did not respond. The time when the crew normally began work passed with the flag remaining on the truck.

Subsequently, supervisor David Compton arrived and, upon observing the flag, removed it from the truck. Rodriguez again replaced the flag on the truck and exchanged words with Compton. The flag remained on the truck.

Later, General Manager Charlie Watts arrived. He told the crew that they would not work as long as the flag remained on the truck. The flag was then removed and returned to the crew, the truck was ordered back to the packing shed, and the crew was sent home. There were no further attempts by any employee to affix the flag to Respondent's truck until July 3, 1979.

Juan Rodriguez arrived at work on July 3, 1979, at 6:30 a.m. Upon arriving, he placed a UFW flag on the rear corner of Respondent's stitcher truck. Supervisor Garcia arrived approximately 20 minutes later. He told the crew that they could not work while the flag remained on the truck. As no one in the crew removed the flag, Garcia ordered the stitcher truck to

return to the shed and told the crew there would be no work for the day.

Juan Rodriguez remained in the field to speak with General Manager Watts about the possibility of returning to work, and then left the field to talk to Garcia at the packing shed. Garcia informed Rodriguez that there would be no more work for the crew and that the crew members would be given their final checks. Garcia stated he had bought the remaining lettuce from Respondent and would harvest it with his own crew. Rodriguez then left the premises.

Two or three days later, as Rodriguez drove past the field he had previously worked in, he observed the other members of his former crew harvesting the lettuce with Respondent's equipment. Rodriguez later learned that almost all of the other employees in the crew had returned to work on July 3, shortly after he had left the premises/ and had continued to work through July 6, 1979.

In his decision, the ALO concluded that the crew had engaged in protected concerted activity by placing the UFW flag upon the stitcher truck/ citing Caterpillar Tractor Co (1956) 230 F.2d 357 [37 LRRM 2619]. In that case, the National Labor Relations Board (NLRB) held that it was a protected activity when employees wore union emblems attached to their clothing while on the job. We reject the ALO's finding that placing union emblems, flags/ or banners on company vehicles or other company property is similarly protected.

The NLRB has long held that the right to engage in union

activity does not extend to the right to use the employer's property. Cashaway Lumber Inc. (1973) 202 NLRB 54 [82 LRRM "-1633]; U. S. Postal Services (1978) 241 NLRB 79 [99 LRRM 1515]; Clark Phonograph (1949) 22 NLRB 1163 [24 LRRM 2409]. There is no evidence in the record that Respondent had allowed employees to post or display union material or any other materials upon its property at any time prior to the action of Rodriguez and the crew in affixing the union flag to the stitcher truck. Moreover, Respondent was under no duty to allow the flag to be attached to, or to remain on, the truck and did not act improperly by disciplining the crew on June 18 and July 3, or by terminating Juan Rodriguez on July 3 for his second violation of a company rule. The fact that Respondent gave Rodriguez a false reason for his layoff is not by itself sufficient to establish an inference of anti-union motivation. Such an inference may only be v justified where it may reasonably be concluded that the motive sought to be concealed by the asserted false reasons is unlawful. Shattuck Denn Mining Corp. v. NLRB (1966) 362 F.2d 466, 470. Superior Forwarding Co. and John Mitchell (1979) 242 NLRB 117 [101 LRRM 1277]. Accordingly, as we find no violation of section 1153(a) or (c) of the Act, we shall dismiss the complaint.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby

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orders that the complaint herein be, and it hereby is, dismissed
in its entirety.

Dated: December 10, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. MCCARTHY, Member

CASE SUMMARY

C. J. Maggio (UFW)

6 ALRB No. 62
Case Nos. 79-CE-171-SAL 79-
CE-221-SAL

ALO DECISION

The ALO concluded that Respondent violated section 1153(a) of the Act by laying off a harvesting crew and discharging Juan Rodriguez for engaging in what the ALO found to be a protected concerted activity, i.e., displaying a United Farm Workers flag on a company truck. He recommended that Respondent be ordered to make whole Rodriguez and the other employees for economic losses suffered as a result of Respondent's actions.

BOARD DECISION

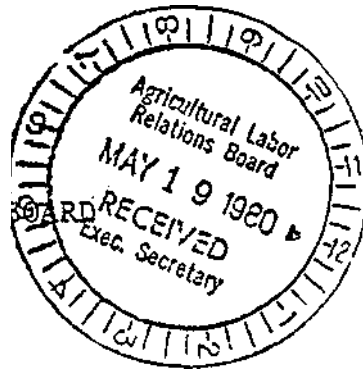
The Board reversed the ALO's conclusion that Respondent's discharge of Juan Rodriguez and the layoff of the harvesting crew constituted a violation of section 1153(a) of the Act. Citing Cashaway Lumber, Inc (1973) 702 NLRB 54 [82 LRRM 1633], the Board found that the placing of emblems, flags, or banners on company property is not protected activity and concluded that Respondent did not violate section 1153(c) or (a) of the Act by its discipline of the crew or its layoff of Rodriguez for their violations of a company rule.

BOARD ORDER

The Board dismissed the complaint in its entirety.

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

STATE OF CALIFORNIA
AGRICULTURE LABOR RELATIONS



In the Matter of :

CARL JOSEPH MAGGIO,

Respondent

Case Nos. 79-CE-171-SAL

79-CE-221-SAL

and

UNITED FARMWORKERS OF
AMERICA, AFL-CIO,

Charging Party.

Appearances: Thomas A. Nassif
BYRD, STURDEVANT, NASSIF & PINNEY
Attorneys at Law
444 So. 8th Street
P.O. Box 710
El Centro, CA 92244
For Respondent C.J. Maggio

Norman K. Sato
Staff Counsel, Agriculture Labor Relations
Board
112 Boronda Road
Salinas, CA 93907
For the General Counsel

Kate Johantgen P.O.
Box 1049 Salinas,
CA 93902
For the Charging Party and Intervener

DECISION

MARK E. MERIN, Administrative Law Officer:

This case was heard before me on October 3, 1979

in Salinas, California. The Complaint alleges violations of Labor Code Section 1153(a) and (c) by C.J. Maggio, doing business as Carl Joseph Maggio (hereinafter sometimes referred to as "Maggio" or "Respondent"), and is based on charges against the employer filed, respectively June 20 and July 27, 1979 and served by mail on the Respondent on those dates.

All parties were given an opportunity to participate fully at the hearing and after the close of the hearing both the General Counsel and Respondent filed briefs in support of their respective positions.

Upon the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following:

FINDING OF FACTS I.

JURISDICTION

Respondent admits, and I so find, that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Agriculture Labor Relations Act (hereinafter sometimes referred to as the "Act") and that the United Farmworkers of America, AFL-CIO (hereinafter sometimes referred to as the "UFW" or the "Union") is a labor organization within the meaning of Section 1140.4(f) of the Act.

^{1/} Unless otherwise noted, all statutory references are to the Labor Code.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In the Complaint, dated August 20, 1979, it is alleged that Respondent violated Section 1153(a) of the Act by threatening employees on June 18, 1979, with loss of work if they placed a UFW flag on a company truck and by suspending work on that day when the flag was so placed; and again violated Section 1153(a) by laying off Juan Rodriguez on or about July 3, 1979, because he placed a UFW flag on a company truck.

At the conclusion of his case, General Counsel amended the complaint to delete an allegation of a violation of §1153(c).

Respondent denies threatening the crew with loss of work on June 18, 1979 if a flag were placed on the company truck and further denies suspending work on that date after a flag was so placed. Instead, Respondent contends that the crew refused to work unless it were permitted to fly the flag on a company stitcher truck which was operated by members of the Teamsters Union.

Respondent also denies laying off Juan Rodriguez because he placed a UFW flag on the company truck on July 3, 1979, and instead contends that Rodriguez violated a company rule by placing the flag on the truck and that he and the crew refused to work unless the flag remained on the truck. The company further contends that it ceased work for a couple of hours on July 3 but returned to work with the crew, minus Rodriguez who received his check

later that day.

III. THE FACTS

A. The General Counsel's case - Juan Rodriguez testimony

The General Counsel rested after presenting only the testimony of Juan Rodriguez. Rodriguez testified that he arrived at work on June 18,^{2/} at approximately 6:30. He saw one of his crew members put a "normal" UFW flag on the rear of the stitcher truck parked at the side of the field where the crew, already assembled and ready to work, was to begin cutting and packing lettuce. The "stitcher", Michael Grimley, a Teamsters crew member who, together with his co-worker, makes boxes for the harvesting crew, threw the flag on to the ground, according to Rodriguez, at which time Rodriguez placed the flag a little lower on the middle of the rear of the truck and made a caustic comment to Grimley. No company supervisors were present and the foreman waited with the crew for a supervisor to arrive. Twenty minutes later Jose Garcia, a supervisor, arrived. According to Rodriguez, Garcia told the crew ".... if we didn't take down the flag, we wouldn't work."

The purpose of placing the flag on the truck,

2/ There was ambiguity in some of the testimony as to dates on which the two incidents relating to the flag occurred but, by stipulation of the parties, the dates were agreed to be June 18 and July 3.

according to Rodriguez, was to show the company that the workers wanted the company to negotiate with the union. Rodriguez thought the crew was in agreement with this message.

After Garcia arrived, Charlie Watts, a supervisor and general manager of C.J. Maggio, then arrived at the field and informed the crew that "... we couldn't work with the flag there." The flag was removed from the truck and given to the crew representative and the truck returned to the shed, with the company indicating that there would be no work that day. There was work the following day and succeeding days and no flags appeared at the field until July 3.

According to Rodriguez on July 3 he put a union flag on the stitcher truck at approximately 6:30 in the morning. After approximately 20 minutes Jose Garcia again arrived and, according to Rodriguez, said to the whole crew: "As you already know, you can't work if the flag is there. You can't work with the flag." Garcia further reportedly informed the crew that "If we didn't take it down, we wouldn't work, he said again." The company then "... took the truck back to the packing shed the way they had done the first day."

Rodriguez remained in the field awhile with some co-workers and among other things, spoke with Charlie Watts telling him that the crew did not want to stop working, that it wanted to work. After about ten min-

utes Rodriguez went to the packing shed to find Jose Garcia who told him there would be no more work and that the supervisor had bought the lettuce which remained and intended to harvest it with his own people.

Rodriguez received his final check from the foreman who delivered it to him in Soledad, where he had never before received his check.

Unbeknownst to Rodriguez, almost the entire crew returned to work July 3, a couple hours after the stitcher truck had left the field and worked that day and on July 5 and July 6.

Rodriguez' explanation for why he placed the flag on the company truck was given in response to Respondent's cross-examination: "Well, I put it there because I thought everyone was in agreement with the Union, to engage in fair negotiations with the Union." Rodriguez further explained his actions: "Well, we wanted to put the flag there precisely to show the company that we wanted it to sign a contract with the Union because we thought that a Union contract would guarantee our rights at work." On June 18, Rodriguez had attempted to explain to Charlie Watts why the crew wanted the flag displayed: "I approached him, in order to try to explain the thing about the flag, that we weren't going to strike against the company, nor would we stop work, but it was just a show of support for the Union, because we wanted the company to negotiate with the Union."

Rodriguez stated that on June 18, "the crew

agreed that we would not take down the flag." According to him, he was willing to work without the flag flying but did not and instead twice put the flag back up "because the whole crew came to a decision and we had all decided to keep the flag up." Further emphasizing this point, Rodriguez reiterated "The crew had decided to keep it there."

In reference to the July 3 incident, in response to a question on cross-examination, Rodriguez explained: "I didn't work because the company said that it didn't want the flag there and, as before, the crew decided that it wanted the flag there, and as far as I know, the company was the one that refused to work, not the people."

B. The Respondent's Case

Respondent introduced evidence tending to impeach Juan Rodriguez and establishing a different version of the events on June 18 and July 3.

Michael Grimley, a driver/stitcher who worked with Respondent in that capacity for three years, testified that "... while I was working, they put a UFW flag on my truck. When I finished working, my truck is a Teamster truck and my union told us not to have a Union flag, someone else's union, on our truck. So I took it, put it on the ground." According to Grimley, Juan Rodriguez replaced the flag which was thereafter again removed and placed on the ground by David Compton, a field supervisor. This time Rodriguez, according to Grimley, put the flag

back up and threatened to kick Compton's ass if he took the flag down again. Grimley reported that Rodriguez, in perfect English, said, variously: "No flag, no work," and "They got the flag, we'll work." Grimley drove the truck back to the shed after he was told to leave by Compton.

As to the July 3 incident, Grimley testified that Rodriguez placed the flag on his truck in the morning and, when he was preparing to return to the shed, Rodriguez approached the truck and removed the Union flag.

David Paul Compton, called by Respondent, testified that he has worked for C.J. Maggio for about a year and a half and is a harvesting foreman. According to Compton, he went to the field on June 18 and saw Jose Garcia and the crew standing around. He talked to Garcia then walked over to the truck, removed the flag, and set it on the ground. Rodriguez replaced the flag at which time Jim Compton, David's father and a grower for the company, arrived. Jim Compton instructed David to "Go back and take it back off [referring to the flag]." When David Compton followed his father's advice, according to his testimony, Juan came back to him, flag in hand, and repeated a threat to "Kick his ass" if he removed the flag again. It was after that, after some discussion among company supervisors, that it was decided that "We should just, just let them go home."

Carlos Rodriguez, a member of the crew on June 18 and July 3, testified that the crew did not engage in any discussion prior to the flag being placed on the company

truck on June 18, that it was already there when he arrived. According to Carlos Rodriguez the crew decided not to work "for the simple fact that the flag was on the stitcher." He explained that "They put a flag up and everyone assumes that means they shouldn't work." The flag according to Rodriguez meant that work was to stop.

If we credit the company's version of the significant events, the crew engaged in quickie strikes on both June 18 and July 3, and there were no company suspensions or lay-offs. On the other hand, the General Counsel argues the events should be seen as the company disciplining workers who refused an order to remove the union flag from the company's truck.

The General Counsel would have us perceive the June 18 and July 3 events as the company, by insisting that the flag be removed before it would permit the men to work, infringing on the workers' privilege to express, concertedly, their wish that the company engage in negotiations with their union for a collective bargaining agreement.

The Respondent generalizes the events of the days in question as acts of workers over-stepping their bounds and usurping management's prerogative by a) trespassing on company property - the stitcher truck - by placing their union's flag on it; b) infringing the rights of the Teamsters Union drivers; and c) endangering the physical well-being of its employees. According to the company,

then, it merely refused to bow to the unjustified demand that the crew be permitted to fly the union flag and this refusal should not be seen as an infringement of the employees' right to engage in protected concerted actions.

As is apparent, much depends on resolutions of conflicts in the testimony and in how the facts, once established, are viewed.

Were the twice repeated raising of the flag the ill-conceived acts of a lone provocateur, Juan Rodriguez, who acted without the consent and endorsement of his co-workers? Or on the other hand, as the General Counsel urges, were the flag raisings merely the expressions of the collective decision to engage in a demonstration of the employees' sentiment on the negotiation question?

Concerted Action

Reviewing all of the testimony, I have concluded that Juan Rodriguez engaged in concerted action when he placed and replaced the union's flag on the the days in question. This conclusion flows from the following testimony:

1) Rodriguez said he understood why the flag was originally posted on June 18 by a co-worker and that he replaced it that day and again on July 3, after being selected the crew's representative, for the same reason - to advance the crew's interest in having the company negotiate a contract with the UFW.

2) Grimley testified that Rodriguez had "four

or five" followers; and

3) Watts testified that when he spoke with Rodriguez he was with two other workers .

Even if there was no enunciated agreement to engage in the flag placing activity, it would qualify as concerted activity under Roadway Express, Inc., 217 NLRB No. 49, 88 LRRM 1503 (1975) enforced, 91, LRRM 2239 (1976), because the interest sought to be furthered was a group interest.

Protected Action

While the protection afforded concerted activities does not extend to "activities which disrupt, or tend to disrupt, production and to break down employee disciplines", it does shield "passive inoffensive advertisements of organizational aims or interests...." Caterpillar Tractor Company v. NLRB, 37 LRRM 2619, 230 F2d 357 (CA7, 1956).

Erected on a company truck at the edge of a field, a Union flag may cause displeasure to Teamster Union drivers, as it did in this case, and may startle company supervisors who have not previously met this situation, but the test of whether the erection of the flag is a protected or unprotected activity rests not on the feelings of these individuals but rather on its effect on the company's operations. There was no evidence that the Teamster Union members refused to work with the flag on their truck or that one Union flag flying on the truck would have the type or effects proscribed in Caterpillar Tractor vs. NLRB, supra,

cited by both the company and the General Counsel.

On the contrary, the placing of the flag on the stitcher truck, did not disrupt production, according to Grimley, who said he did not even notice its presence until after he had finished his work.

There was a dispute as to whether the crew refused to work unless the flag was permitted to fly or the company refused to let the crew work unless someone from the crew took the flag down. Considering all of the testimony, I find that the company decided not to permit the crew to work unless the flag was taken down and that the crew was willing to work, if permitted by the company. Company supervisor Charlie Watts made that point quite clearly.

"I talked to them a little bit and
I said the same thing, 'No work
because of the flags.'" (TR 131)

Even if the flag was placed and replaced in disobedience to an order from the management, as there was convincing evidence to suggest - certainly as to the flag being replaced on June 18 (although Juan Rodriguez testified he did not know the identity of the man who removed the flag the second time and therefore could not be expected to assume that he was a company supervisor) - the mantle of the protection would still extend to cover the activity. Eastern Illinois Gas & Securities, Inc., 175 NLRB 639, 640 (1969); Bob Henry Dodge, Inc., 203 NLRB 78 (1973); Anadonda Aluminium Inc.,

160 NLRB 35, 40 (1966). An employer cannot circumscribe the protections of the Act by promulgating rules making inoffensive, passive displays of sentiment against company policy.

I do not quarrel with the employer's right to impose severe restrictions on the posting of non-union material on company property, such as advertisements of rummage sales or the like, or even limitations on strike notices as were upheld in NLRB v. Murphy Diesel Company, 43 LLRM 2530, as "taunting respondent and its supervisory employees.

I do not find that the posting of the flag constituted an activity "so indefensible as to warrant the employer in discharging the particular employee" (Elk Lumber Company, 91 NLRB 333, 26 LLRM 1493) and so conclude that the activity was protected, concerted activity.

Having so found, I necessarily conclude that the cancelling of work on June 18, and the release of the crew, on July 3, and its surreptitious recall two hours later, minus Juan Rodriguez, interfered with, restrained, and coerced the entire crew in the exercise of its right to engage in concerted activities as guaranteed by §1152, and therefore were unfair labor practices in violation of §1153(a) of the Act.

THE REMEDY

Having found that Respondent violated §1153(a) of the Act by eliminating work on June 18, by depriving the

crew of two hours' work on July 3rd and, by depriving Juan Rodriguez ,of the remaining days of work that season, I shall recommend that the Board order the company to cease and desist from such activity and take certain affirmative action designed to effectuate the policies of the Act; specifically, I shall recommend that the Board order Respondent to make the employees working on June 18 .and July 3rd whole for any loss of earnings they may have suffered as a result of the unlawful actions against them by paying to them a sum of money equal to what they would have earned" had they worked on those days and by paying to Juan Rodriguez an additional amount equal to that earned by employees who completed the season, together with interest at 7% per annum from said dates to and including the date of payment, in accordance with the formula set out in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

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

ORDER

Respondent, its officers, agents, supervisors and representatives shall:

(1) Cease and desist from:

(a) Suspending or discharging employees for engaging in concerted activities for mutual aid or protection.

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

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Make whole each of the members of the crew who reported to work on June 18 and July 3 for any loss of earnings they incurred as a result of Respondent's unlawful actions and make Juan Rodriguez whole by paying to him, an additional amount equal to that earned by employees who completed the season, in accordance with the formula outlined in the Remedy portion of this decision.

(b) 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.

(c) Distribute the following NOTICE TO EMPLOYEES (to be printed in English and Spanish) to all present employees and all employees hired by Respondent within six months following initial compliance with this Decision and Order and mail a copy of said NOTICE to all employees employed by Respondent between June 18, 1979 and the time such NOTICE is mailed if they are not employed by Respondent. The NOTICES are to be mailed to the employees last known address, or more current addresses if

made known to Respondent.

(d) Post the attached NOTICE in prominent places at Respondent's Salinas operations in areas frequented by employees and where other NOTICES are posted by Respondent for not less than a six-month period.

(e) Have the attached NOTICE read in English and Spanish on company time to all employees by a Company representative or by a Board agent and to accord said Board agent the opportunity to answer questions which employees may have regarding the NOTICE and their rights under Section 1152 of the Act.

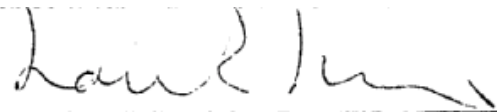
(f) Notify the Regional Director of the Salinas Regional Office within 20 days from the receipt of a copy of this Decision and Order of steps the Respondent has taken to comply therewith, and to continue reporting periodically thereafter until full compliance is achieved.

Copies of the NOTICE attached hereto shall be furnished Respondent for distribution by the Regional Director for the Salinas Regional Office.

Dated: May 16, 1980.

AGRICULTURAL LABOR RELATIONS BOARD

BY



MARK E. MERIN
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing in which each side presented evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 1152 of the Agricultural Labor Relations Act. We have been ordered to notify you that we will respect your rights in the future. We are advising each of you that we will do what the Board has 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.

WE WILL NOT discharge, lay off, or otherwise discriminate against employees with respect to their hire or tenure of employment because of their involvement in activities of mutual aid or protection.

WE WILL PAY to every member of the crew which lost time on June 18, and July 3, 1979 an amount of money sufficient to compensate them for their lost time. Additionally, we will pay to Juan Rodriguez an amount of money equal to what he would have earned had we kept him or. until the end of the season.

Dated:

C.J.MAGGIO

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.