STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY CO.,	)	
	)	Case No. 79-CE-8-SD
Respondent,	)	
	)	
and	)	7 ALRB No. 21
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

DECISION AND ORDER

On April 14, 1980, Administrative Law Officer (ALO) Kenneth Cloke issued the attached decision in this proceeding. Thereafter, the General Counsel and Respondent each filed timely exceptions and a supporting brief.

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

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

The General Counsel 's original complaint contained twenty-nine allegations, one of which charged Respondent with violating section 1153(a)[1/] of the ALRA by discharging supervisor

[1/]Section 1153(a) makes it unlawful for an agricultural employer:

> To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.

Raul Vega. Subsequently, each of the allegations in the original complaint, except the one concerning Vega, was settled by the parties or dismissed. Shortly thereafter, the General Counsel issued *a* consolidated complaint against Respondent alleging additional violations of the Act. Upon motion of counsel for Respondent, and over the General Counsel 's objection, these additional allegations were severed from the remaining original allegation of unlawful discharge.[2/]

In his decision, ALO Cloke concluded that Respondent violated section 1153(a) by discharging Vega, to which conclusion Respondent takes exception.[3/] He did not, however, recommend Vega's reinstatement with backpay.[4/]
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[2/]By filing a belated Motion to Consolidate for Decision, the General Counsel has, in effect, asked us to reverse this ruling, arguing that the conduct involved in the severed complaint would establish that Vega's discharge was unlawful. But the General Counsel directs us to no instance when he was denied an opportunity to present evidence of conduct involved in the severed complaint which might have shed light on the discharge here at issue. In effect, he asks that we reopen the record in the instant case and permit him to introduce evidence now which he failed to present below. While economy and efficiency may have been disserved by the ALO's ruling, the General Counsel was not prejudiced thereby. His motion is denied.

[3/]Because we find that Vega's discharge was lawful, we need not rule upon Respondent's other exceptions.

[4/]The General Counsel takes exception to the ALO's failure to recommend reinstatement and backpay, arguing that the ALO's decision was grounded upon the lack of evidence that Vega's discharge was part of an unlawful pattern of conduct. Such lack of evidence, he argues, was the result of the ALO's erroneous ruling granting Respondent's motion for severance. Because we find nothing unlawful in Respondent's discharge of Vega, we have no occasion to review the ALO's proposed order. We note, however, that the General Counsel's characterization of the ALO's rationale bears no resemblance to what that rationale actually was. See ALOD, p. 44, 11. 5-25.

I.

Raul Vega was initially hired by Respondent in May of 1967. Around 1972 he became foreman, which position he occupied without interruption until his discharge on January 24, 1979.

It appears that the UFW's first attempt to organize Respondent's workforce occurred in 1975, shortly after enactment of the ALRA. The attempt was not successful, however, purportedly due in large measure to Respondent's promises of benefits conditioned upon the employees' rejection of unionization. Shortly after the failure of the union's organizational efforts, Raul Vega terminated a number of Ruline employees who had supported the union.

In 1977, Respondent suffered a substantial loss due in large part to a faltering foliage market, and in January 1978, it decided that a layoff of 20 workers was necessary. The layoff was effected in March 1978, with Raul Vega deciding which employees would be laid off and which would be retained.

In February 1978, Respondent's owner, Rufus Orson, hired Glenn Stoller to prepare a cost study. Upon its completion, Orson persuaded Stoller to stay and work in a managerial capacity from Tuesday through Thursday of each week, until Respondent could get back on its feet. To help ensure Stoller's success, Vega was informed that Stoller would be in charge and that everyone was expected to cooperate.

Almost from the outset, friction developed between Stoller and Vega. Stoller strongly felt that work should be closely supervised and accomplished through a team approach. Vega, on the other hand, had long since opted for a loosely structured managerial

approach, permitting employees to work at "their own pace and to use techniques with which they were most comfortable. As *a* result the employees care to fear and distrust Stoller, while almost revering Vega, their foreman of long standing.

Because a number of incidents occurred over the next ten months which Stoller interpreted as attempts by Vega to undermine his authority, Stoller frequently recommended that Vega be discharged. Orson declined to do so largely because of the long-term, relationship he had had with Vega. Vega, on the other hand, was able to offer reasonable justification for most of the incidents which gave rise to Stroller's dissatisfaction.

In October of 1978, Stoller informed Vega and his subordinate supervisors that Respondent was going to discontinue its foliage program and, instead begin its own azalea propagation program and, in addition, produce more azaleas. He further informed them that there would be no need to immediately lay off any employees as a result of the change. Nevertheless, many employees began feeling insecure for, in addition to discontinuing a substantial crop, Respondent had refused to restore seniority and benefits to those employees who had been recalled from the March 1978 layoff.

On or about November 15, 1978, Vega informed Stoller and Orson that a number of employees were talking "union and strike" and that they had complained about certain working conditions: the lack of a fair recall policy, the lack of premium pay for overtime work, and inadequate wages. Orson contacted his attorney, who informed him. that he should do nothing to counteract the organizational drive

because, as Respondent was not at 50 percent of peak employment, any petition for election would be set aside as untimely. Orson then told Vega and other supervisors to refrain from doing anything that night result in a charge of unfair labor practices.

On November 27, 1978, Orson had another meeting with Vega, having just heard from, a neighbor that a union meeting was going to occur on Respondent's property. Vega was aware of a union meeting scheduled for that evening at a local high school but said nothing about it. When asked what could be done about the union reverent, Vega replied that it was too far advanced. He also indicated his desire to maintain a neutral posture, and Orson purportedly replied that there was no neutral position, only Respondent's side or the union's side.

On December 4, 1978, a petition for election was filed, and the next day Orson again summoned Vega and admonished him against doing anything that might lead to unfair labor practice charges. He also asked Vega to provide advance notice, if possible, as to whether the employees were going out on strike, for Respondent had just begun its busiest time of the year, and expected to market approximately 200,000 poinsettia plants. Vega testified that he asked Orson if he would rather have unfair-labor-practice charges than the union, and Orson replied, "By all means." Orson vigorously denied that this colloquy occurred. The petition for election was subsequently dismissed, the Regional Director having concluded that Respondent was not at 50 percent of peak.

The poinsettia season passed without incident. On December 20 and 26, several short-term layoffs were effectuated. Respondent

did not solicit Saul Vega's advice as to which employees were cc be laid off.

Shortly after the pew year began, another election petition was filed and an election was conducted on January 10, 1979. The union won the election, but post-election objections were filed, some of which were set for hearing.

On January 15, 1979, Stoller provided Vega with a memorandum setting forth tasks to be accomplished during the former's absence. Among then was a requirement that Vega assist a neighboring nursery owner in transferring foliage from Respondent to the neighbor. Upon his return, Stoller was allegedly informed that Vega was uncooperative in raking the transfer. Once again, Stoller recommended Vega's termination, and once again Orson declined.

In November of 1978, at Stoller's urging, Respondent changed the procedure for handing out paychecks. Formerly, Vega picked them up in the morning and distributed them throughout the day during his rounds. However, Stoller determined that this process resulted in too much unproductive time, and decided to have the checks delivered to Vega for distribution, at the end of the workday. On January 23, 1979, Respondent's front office failed to deliver the paychecks to Vega by quitting time. Vega did not call the front office about the oversight and just told employees they would be paid the next day.

The next morning, January 24, Stoller gave Vega a check for his regular pay, vacation pay and severance pay, and said, "For some time we have not been able to understand each other." According to Stoller, Vega replied, "What took you so long?" Vega

circulated among the workers to say goodbye and told them only' "The boss and I no longer understand each other." There is no evidence that Respondent told any of its employees why Vega was discharged.

II.

ALO Cloke concluded that Respondent's discharge of Vega had a tendency to interfere with, restrain, or coerce employees in the exercise of their section 1152 rights and was therefore a violation of section 1153(a) of the Act. However, he elected not to recommend an order for reinstatement with backpay. Rather, he recommended that Respondent convert the discharge to a voluntary quit and provide suitable references to any future prospective employer at Vega's request.

The ALO's analysis of the existing law, however, is inadequate. While initially he correctly concludes that illegal interference, restraint and coercion can occur only in specific factual circumstances (ALOD pp. 24-25), he subsequently abandons this approach in favor of a traditional section 1153(a) analysis, that is, finding a violation in employer action which has a tendency to interfere with, restrain or coerce employees in the exercise of their section 1152 rights. (ALOD p. 28). This is clearly inappropriate in a case involving the discharge of a supervisor because, as discussed below, the fact that a supervisor's discharge may have a tendency to restrain or coerce employees in the exercise of protected rights does not establish a violation of section 1153(a). Stop and Go Foods, Inc. (1979) 246 NLRB No. 170 [103 LRRM 1046].

III.

The protections afforded to agricultural employees under the ALRA are not extended to supervisors as defined in section 1140.4(j) of the Act. See Yoder Brothers, Inc. (1976) 2 ALRB No. 4. Even though supervisors are not explicitly excluded from coverage under the Act, this Board long ago acted to assure supervisors' exclusion, e.g., from bargaining units, in order to

> . . . reflect the uniform principle of private sector labor relations in the United States that because of problems of divided loyalty, a supervisor should not by operation of law be included in the same bargaining unit with employees under his supervision. At p. 11, fn. 8. See also 8 Cal. Admin. Code section 20355(a)(1).

Our reasoning there was consistent with that of the United States Supreme Court in Florida Power & Light v. IBEW, Local 641 (1974) 417 U.S. 790 (86 LRRM 2689] which stated that

> . . . while supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, [citations.], the right to discharge such supervisors because of their involvement in union activities or union membership, [citations], and the right to refuse to engage in collective bargaining with them [citations]. At p. 809.

Similarly, in Beasley v. Food Fair of North Carolina, Inc. (1974) 416 U.S. 653 [86 LRRM 2196], the high court concluded that Congress' objective in excluding supervisors from the National Labor Relations Act's coverage was that:

> Employers were not *to* be obligated to recognize and bargain with unions including or composed of supervisors, because supervisors were management, obliged to be loyal to their employer's interests, and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation. At pp. 660-661.

Thus, a supervisor generally serves at the will of the

employer and may therefore be discharged at any time and for any reason (or for no reason at all), for "the hiring, discharging, and conditions of employment of supervisory personnel are strictly the prerogative of management." NLRB v. Ford Radio & Mica Corp., (2nd Cir. 1950) 258 F.2d at 457 [42 LRRM 2620] Occasionally, however, the NLRB has been confronted with factual situations *where* blind adherence to the general rule would result in consequences clearly repugnant to the express purposes of the Act. See e.g., Better Monkey Grip Co. (1956) 115 NLRB 1170 [38 LRRM 1025], enf'd sub nom. NLRB v. Better Monkey Grip Co. (5th Cir. 1957) 243 F.2d 836 [40 LRRM 2027], (supervisor discharged for giving testimony adverse to the employer in a NLRB proceeding). A review of these cases reveals no single thread of analysis or rationale leading to the findings of illegality. Rather, the cases indicate that there are three, and perhaps four, categories of exceptions to the general rule, whereby the discharge of a supervisor may constitute a violation of section 8(a)(1) [ALRA section 1153(a)].

Turning to the facts of the instant case, it is undisputed that Raul Vega was a supervisor. Therefore, in order to find that his discharge constitutes a violation of section 1153(a), it must be shown that it fell within one of the exceptions to the general rule permitting such discharges at the will of the employer.

To make out a prima facie case within the first category of exceptions, it must be shown that a supervisor was discharged for having refused to engage in activities proscribed by the Act. Talladega Cotton Factory (5th Cir. 1954) 213 F.2d 209 [34 LRRM 2196], Miami Coca Cola Bottling Co. (1963) 140 NLRB 1359 [52 LRRM

1242], enf. den. in pert. part sub nom. NLRB v. Miami Coca Cola Bottling Co. (5th Cir. 1965) 341 F.2d 524 [58 LRRM 2458]; Vail Mfg. Co. (1945) 61 NLRB 181 [16 LRRM 85], enf'd. sub nom. NLRB v. Vail Mfg. Co. (7th Cir. 1947) 158 F.2d 664 [19 LRRM 2177]; Jackson Tile Mfg. Co. (1958) 122 NLRB No. 94 [43 LRRM 1195], enf'd. sub nom. Jackson Tile Mfg. Co v. NLRB (55th Cir. 1959) 272 F.2d 181 [45 LRRM 2239]. In the instant case, General Counsel has argued forcefully for a finding that Vega was discharged for his refusal or failure to thwart Respondent's employees' organizational activities by committing unfair labor practices. A careful review of the evidence, however, reveals that on no occasion did Respondent or its agents ever tell or ask Vega to engage in unlawful activities. To the contrary, there was substantial, credible testimony that Respondent's supervisors were repeatedly admonished to refrain from doing anything to interfere with the employees' organizational activities. The ALO's findings are of similar effect.[5/] Thus, the General Counsel has failed to establish that Vega's discharge falls within this category of exceptions.

The second exception to the general rule that supervisors may be discharged at will occurs when a supervisor is discharged for having engaged in conduct designed to protect employee rights, such as giving testimony adverse to the employer in a NLRB proceeding. Oil City Brass Works (1964) 147 NLRB 627 [56 LRRM 1252], enf'd sub

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[5/] "With regard to Orson, the evidence was insufficient to establish, by a preponderance of the evidence, that Vega was directed to commit unfair labor practices. Even if his version of the conversation with Orson is accepted as more credible, substantial ambiguity surrounds the exchange, and at no time did Orson explicitly direct that pro-union employees be discharged." ALOD at p. 42. (Emphasis in original.)

nom. Oil City Brass Works v. NLRB(5th Cir. 1966) 351 F.2d 466 [61 LRRM 2318]. See also Better Monkey Grip Co., supra, 115 N'LRE 1170; Ebasco Services, Inc. (1970) 181 NLR3 768 [73 LRRM 1518]; Buddies Super Markets (1976) 233 NLRE 950 [92 LRRM 1008], enf. den. (5th Cir. 1977) 550 F.2d 39 [95 LRRM 2108]. There is neither an allegation in the complaint nor evidence in the record that such conduct served as the basis for Raul Vega's discharge. Accordingly, no prima facie section. 1153 (a) violation has been made out for this category.

The third exception, to the general rule is based on the discharge being the means by which the employer unlawfully discriminates against its employees. See, e.g., Kaplan Ranch, (1979), 5 ALRB No. 40, (Rev. den.). A prima facie case is made out in this category when employees' tenure is expressly conditioned on the continued employment of their supervisor, employees have engaged in protected concerted activities, and their supervisor has been discharged as a means of terminating the employees because of their concerted activity. Pioneer Drilling Co., Inc. (1967) 162 NLRB 918 [64 LRRM 1126], enf'd in pert.part sub nom. Pioneer Drilling Co., Inc. v. NLRB (10th Cir. 1968) 391 F.2d 961 [67 LRRM 2956]; Krebs and King Toyota, Inc. (1972) 197 NLRE 462 [80 LRRM 1570]; VADA of Oklahoma, Inc. (1975) 216 NLRB 750 [88 LRRM 1631].

Here, no prima facie section 1153 (a) violation has been made out in this category. No evidence was offered to show that the employment of any of Respondent's employees was conditioned on the continued employment of their supervisor, Raul Vega. Thus, his discharge does not fall within this category of exceptions.

Some cases suggest yet a fourth situation, in which a supervisor's discharge is found to be an integral part of an employer scheme aired at penalizing employees for having engaged in concerted activities. A prima facie section 1153(a) violation appears to be made out in this category when the supervisor's discharge is effected along with the unlawful discharge of unit employees or other widespread employer misconduct, the discharge is aired at employees who have engaged in union activities, and the employer has created such a pervasive atmosphere of coercion that employees cannot reasonably be expected to perceive the distinction between the employer's right to discharge its supervisors for certain conduct and the employees' right to engage in the same activities freely without fear of retaliation. See, e.g., Brothers Three Cabinets (1930) 243 NLRB Mo. 95.[103 LRRM 1507] .[6/] Cf. M. Caratan, Inc. (1978) 4 ALRB Mo. 83.[7/] A careful review of the

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[6/]However, these cases have been characterized by vigorous dissents and seemingly inconsistent holdings. Compare Brothers Three Cabinets, supra, 248 NLRB No. 95; Downslope Industries, Inc. (1979) 246 NLRB No. 132 [103 LRRM 1041]; East Belden Corp. (1978) 239 NLRB No. 108 [100 LRRM 1077]; Sheraton Puerto Rico Corp. (1980) 248 NLRB No. 113 [103 LRRM 1548]; with Stop and Go Foods, supra, 246 NLRB No. 170; Sibilio's Golden Grill, Inc. (1977) 227 NLRB 1688 [94 LRRM 1439], enf'd sub non. NLRB v. Siblio's Golden Grill, Inc. (3rd Cir. 1978) __ F.2d __ [99 LRRM 2633]. And even those cases in which the NLRB has found a violation have often failed to win court approval. See e.g., NLRB v. Nevis Industries, Inc. (9th Cir. 1981) 647 F.2d 905 [LRRM].

[7/] M. Caratan is practically indistinguishable from the instant case. There, we overruled the ALO's findings of a section 1153(a) violation, concluding that the supervisor's discharge was not part of a plan to interfere with employees' organizational rights, notwithstanding findings that the supervisor was summarily discharged after seven years of satisfactory service, that the employer offered no valid business reasons, that the supervisor's

[fn. 7 cont, on n. 13.]

record herein reveals that Respondent has not discriminatorily discharged rank and file employees nor engaged in other unlawful conduct. Therefore, because our resolution of the question would not affect the rights of the parties to this action, we find it unnecessary at this time to decide whether to adopt this fourth category of exceptions.

It may also be argued that Vega's discharge alone would tend to restrain, employees in the exercise of their section 1152 rights if they believed that Vega was discharged for maintaining a neutral stance during the organizational campaign. Assuming, arguendo, that this was a reasonable belief en their part, a violation of the Act would still not be made out, for it is clear that it is the employer's reason for the discharge, i.e., the cause of the discharge, and not its probable effect on employees that determines whether the discharge was unlawful.

In sum, an employer may generally discharge a supervisor for any reason, or for no reason, without violating the ALPA. There are, however, three or four categories of exceptions to this

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[fn. 7. cont.]

pro-union sentiments were known to a number of employees, and that the discharge took place just one week after the representation election and contemporaneously with other employer violations.

Here, Vega too was arguably summarily discharged without business justification after many years of satisfactory employment, his union sentiments (neutrality) were known to many employees, and his discharge occurred about two weeks after an election (but was ret accompanied by other employer violations). Thus, the decision in this case overruling the ALO's recommended finding of a section 1153(a) violation is fully consistent with our own precedent.

general rule.[8/] The General Counsel has failed to establish a prima facie violation under any of them.[9/]

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that the complaint in this matter be, and it hereby is, dismissed in its entirety.

Dated: August 21, 1981

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

[8/] Member McCarthy believes that these very narrow categories of exceptions should be strictly construed in deference to the legislative exclusion of supervisors from the protections of the Act.

[9/]It is implicit in the foregoing that once the General Counsel makes out a prima facie violation in any of these narrow categories, the burden shifts to the employer to establish by a preponderance of the evidence that a valid business justification was the reason for the discharge. See/ e.g., Abatti Farms (1978) 5 ALRB No. 34; Wright Line (1980) 251 NLRE 150 [105 LRRM 1169]. Of course, the failure of the General Counsel to make a prima facie showing in the instant case rakes it unnecessary to consider Respondent's preferred business justifications.

CASE SUMMARY

Ruline Nursery Co. 7 ALRB No. 21
Case No. 79-CE-8-SD

ALO DECISION

The ALO concluded that Respondent discharged supervisor Raul Vega for remaining neutral and failing to prevent unionization in the face of a UFW organizational drive, finding that Respondent's employees reasonably believed that Vega had been terminated for protecting their statutory rights. Thus, the ALO concluded that Vega's discharge reasonably tended to restrain, interfere with, and coerce employees in the exercise of their section 1152 rights and was therefore in violation of section 1153(a).

BOARD DECISION

The Board rejected the ALO's analysis and conclusion, holding that supervisors nay generally be discharged at any tire, for any reason or no reason, since the protections of the ALRA are not extended to supervisors. The Board noted, however, that there are circumstances or situations where the discharge of a supervisor will be held to violate the Act: (1) where a supervisor is fired for refusing to commit unfair labor practices; (2) where a supervisor is fired for giving testimony adverse to an employer at an ALRB hearing; and (3) cases in which employees' tenure is expressly conditioned on the continued employment of their supervisor, employees have engaged in protected activities, and their supervisor is discharged as a means of terminating them because of that protected activity.

The Board noted the possibility of yet a fourth category of exceptions but, since Vega's discharge did not fall within its parameters, declined to adopt it at this time.

As the Board concluded that Vega's discharge did not come within any of the above-described exceptions, it dismissed the complaint in its entirety.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
RULINE NURSERY CO.,	)	
	)	
Respondent,	)	
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and	)	CASE NO: 79-CE-8-SD
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UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

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DECISION

STATEMENT OF THE CASE

KENNETH CLOKE, Administrative Law Officer:

This case was heard before me in San Diego, California, on May 21, June 7, 13, 14, 18, 19, 22; August 27, 29, 30, 31; September 17, 18, 19, 20, 24, 25; October 4, 5, 9, 10, 12 and 15, 1979. The Notice of Hearing and Complaint were duly filed and served, alleging violations of §§1153(a) and (c) of the Agricultural Labor Relations Act, (hereinafter referred to as the Act) by Ruline Nursery Co., (hereinafter referred to as Respondent). The Complaint is based on a single charge filed against Respondent by an employee, Mario Duran, who alleged:

> "On January 24, 1"979, Rufus Orson [owner of Respondent] interfered with our rights to self-organize, when he discharged our general foreman, Raul Vega."

Section 1153(a) was checked as applicable. The complaint alleged, in paragraph 21, that Respondent:

> "interfered with its employees Labor Code Section 1152 rights to freely self-organize by discharging Raul Vega for his failure to impede union activities and support among the employees and in order to retaliate against said employees for such union activities and support. Said discharge intimidated the employees with respect to their exercise of such 1152 rights."

While General Counsel briefly argued at hearing that it had raised the legal issue of a violation of section 1153 (c), he did not mention this section in his Brief. Respondent, through its counsel, duly filed and served an

Answer generally denying the allegations contained in this Complaint. Other paragraphs contained in an earlier Complaint were settled by agreement between the parties shortly after the hearing began.

All parties were given full opportunity to participate in the hearing, to call and examine witnesses, examine and present documentary evidence, and argue their positions. Several motions were made by the parties which were reserved by me and are incorporated herein. Upon the entire record, including testimony, exhibits, judicial notice, observation of the demeanor of the witnesses, and after careful consideration of the briefs filed by Respondent and General Counsel, and independent research and reflection, I reach the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

I. Jurisdiction:

Respondent, Ruline Nursery Co., is a corporation engaged in growing horticultural commodities in Fallbrook, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (hereinafter referred to as the Act.). The United Farm Workers of America, AFL-CIO, (hereinafter referred to as the Union) as charging party, is a labor organization within the meaning of Section 1140.4 (f) of the Act. Although supervisors are expressly excluded from the definition of "employee" under the Act, the complaint herein was filed on the theory that the discharge of a supervisor interfered with, restrained,

and coerced non-supervisory employees in the exercise of rights guaranteed them in Section 1152 of the Act, and in violation of Section 1153(a) and (c) of the Act.

II. UNFAIR LABOR PRACTICES

A. Allegations:

The complaint alleges that Respondent, Ruline Nursery Co., violated Section 1153(a) and (c) of the Act in that it interfered with, restrained and coerced its employees in the exercise of rights guaranteed to them by Section 1152 of the Act, in that on or about January 24, 1979, Respondent discriminatorily discharged Raul Vega for his refusal to commit unfair labor practices.

B. General Findings:

Rufus Orson created the Ruline Nursery Co. in Fallbrook, California, in 1960. Raul Vega was hired as a waterer in 1967 and worked his way up to general forman, the highest employee position, by 1978. In 1975, Orson began investing in real estate with the assistance of Marilyn Abigit, his financial advisor, and as he spent more time with real estate ventures, entrusted more of the nursery's operation to Vega.

Shortly before the Act became law in 1975, Orson called a meeting with Marilyn Abigit and Raul Vega, at which Vega was instructed to discharge potential union adherents, which he did. After the ALRA became law, Orson, Abigit and Vega held several meetings concerning the union, at which ; Vega reported on union activity he had observed. Lists were prepared of workers who supported the union, pro-union workers

were fired on pretext, and employees who did not support the union were rewarded with a new payscale. Vega's testimony regarding the events of 1975 was undisputed, as was employee knowledge of their occurrence.

Ruline Nursery prospered until 1977, when the green foliage market went into a slump, and by October, 1977, Ruline was sustaining heavy financial losses. The poinsettia and chrysanthemum crops were of poor quality, which Olson allegedly attributed to Vega's bad managment, although he said nothing to Vega at the time. By February 9, 1978, the situation has not improved, and Orson hired his friend and business associate, Glen Stoller, to conduct a cost-analysis study of the Ruline operation. On the same day, Orson asked Vega to cooperate with Stoller, as Vega had allegedly failed to cooperate with a similar "efficiency expert" several years before. Again nothing was said to Vega, who denied any such failure. The cost-analysis study was completed on February 16, 1973, and Stoller was hired to implement his suggestions and make Ruline operations more efficient. Stoller was to come from Bakersfield, where he resided, every Tuesday, Wednesday and one-half day on Thursday, and leave the operation to Vega on Monday and Friday.

On February 21, 1978, Rufas Orson called a meeting with Glen Stoller, Marilyn Abigit, Raul Vega, Carl Wiedman, Butch Yamashita and Ken Carlin, to inform them that Stoller was now in charge of the Nursery and that everyone was to cooperate with his instructions. The next day Vega complained to Orson concerning one of Stoller's instructions.

Vega again complained on February 22, 1978, regarding a request that he move a portable potting machine to a seran house. Stoller admitted on cross-examination that Vega had never' been given specific details about when or where to move the machine, and that he had merely suggested the move. Stoller found Vega had used the potting machine in a muddy area in the seran house, and felt he had done so in order to "sandbag" the suggestion. Vega testified he chose the seran house because it was the only one which had an electrical outlet outside, and electricity was needed to run the potting machine. He claimed he had no choice but to place the pots in a muddy area because the cord was short. Orson and Stoller admitted Vega was not informed of their objection, that they did not ask Vega why he used the machine there, order him to place it elsewhere, or suggest an alternative location. At a meeting on February 28, Orson again stated to Vega and other supervisory employees that Stoller's instructions were to be followed.

Stoller testified Vega was given instructions on how to install spaghetti irrigation pipes in late February or early March but Vega did not use Stoller's method of installing the spaghetti system. Vega testified the workers tried Stoller's method without success, that Stoller had not told them he was angry because his suggestion had not been followed, or discussed the issue with Vega. Stoller admitted on cross-examination he had only made a suggestion and had not given Vega an order.

On March 21, 1978, Orson met with Stollerand Vega to

to discuss a previous direction that Vega lay-off a number of workers, which he had not done. Orson again asked Vega to lay-off the workers by a certain date, to choose the workers to be laid-off, and to lay-off Butch Yamashita and Carl Wideman. According to Vega, Orson also requested that Salvador Briseno and his wife, Vicky be laid off because they had been pro-union in 1975. Orson denied having given this direction. The workers were belatedly laid-off.

Stoller continued periodically to suggest that Orson terminate Vega for lack of cooperation. During one such conversation in mid-to-late March, 1978, Stoller told Orson that Vega was "sandbagging" his ideas and the foliage program, by which he meant that Vega was "very clever always at looking like it was an effort to do what I wanted him to do but almost always in such a way that it would never work." (Reporter's Transcript, Vol XI, p. 45, hereinafter cited as R.T. XI, 46.)

On March 28 or 29, 1978, Ruline received an order for 376 cartons of chrysanthemum plants that would be accepted only if delivery were effectuated the following day. The "mums" were not delivered and Orson demanded an explanation from Vega, who stated he could not fill the order because it had arrived too late, the workers already had too many orders to fill, even after work, and the order was not specified "urgent", as was customarily done.

In order to effectuate the delivery, workers would have had to work overtime, which Vega did not wish to ask them to do, unless they were paid time-and-a-half. Vega convinced Orson, in the interest of fairness, to give extra

pay for overtime work. When Orson told Stoller what happened, Stoller again suggested that Vega be terminated. The "mums" had to be thrown away because the customer cancelled the order, and Orson blamed Vega for the loss, but again, never communicated this to him.

Vega testified he had asked Orson in April for permission to reinstate two workers who had been laid-off in March. Vega claimed he was told not to recall them because they had favored the union in 1975. Orson testified Vega had not asked for permission to recall the workers, because they were not recalling any individuals at that time except on a day-to-day basis to "disbud" chrysanthemums, and the two workers were not qualified to do that type of work. Orson testified he told Vega he could have any four individuals to disbud the nuns, and did not tell Vega who not to hire. Stoller corroborated this explanation.

In May, according to Orson, Vega suggested that Stoller be fired, since the workers did not like him. Vega denied he had made the suggestion that Stoller be fired, but agreed workers did not like his suggested changes or ideas because they believed he was despotic.

By May 24, 1978, Orson was at the point of firing Vega, but Marilyn Abigit talked him out of it, and suggested that an organizational chart might be drafted, to clearly define Stoller as in charge of the new foliage program and color crops, with Vega in charge of the remainder of Ruline's operations. An organizational chart was prepared that day by Stoller, and Orson called a meeting attended by Vega, Stoller and

Abigit. Stoller discussed the chart with Vega and explained his control was to be decentralized and that shipping orders would henceforth pass directly to Lucy Escobedo. This change was implemented to save time, as Vega had previously obtained these orders from Orson's secretary who would simply pass them on to Lucy Escobedo. Vega was asked his opinion on how to improve efficiency at Ruline, and several of his suggestions were followed.

On June 7, 1978, Vega discharged a Mr. Lupercio, who worked in the foliage department. Orson testified Vega should have checked with Stoller before terminating him, because under the organizational chart Vega had no authority over foliage. Yet Orson did not state this to Vega or suggest he check with Stoller first, a plausible reason for discharge was given by Vega, and Orson gave his approval.

In mid-June 1978, while Orson was touring the nursery, he noticed weeds growing in the pots, and spoke with Stoller, who blamed Vega, suggesting the workers mirrored his attitude, which was to put in minimal effort, and do only what was absolutely necessary. Stoller told Orson he had reprimanded workers several times for not simultaneously weeding and irrigating the pots.

In July, Stoller had suggested using aluminum roller conveyors to unload pots, and testified Vega told him the workers had tried to use the rollers but didn't like them, and that he told Vega to force them to use the rollers. Vega testified Stoller had replied "no" when asked whether he wanted the workers forced to use the rollers.

On another occasion, workers had informed. Vega that a certain type of pipe Stoller had ordered was not strong enough. Vega went to see Orson who was on the phone with Stoller. Vega informed Stoller of the problem, and was told the pipe was strong enough. Vega reported this to the workers, who installed the pipe, which later burst. The same problem occurred in connection with the installation of some valves, and a trip irrigation system in House 24, where workers reported their instructions from Stoller would not work, were told by Vega to follow Stoller's instructions, and subsequently had to correct the mistakes they had anticipated. On several occasions Stoller became enraged at workers who had not followed his instructions.

Stoller testified he had been given a mechanical toy which ran on a track and did everything automatically. He had set it up in the Nursery office with a sign reading: "How a Nursery Should Run". Raul Vega on observing the toy, had asked "Where are the people?" Stoller testified he took Vega's comment to mean that “just because it was efficient it wasn't good enough, and that it was more important that it have people." (R.T. XII, p. 60.)

On September 5, 1978, Stoller hired Jack Jester, a foliage grower, because he felt his orders regarding foliage were not being followed during the time he was in Bakersfield. Stoller told Orson that whenever he was gone, Vega would remove workers from duties under the organizational chart ; without prior authorization; yet Vega was told he still had; full authority and control over workers, and if Jester needed

workers, he should request them from Vega.

In the meantime, the Nursery was incurring tremendous debts. On October 4, 1978, it was decided the green foliage programs would be terminated, that Ruline would sell the existing crop, and begin propagation of azaleas and other color crops.

Orson testified he had directed Vega on November 24, 1978, to move some azalea stock plants delivered by the Cal-Camelia Gardens into greenhouse number 10, as Stoller had programmed. Instead, Vega ordered the Cal-Camelia truck driver to place the stock plants under a saranhouse . Orson felt Vega had "sandbagged" him, because he had known that Orson and stoller wanted the stock plants in greenhouse number 10. Orson testified that because Vega had failed to follow his order, plants were burned by the cold and lost for prorogation purposes, creating a void in Ruline's program for certain varieties of azaleas. Vega testified he had not received an order from Orson or Stoller to place pots in house number 10, and that the plants were only slightly burned, but had to be pruned anyway, and there was no room to put them indoors. Both he and his brother Oscar Vega testified that cuttings could have been taken from the many plants which were available at Ruline in December. (General Counsel's Exhibit 15, hereinafter cited as GCX 15.)

In November, 1978, workers at Ruline began talking about the Union, and the possibility of engaging in a strike. They were allegedly feeling uncertain about their jobs since 20 people had been laid-off in March, undocumented workers

had allegedly been hired at lower wages, and according to Vega, felt insecure about Stoller's changes and general arrogance. On November 15, Vega told Stoller of the worker's discontent, and repeated his statement later that day to Orson. When union activity began, several workers, including Raul's brother Oscar Vega, asked Haul what position he would take, and he responded that he would remain neutral. Oscar Vega testified that about 20 of the 31 workers at Ruline had asked if Raul would fire them as he had done in 1975, if they joined the union. Oscar Vega told them Raul had said he would remain neutral. Mario Duran, Eliaz Gonzalez and Maria Cortez testified they had known about Raul Vega's discriminatory firings in 1975, asked about his stance in 1978, and were encouraged to engage in concerted activities by his response that he would remain neutral.

On November 21, 1978, Orson was informed by Stoller of Vega's statement that workers were talking about bringing in the union and walking out or going on strike. He telephoned his attorney, Thomas Campagne, who suggested he instruct his supervisors not to do or say anything about the union. Campagne expressed his opinion that Orson had nothing to worry about, since an election petition would be dismissed because the nursery was under fifty percent of peak employment. After this conversation, Orson told Vega his attorney had suggested he direct supervisors not to do or say anything regarding the union, and requested advance notice if Vega learned employees were going on strike. Orson told Supervisors Jester and Escobedo the sane thing, but not Oscar Vega or Mario Duran, both of whom were supervisors.

On November 27, 1978, Orson told Vega he had learned through a neighboring nursery that Ruline was going to receive a petition for a certification election and Vega replied that there was considerable union activity at Ruline. Orson told Vega he never felt it would come to a strike and asked what had gone wrong. Orson testified Vega informed him the workers felt Stoller had been arrogant and despotic. According to Vega, Orson asked what could be done about it, and Vega responded it was far too advanced, that the workers were good people despite their union support, and that he did not want to interfere with them. Vega asked if there was a neutral position, because he wished to remain neutral, and Orson reportedly answered there was no neutral position, that he was either on Orson's side or the union's side. Again Orson asked Vega what could be done and Vega responded he had no idea. Orson allegedly told Vega to sleep on it, and that needless to say he was not going to take it lying down.

On December 4, 1978, an election petition was filed with the ALRB by the UFW. The next day Orson testified he called Vega into his office and advised him once again not to do or say anything but to avoid "frivolous unfair labor practices." Orson then instructed Escobedo and Jester in a similar fashion, but not Oscar Vega or Mario Duran. According to Vega, Orson told him he did not know how this had happened, that if that was what the workers wanted he was not going to do anything about it, and to be careful because he did not want a lot of unfair labor practices filed against him. Orson asked again how such a thing could have

happened and Vega told him union support had resulted from the way the workers had been treated, and mentioned various examples, including the lay-off, hire of illegals, cut in pay and benefits, and Stoller's arrogance. Orson asked Vega to notify him regarding possible strike action, and stated that even two hours would be helpful. Vega responded he would see what he could do. Orson told Vega not to stick his head out too far. Vega then asked him if he referred unfair labor practices to the union, and Orson reportedly answered "By all means". (RT III, 107), Vega began to leave, Orson called "Mr. Vega", he returned, and Orson shook his hand firmly, which he had not done before. Orson did not ask him to request the employees to vote "no union" or to commit any specific unfair Tabor practice. According to Orson, he simply asked for notice in advance of a strike and stated that even an hour or two would help.

The first election petition was dismissed by the ALRB, since Ruline was not at peak, and afterwards Vega's authority began to decrease. He received noticeably fewer calls on the terriphone, which could be heard by workers, while calls to Escobedo and Jester increased. Escobedo and Jester began to give orders only Vega could previously have given and to take workers away from the Assignments Vega had given them without informing him. The workers noticed these changes. When Vega asked Escobedo why she was doing these things, she replied that she had been told to do so by Orson. She testified Vega arrived late for work during the last week in December, 1978, when she and some other

workers were cleaning out greenhouse No. 22, pursuant to Orson's instructions. She told Vega that Orson wanted house 22 filled with hydrangeas, and that the remainder were to be placed in house 23. After January 1, 1979, Vega instructed workers to move hydrangeas into greenhouse No. 22, because it had benches and other conditions favorable to hydrangeas. Jester countermanded his instructions, and told the workers to put them in house No. 22. Vega returned and again directed that the order be placed in house 23, and again Jester chanced his order, based on instructions from Stoller and Orson. Vega and Jester got into a heated argument. Jester told Vega the hydrangeas were to go into house 22 pursuant to Stoller's program of which Vega had not previously been informed. Vega went directly to Orson to clarify the situation and was told there was such a program, and he would receive a copy. Orson became upset because under the organizational chart, Vega had nothing to do with hydrangeas, which are green foliage. Orson allegedly stated to Vega that he and Jester possessed the same degree of authority, but this conflicted with what Orson had originally told Vega when Jester was first hired, Vega had never received a copy of Stoller's program. While Orson argued Stoller's chart (GCX2) showed Jester had never been under Vega's supervision, another chart (GCX14) prepared by Stoller and given to the ALRB by Respondent's attorney during an interview concerning the first election petition and represented to be an accurate depiction of the distribution of authority in Ruline, confirmed Vega's authority over Jester. An identical chart was turned over under a

documentary subpoena requesting records which demonstrated supervisorial authority at Ruline.

Oscar Vega corroborated his brother's testimony that Escobedo and Jester began to give orders traditionally given only by Raul, and it was stipulated that Maria Gonzalez would have testified in corroboration as well. Mario Duran testified he called the office once to clarify whose orders he should follow and the office secretary told him he should listen to Escobedo.

Jester testified Vega had never cooperated with him and was always trying to stab him in the back. (RT XII, 110).Oscar Vega and Mario Duran testified the workers discussed among themselves the fact that Raul was losing authority, and believed it was due to his neutral position on unionization.

From the time the first petition was filed on December 3, until his discharge, Orson spoke to Vega only a few times, and then only to ask him if anything was new with the union. Vega always replied there was nothing new. During this period Orson became aware that Oscar Vega was a strong supporter of the union, from conversations with Escobedo, observation or reports of Oscar handing out union leaflets, or from having been personally served with an unfair I labor practice charge by Oscar. Orson also had been informed by Jester and Campaign that Oscar Vega had led the union's victory celebration. It was thus evident to Orson that Raul Vega was not keeping him completely informed regarding the union.

Orson and Stoller testified they believed Vega

completely controlled the workers at Ruline. Stoller stated that Vega was in charge of the workers regardless of who gave the orders, and that the workers had not liked his ideas because Vega did not like them. Orson also acknowledged Vega's control over the workers when he stated he did not fire Vega during the busy poinsettia shipping season in December, since he was frightened the workers would believe it was due to union activity and go on strike. It was clear from the testimony as a whole that Orson and Stoller believed Vega could have controlled the workers so as to discourage union activity, had he wanted to do so.

On December 20 and 26, workers were given a few days lay-off, Oscar Vega and Mario Duran were permanently laid-off, and for the first time in years, Vega was not informed ahead of time and had no part in the selection of workers to be laid-off. A second election petition was filed on January 3, 1979 by the UFW. Although Respondent's attorney moved to dismiss the petition on the ground that Ruline was not at 50 percent of peak, the Regional Director decided to hold the election and let the matter be resolved by post-election objections. The election was held on January 10, 1979, and is presently on appeal.

On January 16, Orson left written instructions for Vega to cooperate with a buyer, Tom Andre in moving a large amount of green foliage while Orson was out of town and stated that due to problems in communication, Orson would now communicate with Vega in writing. (GCX4) . When Orson

returned, he was informed by Andre that Vega had not been cooperative. Although stoller recommended Vega be terminated immediately, Orson testified he was having a hard tine firing Vega because of "old times sake". (RT VIII at 21). According to Vega, Orson told him in an angry tone that for some time they had not been able to communicate well, Vega responded he was sorry it had come to this, that he had previously fought against the union at Orson's side, but this time he could not do it. Vega reportedly stated it was a matter of principle, and Orson did not respond, impliedly admitting Vega's statement by silence. Orson denied the union was discussed and asked Vega why he had not cooperated with Andre in removing the plants pursuant to written instructions. The letter stated Vega was to help Andre's workers remove the plants "but NOT to use Ruline employees to care for those materials." (GCX4, original emphasis.)

Finally, on January 24, 1979, Orson called Vega to ask why he had not distributed pay-checks to workers the evening before. Vega told him he had previously been instructed to wait until the checks were brought to him, and waited until 4:30, but the checks never arrived, and the workers had said tomorrow would be fine. Vega testified his practice had been to distribute checks during work-time, but after union activities began, he was told they would be brought to him for distribution no earlier than 4:15, and this had been the custom until the day he was discharged. Orson admitted Vega had been told the checks would be delivered, but felt Vega should have telephoned to remind him to bring the checks

down. Orson had talked to Stoller about this by telephone, and Stoller recommended that Vega be terminated. Orson agreed and discharged Vega, stating that "they just weren't communicating anymore." According to Orson, Vega responded "what took you so long". (RT VIII, 37).

Maria Aros Cortez testified the workers were never given a reason for Vega's firing, but were simply told by Orson that Vega would no longer be working at Ruline, and Jester and Escobedo would be in charge. Maria Gonzalez corroborated this testimony.

Stoller testified Vega was not part of the management "team", and that his attitude toward supervision was one of letting people work in their own way, whereas Stoller believed work had to be supervised in detail, in the movement of their bodies, as well as in the materials and quality of their product. As Stoller stated, he was for management while Raul was for the people.

Stoller was clearly expert in plants and propogation, but not in communication or personnel administration. He was certainly capable of giving a direct order, offering constructive criticism, directing work, or explaining what he wanted done, yet seldom did these things with Vega, who was under his direct command. The absence of <u>any</u> effort at direct confrontation over incidents, policies or philosophies of management is unexplained by Respondent, and clearly constituted a major element in a discharge which might never have happened. The catalyst in Vega's termination was clearly the impending unionization and consequent potential for higher

wage rates, in a company already suffering financial loss and committed to a management policy of directed labor efficiency, inconsistent with both unionization and Vega's personal style of management.

While unionization may have been "the straw that I broke the camel's back" in Orson's relationship with Vega, it was Stoller who performed that function for unionization. The insecurity workers must have felt with new efficiency-oriented management committed to detailed regulation of the work-process, sale of foliage, financial set-back, new propogation programs, and lack of communication, explanation, or reassurance concurring their job-security, had to have been aggravated to a considerable degree by the falling favor of their supervisor of several years, who had recently declared to them, by professed neutrality, his refusal to commit unfair labor practices, and was dismissed. It would have been extraordinary, under the circumstances, if they had not felt less secure in the exercise of their rights, by Vega's unexplained dismissal.

With regard to credibility resolutions, there were few conversations or events whose details were contested, and many of these do not matter in determining whether Vega's discharge interfered with, coerced or restrained Respondent's employees in the exercise of their statutory rights. Moreover, the disputed conversations took place outside the presence of unbiased or uninterested witnesses, and commonly involved differences in styles of speech and perception. All percipient witnesses could be discounted based on self-interest. Jester

and Escobedo expected advancement, Oscar Vega and Mario Duran were active union supporters, Stoller had a vested interest in the success of his programs and an expectation of obedience to suggestion, Orson felt betrayed, and Raul Vega wrongly treated. In general, Vega's tone was respectful, honest, and direct throughout, as was that of Rufus Orson. With respect to allegations of "sandbagging", these were comprehensible more as failures of communication and management resolve, than issues of credibility. Vega's explanations for his conduct demonstrated that his errors, if they were such, were made in good faith, and fell short of intentional misbehavior. The same may be said of Rufus Orson's alleged request that Vega commit unfair labor practices. Even without resolving the credibility issue regarding this request, it is plain that there was inadequate direction on Orson's part, to an employee with Vega's intelligence, high ethical standards, and independence of decision-making. Had Orson been committed to a course of illegal conduct, he could have discharged these individuals himself, or given a more direct order. Instead, he was frightened of a strike at the beginning of the Christmas season, and expected to win on the election issue. It is more likely that Orson was beginning to doubt Vega's loyalty, the degree to which he was being informed of union activity, and the extent of Vega's legal efforts to combat it. It was clear from the testimony that Respondent was worried and upset at the prospect of a strike, and began to treat Vega differently after union activity began. It is reasonable to infer that Vega's usefulness to

the company delcined in their estimation with his inability to influence employee opinion against the union. Orson and Stoller both indicated Vega was "in control" of the workers, and in all likelihood, felt his neutrality, whether it was stated or not, as a form of disloyalty. Regardless of their intent, workers at Ruline believed Vega's declining authority resulted from his neutrality, and their own organizational efforts. The question then becomes whether this belief is legally sufficient to constitute an unfair labor practice under the Act.

CONCLUSIONS OF LAW

A. In General:

Section 1143 of the Act requires that the Board follow "applicable precedents of the National Labor Relations Act, as amended." Sections 1153(a) and (c) of the Act are identical to Sections 8(a)(1) and (3) of the NLRA.

Section 1152 of the Act, which is identical to Section 7 of the NLRA, establishes the rights of agricultural employees to engage in collective self-help:

> Employees shall have the 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, and shall also have the right to refrain from any or all of such activities..."

In Section 1, the purpose of the Act is stated as follows:

> "In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.
>
> This enactment is intended to bring certainty and a sense of fair play to presently unstable and potentially volatile condition in the state."

B. Discharge of a Supervisor;

The Act defines a supervisor in Section 1140.4 (j) as:

> "any individual having the authority, in the interest of the employer to transfer ...layoff...assign... or discipline other employees, or the responsibility to direct them...or effectively to recommend such action, if...the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement."

Respondent stipulated at trial that Mr. Vega was a supervisor within the meaning of Section 1140.4(j) of the Act at the time his relationship with Respondent was severed, and at all times material herein.

Supervisors are expressly excluded from the definition of "employee" under the Act, and are therefore generally excluded from its protection. NLRB v. North Arkansas Electric Cooperative, Inc., 445 F.2d 602, 609 (1971): NLRB v. Fullerton Publishing Co., 283 F.2d 545 (CA 9, 1960). This exclusion

> "rests on the premise that the functions and interests of such individuals are more closely allied with those of management than with production workers, and therefore, that they are not truly employees within the meaning of Section 2(3) of the Act, as read in conjunction with Section 2(2)."
> NLRB v. North Arkansas Electric Cooperative, Inc., supra, at 605.

A further reason for exclusion was stated in Carpenters District

Council V. NLRB, 274 F.2d 564, 566, 44 LRRM 2457 (1959): "In enacting Sections 2(3) and (11) Congress' preeminent purpose was to give the employer *a* free hand to discharge foramen as a means of ensuring their undivided loyalty, in spite of any union obligations." Thus, even the discriminatory discharge of a supervisor is not generally considered to be an. unfair labor practice. NLRB v. Fullerton Publishing Co., supra, at 551. A supervisor can be required by an employer to obey instructions to remain neutral in a union election. NLRB v. North Ardansas Electric Cooperative, Inc., supra; not to become a union member or engage in union activities, Pierce Industries, Inc., 45 LRRM 1522 (1960), Fair Lady, Inc. 211 NLRB 22, 87 LRRM 1027 (1974), Texas Gulf, 64 LRRM 1302 (1967); or to engage in lawful anti-union activity. Russell Stover Candies v. NLRB 551 F.2d 204, 94 LRRM 3036 CC.A. 1977).

C. Exceptions to the General Rule:

An exception to this rule has been recognized whenever discharge of a supervisor reasonably tends to interfere with, restrain or coerce non-supervisorial employees in the exercise of protected rights under Section 7 of the LMRA. As the court stated in Russell Stover Candies, supra, at 94 LRRM 3037: "...The supervisor is not protected in his own right...his basis for relief is that his discharge had a tendency to interfere with, restrain or coerce the protected employees in the exercise of Section 7 rights..."

Interference, restraint or coercion of non-supervisorial employees can occur in three situations: first, when a supervisor has been discharged for testifying against an employer

at a Board hearing, NLRB v. Better Monkey Grip Co., 243 F.2d 836, 40 LRRM 2027 (CA 5, 1957); Oil City Brass Works v. NLRB, 357 F.2d 466 (CA 5, 1966); King Radio Corn., Inc. v. NLRB, 398 F.2d 14 (CA 10, 1968); second, when the supervisor's discharge was part of a pattern of conduct aimed at penalizing employees for their union activities and ridding the plant of union adherents, Miami Coca Cola Bottling Company d/b/a Key West Coca Cola Bottling Company, 140 NLRB 1359 (1963) ; East Belden Corporation, 239 NLRB 108 (1978); Dave Walsh & Co., 4 LRB 84 (1978); Production Stamping, Inc., 293 NLRB 176 (1979); and third, when the supervisor has been discharged for refusing to engage in unlawful conduct directed at employees by an employer; NLRB v. Talladega Cotton Factory, 213 F.2d 209, 34 LRRM 2196 (1954); Russell Stover, supra; Jackson Tile Manufacturing, 122 NLRB No. 94, 43 LRRM 1195 (1959) enf. 272 F.2d 1181, 45 LRRM 2239 (CA 5, 1959).

The underlying theory for this exception was stated in Gerry's Cash Markets v. NLRB, 101 LRRM 3116 (1979):

> "...not, of course, that the Act protects the supervisor which it does not, nor even that disciplining a supervisor for union activities instills fear in rank-and-file employees that their own protected union activities may subject them to a similar fate. Rather, the theory is that if employers are allowed to force supervisors to engage in unfair labor practices, this necessarily results in direct interference with the affected rank-and-file employees in the exercise of their Section 7 rights." Id at 3117, citing Oil City Brass works v. NLRB, supra, at 470-71.

In Russell Stover Candies, Inc., the Court stated: "(s)uch a discharge interferes with nonsupervisory employees' protected self-organizational rights by demonstrating to them

the extreme measures to which the employer will resort in I order to thwart the unionization efforts." Id at 206-07.

Respondent states in its Brief that the Ninth Circuit still follows the rule, without exception, that since supervisors are expressly excluded from the definition of "employee" under the Act, the Board is without jurisdiction to order supervisors either reinstated or entitled to back pay, citing NLRB v. Fullerton Publishing Company, supra.

In Fullerton, the court overturned a determination by the NLRB that an employee was not a supervisor. The Board held the employee's discharge was motivated by union membership, and therefore an unfair labor practice. The Board also concluded the questioning of Respondent's employees and subsequent discriminatory discharge also constituted an unfair labor practice. The court denied enforcement of the Board's order on the grounds that:

> "...Since Fuller was a supervisor...his discharge cannot form the basis of an unfair labor practice. Therefore, the case of the unfair labor practice as to the remaining employees of Respondent must be rested merely on the questioning of such other employees. But it is well settled that the mere questioning of employees, standing alone, is not an unfair labor practice. (Citations omitted). Hence the conduct of questioning the employees even though the supervisor Fuller was subsequently discharged, was not an unfair labor practice, and the "Board was without jurisdiction to order respondent to cease and desist from such practice. Id. at 551.

Three years later in General Engineering, Inc. v. NLRB, supra, the Ninth Circuit was again faced with the issue of whether a supervisor's discharge could form the basis for

an unfair labor practice.

The court there found it unnecessary to resolve this issue, as it reversed the Board on grounds that the evidence did not support a finding that the employees knew or could have known that the motivation behind the discharge was discriminate:

While Fullerton contains broad dicta that the discharge of a supervisor cannot constitute an unfair labor practice, Id. at 551, this is clearly not the law. Indeed, the NLRB has recently decided two cases in which it found unfair labor practices in the discharge of supervisors. Nevis Industries, Inc., dba Freson Townhouse, 1979-80 CCH ¶NLRB 16,608; Down-slope Industries, Inc. 1979-80 CCH NLRB ¶16,609.

Moreover, in some cases, supervisors have been found to possess rights of concerted activity, both as a part of their jus tertii , or as third party representatives, and in their own right.

As Judge Sherman reasoned in Theatre Now, Inc., 211 NLRB 525 (1974):

> "discharge of or other reprisals directed against a supervisor for engaging in conduct protected in an employee violates Section 8(a)(1) of the Act if (1) under all the circumstances, such punishment tends to lead rank-and-file employees reasonably to fear that the employer will punish them for engaging in like conduct; and (2) the employer has failed to take reasonable and timely steps to reassure his rank-and-file employees that they will not be punished for such conduct. This second requirement enables employers who have made such efforts at reassurance to discipline supervisors for Section 7-type activity even though the fact of the punishment and (perhaps) circumstances beyond the employer's control nonetheless tended to put the employees in fear. In my view, such an approach effects a proper

> accommodation between employee rights and the congressional policy withholding from supervisors the protection afforded by Section 7."

Sherman added, in a footnote:

> "In so concluding, I am aware that a number of cases have used language which might well point to an absolute privilege by employers to discharge supervisors for concerted or union activity and to enjoy the benefits of any consequent chilling effect on rank-and-filers' like activity."

D. Discriminatory Discharge:

There is insufficient evidence of animus on which to base a charge under §1153 (c). Since General Counsel did not argue this issue in his Brief, I will assume he is in agreement.

E. Interference, Restraint and Coercion:

1. The Law in General:

Section 1153(a) of the Act declares it is illegal for an employer to "interfere with, restrain or coerce employees in the exercise of rights guaranteed under Section 1152". To find a violation of 1153(a), the General Counsel need not show actual interference or that the coercive conduct has its intended effect. The test is whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7. In Russell Stover Candies, supra, the court stated:

> "...the illegality of an employer's conduct under Section 8(a)(1) does not depend upon evidence that the employees were in fact coerced in the exercise of their Section 7 rights. 'Where conduct was coercive, as found here, it is not necessary to show that the coercive conduct had its desired or intended effect. The remedy furnished by the Act

> is available whether coercion succeeds or fails (citation omitted). 'Although that principle has previously been articulated only in cases where unfair labor practice consisted of management's direct coercive remarks to protected employees, we believe its application in the "supervisor discharge" cases effectuate the purpose and policy of the Act. Inter Alia the Act is intended to protect employees' self organization from disruptive interferences by employers...Id. at 207-8 (citation omitted)."

2. Unlawful Employer Instructions

Discharge of a supervisor for refusing to follow an employer's unlawful instruction- tends to interfere with, restrain and coerce employees in the exercise of their statutory rights. In Russell Stover, supra, a supervisor was fired for refusing to continue unlawful surveillance of employee union activities. The court held:

> "Johnson's surveillance was more than merely being attentive to employees' comments regarding the union. The Company instructed Johnson to engage in systematic surveillance of the employee union activities, questioned him concerning the information he had gathered, and encouraged him to continue his surveillance even during non-work time." Id. at 207.

In NLRB v. Talladega Cotton Factory, supra, an employer was held to have violated Section 8 (a)(1) when he discharged two supervisors for failure to wage a sufficiently effective pre-election anti-union campaign. In a recent case Gerry's Cash Markets v. NLRB, supra, an employer was held to have violated the Act by demoting a supervisory assistant for failure to enforce an unlawful no-solicitation rule. It has generally been held that the discharge of a supervisor is not in violation of §8(a)(1) when based on a failure to discourage unionization. Western Sample Book and Printing Co., 86 LRRM

1171; Capital Electric Power Assn., 71 NLRB No. 42, 68 LRRM 1243 (1968). In Southwest Shoe Exchange Co., 36 NLRB 247. 49 LRRM 1759 (1962) , the NLRB found it was not an unfair labor practice for an employer to discharge a supervisor for failure to comply with instructions to talk employees out of voting for the union. The Court stated:

> "If Buck was discharged for failing to follow instructions, the Respondent did not violate the Act for...we do not find that those instructions were unlawful. Respondent through its supervisors was privileged to try to dissuade employees from supporting the union so long as threats or reprisals or promises of benefit were not employed, and there is nothing in the record to suggest that Respondent instructed Buck to engage in illegal conduct on its behalf." Id. at 248.

The court reasoned that since the employer had a right to express its opposition to unionization in a noncoercive manner, the instructions to its supervisor were not unlawful, and since the supervisor had no protected right to engage in union activities, he could be discharged for failure to follow lawful instructions.

In Didde-Glaser, Inc., 233 NLRB 765, 97 LRRM 1089 (1977), the Board found an employer had not violated the LMRA when it discharged two supervisors, since the employer did not direct then to engage in unfair labor practices, but only to lawfully resist the union. In palmer Paper Co., 180 NLRB No. 156, 73 LRRM 1239 (1970), the court also found no §8(a)(1) violation where only lawful instructions were given by the employer:

> "Except for the single instance when Flud was directed to ascertain the identity of

> the union instigator and did, there is no credible evidence in this record of any instruction to Flud to violate the law...(o)n the contrary, I find that Flud was discharged for...engaging in union activity. As a statutory supervisor, Flud has no protected right to so engage." Palmer Paper Co., supra, at 1012.

In Russell Stover, supra, the court held: "discharging a supervisor who refuses to follow his employer's lawful instructions regarding union organizing attempts does not constitute a violation of Section 8(a)(1), so the supervisor is not entitled to reinstatement." Id. at 207.

Yet it has been held that the moving cause behind the discharge of a supervisor must be poor performance or misconduct, and not failure to engage in unlawful activity directed toward employees at the employer's insistence. Russell Stover Candies, Inc., supra; Key west Coca Cola Bottling Company, supra.

In Key West Coca Cola Bottling Company, supra, at 1368, the Board held:

> "...Whether Respondent could or should have discharged Dobarganes because of the quarrel between him and Menendez is beside the point: I find that, whether or not the "war" was over, that was not the moving cause for Respondent's discharge of Branch Manager Dobarganes but that its real reason was his failure to "clean house," as directed by discharging union supporters. By such discharge, therefore, Respondent invaded the self-organizational rights of the rank-and-file employees in violation of Section 8(a)(1) of the Act."

In Russell Stover Candies, Inc., supra, at 207, the Court found:

//

> "...Arguably, there is sufficient evidence in the record which might, under ordinary circumstances, justify Johnson's firing based on poor work performance. However, the circumstances indicate that his poor performance as a supervisor was not the moving cause of his ultimate firing. On the day before he was discharged, Johnson was notified that he was being given two weeks to improve his work performance...(t)he only interim event which could reasonably have precipitated his immediate discharge was that Johnson notified management that he was no longer going to be an informer."

In Better Monkey Grip, 115 NLRB 1170, enf.243 F.2d 836, the Board found an employer in violation of Section 8 (a)(1) when it discharged a supervisor for giving testimony adverse to employer interests in a prior proceeding before the Board:

> "Whaley testified at a public hearing before the Board, and it must be inferred that many of the employees of Respondent, particularly those interested in joining the Union, were well aware of the fact that he had so testified. These employees, not being apprised of any good and valid reason for the discharge of Whaley, would necessarily conclude that his discharge was because he did testify, and that his discharge constiuted warning to them by the Respondent to discontinue their interest in, or activities on behalf of, the Union." Id. at 1182.

In Rohr Industries, Inc., supra, the Board stated:

> "The record...does warrant determinations... that various departmental workers were "aware" with respect to Pierceall's layoff; that some of them did consider Complainant's termination chargeable directly to the statement, supportive of Well's grievance...that shop Steward Rosalio Puente did query General Foreman Sampite and Superintendent Childers, specifically, with respect to Respondent's motivation; but these management representatives never proffered a rationale for Pierceall's layoff consistent with their firm's presently suggested "lack of candor" justification. If Respondent's management representatives...had, really considered their presently proffered rationale for Pierceall's termination exculpatory, some steps calculated to forestall any possibility

> that it might be prejudicially misconstrued should minimally have been taken." Id. at 1038.

F. Employee Knowledge of Reasons for the Discharge

The law is unclear as to whether employees must have knowledge of the reasons for a supervisor's discharge in order to establish a Section 8(a)(1) violation. See, e.g., Carroll Hament "Are instructions to Supervisors to Commit Unfair Labor Practices Unlawful Per Se?" 26 Lab. L.J. 281 (1975). In General Engineering, Inc., 131 NLRB 648 (1961), the Trial Examiner found a company in violation of Section 8(a)(1) where instructions were given to a supervisor to discharge those employees responsible for union activities, even though the instructions were never carried out or communicated to the employees. The Board overruled the Trial Examiner's decision and held:

> "unexecuted instructions to a supervisor to discriminate against employees who are unaware of the instructions do not have any impact upon the employees and therefore cannot interfere with the exercise of the rights guaranteed by Section 7 of the Act. Id. at 649.

The Board agreed with the Trial Examiner that the employer had violated the Act by discharging the supervisor for refusing to support its pretext for discriminatory discharge. The Board stated:

> "...in plants such as that of Respondents where the employees were aware of the Respondent's antagonism to the Union the reasons for the discharge of Supervisor Woodruff, namely, the latter's refusal to aid the Respondents in their campaign against the Union, would come to the attention of the rank-and-file employees. Id. at 650.

The Ninth Circuit reversed the Board, on the following ground:

> "In the opinion of Board Member Roger, the record evidence is insufficient to support a finding or sustain an inference that any employee knew or could have known of the motivation for Woodruff's discharge. We agree with Board Member Roger's view that the record evidence indicates to the contrary." General Engineering, Inc. v. NLRB, 311 F.2d 570, 574 (1962).

In Cannon Electric Co., 151 NLPB 1465 (1965) , a supervisor complied with an employer's instructions to submit names of employees thought to be active on behalf of the union. The Board assumed knowledge on the part of the employees, but held:

> "Even if we were to accept the Trial Examiner's findings of lack of employee knowledge of the instructions to the supervisors, we would still find that these instructions were unlawful. An employer cannot discriminate against union adherents without first determining who they are...The frequency of a pattern of employer conduct associating discrimination against union adherents with employer's efforts to learn the names of union activists supports the conclusion that there is a danger inherent in such conduct: a tendency toward interference with the exercise by employees of their organizational rights...Accordingly, we conclude that the tendency of Respondent's conduct justified outlawing it." Cannon Electric Co., supra, at 1463, 1969.

In Elder-Beerman Stores Corp., 173 NLRB 566 (1969), the Trial Examiner held an employer violated Section 8(a)(1)by discharging a supervisor for refusing to engage in illegal surveillance. The Trial Examiner found the employees knew of the instructions and of the reason for the discharge. The Board affirmed the decision, but stated:

> "We find, in the circumstances of this case, that this conduct was unlawful without regard to employee knowledge...(t)he nature and extent of the unfair labor practices committed by the Respondent clearly demonstrate that the instructions issued to Supervisor Graham were an integral part of a plan to discover the identity of the employees engaged in union activity and rid the respondent of union, adherents..." Id. at 566.

The Board cited Cannon Electric Co. , supra, where a similar "illegal scheme" had occurred. The Board assumed knowledge on the part of the employees of unlawful instructions given by the employer, and went on to hold:

> We find it unnecessary in this case to determine the effect on the employees' section 7 rights of instructions to supervisors to engage in surveillance where employees are not aware of instructions and they are neither executed nor enforced by discharge. To the extent, however, that General Engineering, Inc., etc., 131 NLRB 648, is inconsistent herewith, it is hereby overruled." Id. at 466. Footnote 4.

In Florida Steel Corp., 94 LRRM 2589 (1977) (unpublished opinion) the court cited General Engineering, inc., supra, overruling a Board decision that an employer violated the Act by discharging a supervisor for failure to follow unlawful instructions, holding:

> "...(W)e agree with the Company that the Board erred in ordering the reinstatement of Eudy...because the record contains substantial evidence that the Company had ample lawful reasons to fire Eudy and no evidence that nonsupervisory employees had any knowledge of the reasons for his dismissal." Florida Steel Corp., supra, at 2590.

In GTE Automatic Electric, 204 NLRB No. 101 (1973) , the Board affirmed, on the authority of Elder-Beerman, a Trial Examiner's findings that an employer had violated Section 8(a)

(1) when he discharged a supervisor for refusing to obey instructions to create pretextual reasons for the discharge of union adherents. The Board stated:

> "Although there is no evidence that employees knew the reasons for the discharge of Cornelius, such conduct, in the circumstances of this case, "was unlawful without regard to employee knowledge". Elder-Beerman 173 NLRB at 566. The illegality of the action requested of Cornelius, discriminatory discharges violative of Section 8(a)(3), was at least opprobrious and detrimental to the employees' protected rights as the action which the supervisor in Elder-Beerman refused to engage in."

In Russell Stover Candies, Inc. v. NLRB, supra, the court affirmed a Board finding that an employer committed an unfair labor practice by discharging its supervisor for refusing to continue to engage in unfair labor practices involving surveillance of employee union activities. With regard to employee knowledge, the court stated:

> "There is substantial evidence of those disruptive tendencies here because the employees knew that Johnson was fired for refusing to continue his surveillance because Johnson himself told them so...(i)t is immaterial how the employees discovered the reason for Johnson's discharge-the important point is that they did have the knowledge." Id. at 208.

G. Defenses

Respondent argues that even if Vega were discharged for refusing to engage in unlawful conduct at Respondent's insistance, the fact that he was discharged for a legitimate business reason would preclude finding a Section 8(a)(1) violation (Respondent's Brief, at 36-7).

Yet, in a recent supervisor discharge case, the NLRB held:

> "(T)he determination of the legality of the employer conduct which could tend to interfere with employee rights but which could also have a legitimate business purpose depends, first, on an evaluation of the employer's motive in engaging therein and second, assuming no evidence of illegal motive, on a balancing of the coercive effects against the asserted business justification. Thus, where there is no evidence of a tainted motive such employer conduct will not be deemed unlawful if its tendency to interfere with employee rights is "comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate ends." Nevis Industries, Inc., 246 NLRB No. 167 (1979) (citation omitted), cf., NLRB v. John Brown, 380 U.S. 278 (1965).

In Ebasco Services, Inc., 181 NLRB 768, 73 LRRM 1518 (1970), an employer demoted to nonsupervisory status foremen who agreed to appear at a hearing before an "employment stabilization board" established by a collective agreement to adjust employee grievances. The employer contended the foremen's attendance at the hearing was not essential, whereas by attending they had substantially interfered with the employer's right to continue its business operation without hindrance. After recognizing that employees have a right to a full and fair hearing on their grievances under contract procedures which must be protected from interference, the Board stated:

> "Under the authorities Respondent must show that its demand that they do not attend, followed by demotion for refusal to obey, was reasonably adapted to the exigencies of continued operation, but it offers no proof that the project was in fact shut down or even delayed...for lack of foremen...(r)espondent also claims employee's rights to a fair hearing on the grievances were not affected by the demotions, in the absence of proof that testimony of the six was essential before

ESB. But this is at most a speculation. Ebasco Services, Inc., supra, at 770.

Applying this standard, the Board found the employer's actions violated Section 8(a)(1).

In Rohr Industries, Inc., 220 NLRB 1029 (1975), the Board found an employer in violation of Section 8(a) (1) for terminating a supervisor during a general work force reduction rather than reassigning him to his former nonsupervisory position, for having prepared a statement for use in contractual arbitration proceedings at the request of a union representative. The employer had contended the supervisor was laid off because of a lack of loyalty and candor, together with a purportedly marginal work record. The Board found:

> "Respondent's management did not, really, consider supervisorial "loyalty and candor" primary values ...(f)urther, I have found... Pierceall's purportedly poor work record...lacking in record support. Respondent's presently proffered rationale for Pierceall's termination, therefore, cannot stand...Within this context, Pierceall's layoff clearly carried a threat that worker's "rights to full and fair hearings on their grievances under contract procedures" could, or would be, prejudicially restricted. Ebasco Services Inc., supra Statutorily guaranteed rights were, I find, violated thereby." Rohr Industries, supra,_ at 1039.

H. PRETEX VS. CAUSE

It has been held that failure to allow an opportunity to explain a breach of conduct provides evidence that an employer's justification for discharge is pretextual. NLRB v. Coast Delivery Service, Inc. , 76 LRRM 2450 (1971); U.S.. Rubber Company v. NLRS, 384 F.2d 660 (1967); NLRB v. Lone star ; Textiles, Inc; Guadalupe Valley Cotton Mills Division, 386 F.2d

535 (CA 5, 1967), 67 LRRM 2221.

In U.S. Rubber Company v. NLRB, supra, the Court of Appeals affirmed a Board holding that the motivating purpose for discharge of two employees was discrimination due to union activities, and not violation of company safety rules. The Court stated:

> "Perhaps most damaging is the fact that both Brewster and Morales were summarily discharged after reports of their misconduct. ..without being given an opportunity to explain or give their versions of the incidents. This and other evidence supports the Board's conclusion that Williams was looking for any infraction by Brewster and Morales that might ostensibly justify discharging these employees."
> Id. at 662-63.

In NLRB v. Lone Star Textiles, inc; supra, the Court sustained a Board finding that an employee was discharged for union activities and not for failing to punch the time clock as his employer alleged, reasoning:

> "Grunder was a valued long time employee...[t]he evidence of the immediate special ; handling of his breach by management; the fact that no one had been discharged in the past for failing to punch the time clock; the fact that management had sought Grunder's help without success in combating the union movement; and the fact that he was discharged without being allowed to give any explanation of the breach were factors to be considered in determining whether General Counsel carried the burden of showing that the discharge was for the purpose of interfering with rights accruing to Grunder under Section 3(a)(3) and (1) of the Act."
> Id. at 536.

The Courts have also found a failure to warn an employee of continuing misconduct to be evidence of unlawful discharge. Rowe Furniture Corp., 200 NLRB No. 1, 81 LRPM 1569 (1972);

NLRB v. Mid State Sportswear, Inc. 412 F.2d 537 (CA 5, 1969), I 71 LRP.M 2370; Dibert, Bancroft & Ross Co., LTD; 78 LRRM 1504, 193 NLRB 553 (1971). In Distinctive Graphic Arts Corp., 219 NLRB No. 139, 90 LRRM 1125, (1975), the Board found an employer in violation of Section 8 (a)(3) where its discharge of an employee was at least partly motivated by the employee's union activities. The Board found:

> "The Respondent's other grounds for Walls' termination - her lateness and poor performance - are equally suspect...Shop Manager Robinson did not inform her at the time of her discharge that these shortcomings had brought about her separation...It is hard to understand, if Walls' tardiness and unsatisfactory performance really were the grounds for her discharge, why she was not so informed...Further demonstrating the pretextual nature of the assigned reasons for Walls' discharge is the fact that, whatever was her record of tardiness, it did not seem to be of sufficient concern to the Respondent to warrant a reprimand or disciplinary action or some warning that she risked discharge if she did not improve, until her union sympathies became apparent. Id. at 644-645.

In Ohio Hoist Manufacturing Co., 189 NLRB 685, 77 LRRM 1187, the Board held an employer violated Section 8 (a)(3) by discharging a known union adherent, finding the discharge was discriminatory and not due to the employees' allegedly "poor attitude", citing its retention of the employee, shifting reasons, and special treatment:

> "If Ferguson's behavior, mainly manifested by what the Company chose to describe as his poor attitude towards his bosses, was so bad that it could not be tolerated, it is difficult; to understand why he was retained as an employee for six months. Furthermore, the Respondent gave shifting reasons for his discharge... Ferguson was singled out by the Company for especially intense surveillance and was told

> that he must stay at his work station and he was forbidden to move away from it...In view of the facts...I conclude... that the company was guilty of violating 8(a)(1) and (3)."
> Id. at 688.

Shifting and inconsistent reasons given for an employee's discharge have often been found to evidence unlawfulness in discharge. Rockingham Sleepwear, Inc., 190 NLRB 472, 77 LRRM 1367 (1971), Skaggs_ Pay Less Drug Stores, 188 NLRB 784, 76 LRRM 1461; Leon Ferenback, Inc., 312 NLRB 63. 87 LRRM 1381 (1974).

In NLRB v. Georgia Rug Mill, 308 F.2d 80 (CA 5 1962), the Court affirmed a Board decision that Respondent dismissed an employee because of union activity and not for over-staying a leave he had requested. The Court stated:

> "Gaines' insubordination is only the last of four explanations the Company gave at different times for Gaines' discharge... [W]hen an employer shifts positions several times in explaining why an employee has been fired, his own case is weakened and the Board's conclusion that the true reason was for union activity is correspondingly strengthened. See NLRB v. International Furniture Co., 5th Cir. 1952, 199 F.2d 648." Id. at "91";

Respondent here cited Vega's failure to pick up employees checks, his lack of communication with management, and several incidents involving negligence, refusal to obey orders and sandbagging, as bases for discharge. Yet on no occasion did Respondent warn Vega, discuss his shortcomings, give him a direct order, or pursue any number of other management options which were available to them. While it was clear that Vega and Stoler did indeed espouse different

philosophies of management, Respondent failed to prove Vega was disloyal, insubordinate, obstinate when faced with a direct order, intentionally destructive, incompetent, or for that matter, "sandbagging" its operation. Vega's explanations were credible under the circumstances, and Respondent did not make its wishes clear. The organizational chart, by itself, was hardly explanatory of an entire philosophy of industrial efficiency which Respondent expected Vega to implement without explanation or communication, when it ran counter to his experience and philosophy of management.

With regard to Orson, the evidence was insufficient to establish, by a preponderance of the evidence, that Vega was directed to commit unfair labor practices. Even if his version of the conversation with Orson is accepted as more credible, substantial ambiguity surrounds the exchange, and at no time did Orson explicitly direct that pro-union employees be discharged. Nonetheless, it is clear that Vega's neutrality and failure to prevent unionization were substantial factors in his discharge, and that workers reasonably believed he had been terminated for protecting their statutory rights. It is not necessary that employee knowledge or belief be accurate in all respects, as long as it is not irrational, and Respondent's conduct reasonably tends to restrain, interfere with or coerce employee rights in self-organization. While employees had no knowledge I of conversations between Orson and Vega, or the objections raised by Stoller to Vega's continuing employment, they did know of Vega's earlier discharges of union activists, they knew he began being treated differently after union activities began,

and had expressed his desire to remain neutral, and they reasonably interpreted these facts, in light of the events of 1975, as an indication that Respondent was punishing Vega for refusing to commit unfair labor practices.

I therefore conclude, that while cause may have existed for the discharge of Haul Vega on any number of earlier occasion: and while Respondent might have fired him, under existing law, "for no reason at all", the actual reason given for his discharge was pretextual. Had Respondent discharged Vega in May or August, it would have incurred no responsibility under the Act. But his discharge for failing to perform an act unnecessary under its own procedures, shortly after receiving information that his brother was actively supporting the union, and that he had not fully informed the company of union activity he had to have known of among its employees, together with Respondent's failure to inform employees of the reasons for his discharge, its past willingness to fire employees for union sympathies, the lay-off of Oscar Vega and Mario Duran shortly after union activity began, and the knowledge that employees had voted in favor of the union, all suggest a tendence for employees to feel interfered with, restrained and coerced in the exercise of their Section 1152 rights.

Uncontradicted testimony established widespread employee knowledge of Vega's earlier involvement in the discharge of pro-union workers, his neutrality in current organizing efforts, company hostility to him following a resurgence in union activity, and a reasonable belief that his discharge was motivated by anti-union animus. While the test for intimidation

or coercion is objective rather than subjective, to avoid the necessity of assessing competing personal impressions, objective cause for agency concern and the application of legal remedy is demonstrably present.

The purpose of the act is primarily to protect employees, rather than supervisors. Had Vega been discharged for refusal | to commit unfair labor practices, for which General Counsel's evidence is inadequate, or for testifying before the ALRB, or had he been discharged with other pro-union employees, reinstatement with back pay would be the appropriate remedy. In the absence of more explicit statutory protection for supervisors, however, reinstatement of confidential supervisory employees creates measurably greater problems than otherwise, particularly where reinstatement is to the highest supervisory position, where enmity and hostility have dissolved the confidentiality which is essential to the relationship, and where a close personal relationship with management is essential. Moreover, as at at-will employee, Vega could be ordered back to work one week and fired the next, for any number of grounds unrelated to union activity. For these reasons, and because it is employee rights which have been illegally coerced, remedy will be directed at employee notice, and will not extend to reinstatement or back pay, not because Vega was in any sense at fault, but because present law does not protect supervisor's rights to the same degree that it does employee rights.

In order to protect Vega from further ill effects due to his discharge, I will order that his discharge be converted to a voluntary quit, and that Respondent provide him with suitable

references, both orally and in writing, to any future prospective employer, at his request.

I therefore find that Respondent interfered with, restrained!, and coerced employees in the exercise of §1152 rights by firing Raul Vega on January 24, 1979, and issue the following Order and Notice.

ORDER

Pursuant to Labor Code Sections 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Ruline Nursery Co., its officers, agents, successors and assigns shall:

1. Cease and desist from in any manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Labor Code Section 1152.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Sign the attached Notice to Ruline Nursery Co. Employees. Following its translation by a Board Agent into appropriate languages, Respondent shall thereafter

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

(2) Mail copies of the attached Notice, in appropriate languages, to all employees and supervisors employeed at Respondent at any time between November 21, 1978 and January 24, 1979.

(b) Arrange for a representative of Respondent or a Board, agent to read the attached Notice in appropriate languages to assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors or management, to answer any questions employees may have concerning the Notice or their rights.

(c) Correct all personnel records to show Raul Vega's termination as a voluntary quit, and provide him with suitable references, both orally and in writing, to any future prospective employer at his request.

(d) Notify the Regional Director in writing within 30 days after the issuance of this order and periodically thereafter of the steps taken to comply with it.

DATED: April 14 , 1980.

KENNETH CLOKE,
Administrative Law Officer

NOTICE TO RULINE NURSERY_CO. EMPLOYEES

After a hearing at which all parties presented evidence, an Administrative Law Officer for 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 their rights under the Act by discharging Raul Vega. We notify you that we will remedy this violation and that we will respect the rights of all employees in the future.

We 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 choose who 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 stop you from doing any of these things. Especially, we will not discharge employees for engaging in union activity, and we will not interfere with, restrain or coerce employees in the exercise of these rights.

Dated: _____

RULINE NURSERY COMPANY

By: _____
Rufus Orson, Owner

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

DO NOT REMOVE OR MUTILATE.