

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VERDE PRODUCE COMPANY,)
)
 Respondent,) Case No. 79-CE-215-EC
)
 and)
)
 UNITED FARM WORKERS OF) 7 ALRB No. 27
 AMERICA, AFL-CIO,)
)
 Charging Party.)
 _____)

DECISION AND ORDER

On February 9, 1981, Administrative Law Officer (ALO) Mark E. Merin issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each timely filed exceptions and a supporting brief.

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

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

Respondent is an agricultural employer engaged in harvesting lettuce in the Imperial Valley and at Blythe. The discriminatees, Alberto Ramirez and Eufemio Zapien Vargas, worked in Respondent's lettuce fields during the 1978-79 season; each applied for work with Respondent for the 1979-80 season but was refused rehire.

General Counsel's amended complaint alleged that Respondent refused to rehire Ramirez and Vargas because of their union activities and participation in protected concerted activities.^{1/}

The ALO concluded that Respondent had violated section 1153(c) and (a) of the Agricultural Labor Relations Act (Act) by its refusal to rehire Ramirez, but found that the General Counsel failed to establish by a preponderance of the evidence that Respondent had unlawfully refused to rehire Vargas.

Respondent excepts to the ALO's finding of anti-Union animus on the part of Respondent's agents, to his interpretation of Respondent's seniority system, and to his conclusion that Respondent discriminatorily refused to rehire Ramirez.

General Counsel excepts to the ALO's findings that Vargas did not apply for work approximately ten days before the 1979-80 harvest began, that he lost his seniority by not timely applying for work, and that no work was available when he did apply.

To establish a prima facie case of discriminatory discharge or discriminatory refusal or failure to rehire, the General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that Respondent

^{1/}During the hearing, the ALO granted Respondent's motion to strike the portion of the complaint which alleged that Respondent refused to cooperate with the Board during the investigation of the charges (General Counsel sought attorney's fees under this allegation). Because the General Counsel has not excepted to the ALO's granting of the motion to strike, we will not discuss or decide the attorney's fees issue in this case.

had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the discharge or failure to rehire. Jackson and Perkins Rose Company (Mar. 19, 1979) 5 ALRB No. 20.

Where the alleged discrimination consists of a refusal to rehire, the General Counsel must ordinarily show that the discriminatee applied for work at a time when work was available, and that the employer's policy was to rehire former employees. Prohoroff Poultry Farms (Feb. 7, 1979) 5 ALRB No. 9, review den. by Ct.App., 4th Dist., Div. 1, Nov. 21, 1979, hg. den. Dec. 20, 1979; Golden Valley Farming (Feb. 4, 1980) 6 ALRB No. 8, ALOD at 14, but see p. 2, fn. 1.

If the General Counsel establishes a prima facie case that protected activity was a motivating factor in the employer's decision, the burden then shifts to the employer to prove that it would have reached the same decision in the absence of the protected activity.^{2/}

The Refusal to Rehire Alberto Ramirez

Alberto Ramirez testified that he had been a farm worker for 18 to 20 years, and that during the 1978-79 lettuce harvest he worked for Respondent beginning early in the season in mid-December as a cutter and packer in crew 2 under foreman Francisco Sandoval. For a short time he worked as a closer in crew 2, and later transferred to crew 3 to work as a loader until the end of the

^{2/}Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721; Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169]; Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18,

season in April 1979.

Ramirez testified that during the 1978-79 season he told other workers they would be better protected with a union. He encouraged them to sign authorization cards which United Farm Workers (UFW) organizers brought to the field, he was elected Union representative of his crew, he was among those who signed and delivered the Petition for Certification to Respondent's office, he distributed Union flyers among workers on election day, and he testified on behalf of the Union at a hearing in 1979 on election objections.

Ramirez also testified that he heard two of Respondent's supervisors making anti-Union statements, and he told them they should not do so in front of the workers. One supervisor, Sandoval, heard Ramirez telling the workers they would be better protected with a union, and told Ramirez the next morning that he was "too favorable to Chavez, Chavistas."

On the first day of the 1979-80 harvest, Ramirez went to Roberto's restaurant in Calexico, where crew members and foremen customarily gathered before each work day, and talked to foreman Sandoval about a job. Sandoval told him he should have work because he had seniority from the previous season.

However, when Ramirez presented himself at the field that same morning, supervisor Rodriguez told him he could not work because there were only two crews at that time and Ramirez had seniority in crew 3 as a loader. Rodriguez told Ramirez to return when crew 3 was started in the next few days.

Ramirez continued to seek work each morning at the

Calexico restaurant, but was regularly told by Sandoval that the new crew had not yet started. About the middle of January, Ramirez again went to the field and asked Rodriguez for work. The new crew was starting at that time, but Rodriguez told Ramirez he could not give him work because he (Rodriguez) already had a surplus of people.

Respondent's supervisor of crew 1 for 1978-79 and 1979-80, Roberto de la Madrid, testified that under Respondent's seniority system, a worker could achieve seniority for the following season by working for a 30-day period, or by finishing the current work season. He also testified that if a person worked as a closer during the prior season and returned the next season but there were other closers with more seniority, that person would be given a job as a cutter-or packer if a job was available and he knew how to do it. Madrid also testified that a worker who did not timely present himself (within 3 days after the start of the season) could lose his seniority if the work crews had already been completed.

Supervisor Fidel Rodriguez testified that if a worker achieved seniority in crew 3 the prior season, he would also have seniority to be hired in crew 1 or crew 2 the next season if he applied for work timely and had more seniority than some others available for work.

The ALO found that Ramirez had openly engaged in Union activities, that Respondent's supervisors had been aware of his Union support, and that Respondent's representatives had expressed anti-Union animus. He found that Ramirez had seniority from

completing the previous season, that he had seniority over new employees in crews 1 and 2, that he timely applied for work at the beginning of the 1979-80 season, and that at least six men with less seniority than Ramirez were hired in his stead at the start of the season. The ALO concluded that the Respondent failed and refused to rehire Ramirez at least in part because of his known activities on behalf of the Union.

We agree with the ALO's findings and conclusions regarding Ramirez, and conclude that the General Counsel established a prima facie case of discriminatory failure to rehire Ramirez. Under the applicable Wright Line, Inc. test (ante, fn. 2), the burden then shifted to Respondent to show that Ramirez would not have been rehired even in the absence of his protected activities.

Supervisor Rodriguez testified that he did not offer Ramirez work as a cutter or packer because his seniority was as a loader or closer. However, supervisor Madrid testified that seniority applied across job categories, and that, for example, a closer from the previous season would have seniority as a cutter and packer the next season if he knew how to do the job. Ramirez had worked as a cutter and packer, a closer, and a loader at various periods during the 1978-79 season; thus he should have had seniority in any of those jobs for the 1979-80 season.

When Ramirez returned to Respondent's field in mid-January on the day crew 3 started work, Rodriguez stated that he already had a surplus of people. However, Respondent's payroll records show that crew 3 included five new workers without Company

seniority doing the loader-closer job which Ramirez had performed the previous season.

We conclude that Respondent failed to present a legitimate business justification and failed to show that Ramirez would have been refused rehire even absent his union activity. We find that Respondent, in failing and refusing to rehire Ramirez, violated Labor Code section 1153(c) and (a).

The Refusal to Rehire Eufemio Zapien Vargas

Eufemio Zapien Vargas testified that he had been a farm worker for 10 to 12 years. During the 1978-79 lettuce harvest, he began working for Respondent at the beginning of the season in December 1978 in crew 1, having been hired by the second foreman, "El Monicero" (the first foreman was Roberto de la Madrid), and he worked through the rest of that season.

Vargas testified that he always wore a UFW button at work, and that his foreman and field supervisor Rodriguez saw him wearing the button. When UFW representatives came to the field to obtain signatures on authorization cards, Vargas spoke with the representatives and was close enough to the foremen for them to see him. Vargas was one of those who took the authorization cards to the ALRB office, and he signed the Petition for Certification which was delivered to Respondent's offices. At the job site, he openly encouraged other employees to support the Union and took part in discussions with other workers about the benefits of unionization.

Vargas testified that Rodriguez never liked the Union, and that he frequently mocked the Union by pulling out a plain green flag with no emblem on it, and waving the flag while saying,

"This is the most potent union." Vargas stated that Rodriguez told the workers "not to believe anything about that union [the UFW], that it is best not to get involved."

Vargas testified that about 10 days before the beginning of the 1979-80 season, outside Roberto's restaurant in Calexico, he asked Rodriguez for work, and that Rodriguez said "he did not want no Chavistas there." In his testimony, Rodriguez did not specifically deny making that statement to Vargas, but denied being present at the restaurant at the time the conversation allegedly took place.

Vargas testified that at Roberto's restaurant, about a week after the season began, he asked foreman Madrid for work. (Madrid, in his testimony, acknowledged that Vargas asked him for work, but recalled that it was about 10 days after the beginning of the season.) Vargas testified that Madrid told him to wait until another crew was formed. According to Madrid's testimony, at that time he already had a full crew and Vargas had lost seniority by not presenting himself within three days of the start of the season.

The ALO found that Vargas had openly supported the Union and was recognizable as a UFW supporter by his habitual wearing of a Union button. He found that supervisors Rodriguez and Sandoval had expressed anti-Union animus, and that Vargas' signature on the Petition for Certification--being one of only five signatures--must have subjected him to particular scrutiny and marked him as a Union supporter.

The ALO discredited Vargas' testimony that about 10 days before the beginning of the 1979-80 season, at Roberto's

restaurant, Rodriguez refused to rehire him, saying he did not want any Chavistas there. Instead, the ALO credited Rodriguez' statement that he was not present at the restaurant on that day, and the ALO considered this a sufficient denial that the "Chavista" statement was made by Rodriguez.

We agree with the ALO's findings that Vargas engaged in protected activity, that Respondent had knowledge of such activity, and that Respondent's supervisors expressed anti-Union animus. Although we do not consider Rodriguez' denial of his presence at the Calexico restaurant 10 days before the start of the season to be a positive denial that he ever uttered the "Chavista" statement, the fact that Vargas later reapplied for work suggests that Rodriguez' statement, if made, may not have been an absolute refusal to rehire Vargas.

The question remains, however, whether Respondent's refusal to rehire Vargas when he presented himself seven to ten days after the start of the season was discriminatory. Respondent claimed that Vargas was not rehired because he lost his seniority by not applying for work within three days of the start of the season, and because no work was available when he reapplied.

Respondent's payroll records, and a summary of those records, were admitted into evidence at the hearing. The payroll records reveal that 31 seniority workers were rehired in 1979-80 despite not reporting for work within 3 days of the start of the season. The records also reveal that Respondent was hiring workers during the time period in which Vargas reapplied for work. The records indicate that the work season commenced on December 6, 1979.

Vargas testified that he reapplied for work about a week after the season began, or approximately December 13, 1979. Respondent's foreman Madrid admitted that Vargas reapplied for work, but testified that he did so about ten days after the season began, or about December 16, 1979.

The payroll records show that on December 13, 1979, five workers were hired into crew 1 (Madrid's crew). On December 14, 1979, six workers were hired into crew 1 and five workers were hired into crew 2. On December 15, 1979, two workers were hired into crew 1, three workers were hired into crew 2, and one man who had no Company seniority but who had worked December 10, 1979, was rehired after not working December 13 or 14. Respondent did not operate on Sunday, December 16, 1979, the tenth day after the start of the season. However, on the following day, December 17, 1979, seven workers were hired into crew 1 and three workers were hired into crew 2.

We find that the General Counsel established a prima facie case of discriminatory failure to rehire Vargas by showing protected activity, Respondent's knowledge of that activity, anti-Union animus on the part of Respondent's supervisors, and Vargas' application for work at a time when work was available. The burden then shifted to Respondent to prove that it would have reached the same decision not to rehire Vargas in the absence of the protected activity.

As a business justification for not rehiring Vargas, Respondent asserted that: (1) he had lost seniority by applying after the three-day period, and (2) no work was available when he

applied. However, the payroll records clearly show the Respondent's claim that no work was available when Vargas applied to be false. Even if Respondent was entitled to treat Vargas as a new employee after the three-day period, it has not shown any legitimate reason for treating Vargas differently from other new applicants; i.e., it has not shown why other new workers were hired on each day of the relevant period, when Vargas was told that no work was available.

Because of the expressed anti-Union animus on the part of Respondent's representatives, the inference arose that Vargas was treated differently from other new applicants because of his prior Union support and activities. Certainly that inference was not refuted by Respondent's false claim that no work was available when Vargas applied for rehire.

We conclude, therefore, that Respondent did not present a legitimate business justification for refusing to rehire Vargas, and that it failed to show that Vargas would have been refused rehire even in the absence of his Union activity. Thus we find that Respondent, by its failure and refusal to rehire Vargas, violated Labor Code section 1153 (c) and (a).

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Verde Produce Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Refusing to hire or rehire, or otherwise

discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any union activity or other concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

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

(a) Immediately offer to Alberto Ramirez and Eufemio Zapien Vargas full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

(b) Make whole Alberto Ramirez and Eufemio Zapien Vargas for any loss of pay and other economic losses they have suffered as a result of their discharge, reimbursement to be made according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(c) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into

appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from December 1979 until the date on which the said Notice is mailed.

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

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

(h) Notify the Regional Director in writing, within 30 days after the issuance of this Order, of the steps Respondent

has taken to comply therewith, and continue to report periodically thereafter,
at the Regional Director's request, until full compliance is achieved.

Dated: September 10, 1981

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by refusing to rehire two of our employees during December 1979, because of their union activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farm workers these rights:

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to refuse to rehire Alberto Ramirez and Eufemio Zapien Vargas. WE WILL NOT hereafter discharge or refuse to rehire any employee for engaging in union activities.

WE WILL reinstate Alberto Ramirez and Eufemio Zapien Vargas to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their discharge.

Dated:

VERDE PRODUCE COMPANY

By:

Representative

Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California; the telephone number is (714) 353-2130.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Verde Produce Company

7 ALRB No. 27

Case No. 79-CE-215-EC

ALO DECISION

The ALO found that the employer refused to rehire one former employee because of his union activity, but found that the General Counsel failed to establish that the employer unlawfully refused to rehire a second former employee. The employer's asserted business justification was that the former employees lacked seniority and that no work was available when they applied. As to the first employee, the ALO discredited the employer's business justification because employer payroll records indicated that several workers with less seniority were hired in his stead. As to the second employee, the ALO found that he had lost his seniority by applying after the company's three-day grace period, and that no work was available when he applied.

BOARD DECISION

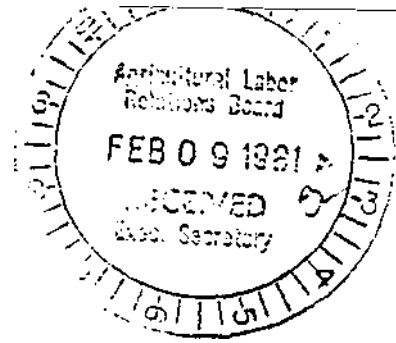
The Board affirmed the ALO's findings and conclusions regarding the first employee. The Board found that the employer had also discriminatorily refused to rehire the second employee. The Board discredited the employer's asserted business justification regarding the second employee, because employer payroll records indicated that new workers were hired each day during the time period when he was told no work was available.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of

VERDE PRODUCE COMPANY,

Case No. 79-CE-215-EC

Respondent,

and

UNITED FARMWORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

Sarah A. Wolfe
200 Newstein Road, Suite 228
Bakersfield, CA 93309

For Respondent:
Verde Produce Company

Michael Go Lee
319 Waterman Avenue
El Centro, CA 92243

For General Counsel

DECISION

MARK E. MERIN, Administrative Law Officer:

This case was heard before me on October 8, 9, and 10, 1980, in El Centro, California. The First Amended Complaint alleges violations of Sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter the Act) by Verde Produce Company (hereinafter sometimes referred to as "the Company" or as "Respondent"). The First Amended Complaint^{1/} is based on a charge filed and served on December

^{1/} The First Amended Complaint was further amended

11, 1979 by the United Farmworkers of America, AFL-CIO (hereinafter sometimes referred to as "UFW" or "the Union") . All parties were given a full opportunity to participate in the hearing and, after the close of the hearing, the General Counsel and Respondent filed briefs in support of their respective positions.

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

FINDINGS OF FACT

I. Jurisdiction

Respondent admits that it is an agricultural employer within the meaning of §1140.4(c) of the Act and that the UFW is a labor organization within the meaning of §1140.4(f) of the Act and, accordingly, I so find.

II. The Alleged Unfair Labor Practices

The First Amended Complaint dated October 1, 1980, alleges that Respondent violated §§ 1153(a) and (c) of the Act by (1) failing and refusing in the middle of October, 1979 and on November 4, 1979, to rehire Eufemio Zapien Vargas because of his union activities, sympathies, support, and

at the hearing to eliminate Paragraph five and to strike from Paragraph six the names "Poncho" and "El Monicero" as supervisors and/or agents of Respondent within the meaning of §1140.4 (j) , with the correct names of said supervisors to be provided at or prior to the hearing. Pursuant to stipulation "Pancho" is Francisco Sandoval however "El Monicero" was not more specifically identified and the parties continued to refer to him as "El Monicero" which designation I have adapted.

participation in concerted activities; and (2) failing and refusing on or about December 6, 1979, again at the end of December, 1979, and finally on January 16, 1980, to re-hire Alberto Ramirez because of his union activities, support and participation in concerted activities.

Respondent denies that it refused to rehire either of the named employees because of their union activities, support or participation in concerted activities but, to the contrary, contends that said employees either failed to make application in a timely manner, did not have sufficient seniority for the job sought, at the time of application, or were denied employment for other legitimate business reasons.

III. Statement of Facts

A. Company

While no witness specifically addressed the nature of the Company's operations, from all of the testimony it is apparent that Verde Produce Company cuts and packs lettuce, among other agricultural commodities, in both the Imperial Valley and in Salinas.

The Company's foremen operate on a seniority system described by supervisors Fidel Rodriguez Casteneda (known to some of the workers as "El Cowboy" but referred to herein as "Rodriguez") and by supervisor Roberto de la Madrid as follows: those workers who complete the season get seniority in the job classification they were performing at the completion of the previous season. Seniority may be lost if a worker

does not appear for work within three days of the start of the next season. A worker who gained seniority by working in one crew would still have the right to be hired into another crew if he presented himself in a timely fashion and he had more seniority than some others available for work in that crew. These generalizations are extracted from the testimony of Rodriguez and Madrid which, in some respects, conflicted on refinements in the unwritten seniority system they apply.

B. The Employees in Issue

1. Alberto Ramirez

Ramirez testified that he has been a farmworker for the last 18 to 20 years, lives in the Imperial Valley, and works in lettuce, cutting and packing. In the 1978-79 lettuce harvest, Ramirez worked for Verde Produce Company, starting work in mid-December, early in the season, and cut and packed lettuce in crew number 2 whose foreman was Francisco Sandoval. For a short time Ramirez was a closer in Sandoval's crew but, according to his testimony, was replaced as a closer by the brother of field supervisor Rodriguez and transferred to crew number 3 wherein he worked as a loader until the end of the season in April.^{2/}

Ramirez testified that he felt working conditions were bad at the Company and expressed those feelings to his fellow workers. On one particular rainy day when his

^{2/} While Ramirez testified that he thought he completed the season in either crew 3 or 4, other evidence establishes that it was in crew 3 that he worked through the balance of the season,

crew had completed more than eight hours of work, Ramirez objected to the other workers to continuing the work in the rain. His foreman Sandoval was present, watching and listening to Ramirez' statements to the other workers.

An Agriculture Labor Relations Board representation election was held at the Company in late February, 1979. Prior to the election UFW organizers visited the Company's workers at the fields and workers assembled on the side of the fields to sign authorization cards. Ramirez was elected by his crew to be their union representative. He called to a few workers in the field who did not initially come over to the side to sign the cards, telling them to "come and sign the cards that it was important." The authorization card signing and Ramirez' activities were witnessed by Sandoval.

As crew representative, Ramirez was among those who took the authorization cards to the ALRB's offices where he and the others received a petition for certification. Ramirez was one of the workers who signed the petition and took it to the Company's office, delivering it to Hector Saikhon, an owner and Company officer.

On the morning of the election Ramirez distributed fliers at the restaurant meeting place (variously identified as "Roberto's" or the "Carolina") where the foremen customarily met their crew members. According to Ramirez three Company foremen, including Sandoval were present and observed him passing out the leaflets. Informed that one of the foremen, El Monicero, was making anti-union statements, Ramirez

sought him out and told him "not to be telling nothing to the people to let the people do whatever they wanted to."

At the election Ramirez was an observer checking on the eligibility of those voting, making challenges, and observing the ballot counting. Company representatives were also present as observers.

While working in Blythe for the Company towards the end of the season, according to Ramirez* testimony, Ramirez overheard ranch supervisor Rodriguez joking about the Union, referring to the bananas that were on the road, and saying "this is where the Governor can sit on. if he loves the Union so much and the workers." Ramirez stated he challenged Rodriguez telling him that "if he didn't like the Union that he should never be making jokes about the Union in front of the people because the people didn't accept anything that he was saying. . ."

At a hearing on election objections held by the Agricultural Labor Relations Board during the summer of 1979, Ramirez testified on behalf of the Union in the presence of Hector Saikhon.

At the beginning of the 1979-80 harvest, -according to Ramirez, he went to the Company's usual assembly point in Calexico and was told by Sandoval that "I believe you'll have work because you worked all last season until the end of it." Sandoval directed Ramirez to the field at which Verde would be starting. At the field where Ramirez presented himself, Rodriguez refused to permit Ramirez to begin working

on the ground that he did not have sufficient seniority, that those working had greater seniority than Ramirez. According to Ramirez, there were at least two or three workers whom he had never seen before. Rodriguez told Ramirez that he could begin work as a loader when another crew was started in the next few days. Ramirez continued to seek work at Verde by going each morning to Roberto's restaurant but was regularly told by Sandoval whom he saw there that the other crew had not yet started.

About the middle of January, Ramirez and a truck driver who was also looking for work at the Company went to the field where the Company was engaged and Ramirez asked Rodriguez for work. The new crew was starting at that time but Rodriguez responded that he could not give Ramirez work because he already had a surplus of people. Ramirez did not again seek work at the Company but made a complaint against the employer with the ALRB.

According to the Company, Alberto Ramirez worked during the 1978-1979 season but was not a satisfactory employee. His work as a cutter and packer was poor and he demonstrated insubordination to his superiors. The principal insubordination related to selling beer to other workers at the fields where the crew was engaged despite occasional orders to discontinue his sales and repeatedly cursing and threatening the general field supervisor, Rodriguez when his sale of beer was questioned.

According to Rodriguez, Ramirez asked for a job during the 79-80 season on only one occasion, between the

20th and 25th of December when he was organizing the crews, telling them where they were going to start. At that time Ramirez approached him for work, Rodriguez responded that he should wait and check with the foreman of number 3 crew when it was started because there are three to four loaders in each crew and each crew has its own seniority. According to Rodriguez, Ramirez had seniority only in crew number 3 and he knew that Ramirez did not have seniority in crews number 1 and 2 because right before he saw Ramirez he was informed by Sandoval that Ramirez was present at the field and had no seniority in crews 1 or 2. Rodriguez testified that he never again spoke with Ramirez about a job.

2. Eufemio Zapien Vargas

Vargas has been a farmworker for 10 to 12 years. He lives in the Imperial Valley but migrates to Salinas following the lettuce harvest. In the 1978-79 harvest season, Vargas started working with the Company in December, having been hired by the foreman known as El Monicero. The principal foreman of crew number 1 into which Vargas was hired by El Monicero was Roberto de la Madrid.

In his crew the majority of the workers supported the Union, as did he, and he spoke to them and others in support of the Union both before and after work outside of the fields and at the restaurant where the workers assembled after and before work. Both of the foremen of crew number 1 in which he worked were present at the restaurant and in his vicinity at the times he discussed his support for the Union with other Company employees.

On the day the Union sent representatives to the field to obtain the workers' signatures on authorization cards, Vargas spoke with the representatives at the side of the field and was with them for about an hour. The foremen were also at the field close enough to him to see him in discussions with the Union representatives and the other workers.

Vargas testified that he wore a Union button all of the time at work to show support for the Union. His foremen and Rodriguez, according to Vargas, both saw him wearing the button.

Vargas was one of the workers who took the cards to the ALRB and received a petition to take to the Company. Vargas identified his signature, one of five, on the petition for certification submitted as an exhibit at the hearing.

Vargas testified that the field supervisor never liked the Union and would pull out a green flag, on occasion, wave it, and say that it was a greater flag than Chavez'. The flag was pulled out, according to Vargas, when the workers were showing their support for the Union. Vargas testified at the start of the 1979-80 season he approached Rodriguez and asked for work about ten days before the crew started. The conversation took place outside of Roberto's restaurant where the workers assembled before going to the fields. According to Vargas, Rodriguez refused his request for work saying that "he did not want any Chavistas there."

Vargas also asked foreman Roberto de la Madrid

for work about a week after the crews started but was told by de la Madrid that he should wait until another crew was formed. Vargas did not again request work at the Company but filed a complaint with the ALRB.

The Company denies that Vargas asked for a job in a timely fashion, denies that Vargas was told by Rodriguez 10 days before the start of the season that he did not want any "Chavistas" there, and asserts that the only reason Vargas was not hired was because, having lost his seniority , by not applying for work within 3 days of its start, he was treated as a new employee when he did apply for work and there were no openings then available.

IV. Analysis and Conclusions

Section 1152 of the Act guarantees to agricultural employees:

. . .the right to self-organization,
to form, join or assist labor organizations,
to bargain collectively... and to engage in
other concerted activities for the purpose of
collective bargaining or other mutual aid or
protection. . .

Section 1153 (a) of the Act makes it an unfair labor practice

. . .to interfere with, restrain, or coerce
agricultural employees in the exercise of the
rights, guaranteed in §1152.

Section 1153 (c) makes it an unfair labor practice . . .by discrimination in regard to the hiring or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization.

To make out a prima facia case of discriminatory refusal to rehire, as the General Counsel here alleges in respect to both Ramirez and Vargas, the General Counsel must offer evidence to establish (a) that the employees supported the Union or engaged in Union activities; (b) that the Company had knowledge of such support or Union activities; and (c) that the Company's failure or refusal to rehire the employees was based in part on the Union's support or activities. Jackson and Perkins Rose Company, 5 ALRB 20.

A. Ramirez' Union Support and Activities

There is no serious dispute about, and I find that, Ramirez engaged in various Union activities during his employment by Verde Produce Company and unequivocally indicated his support for the Union.

While working in Pancho's crew and in that supervisor's presence, Ramirez attempted to convince the workers in his crew to leave the field one rainy day when the crew had already worked more than eight hours. On that occasion Ramirez stated to the other workers in his crew that they would be better protected if they had a Union.

In February, 1979, Union organizers came to a Company field to obtain signatures of field workers on authorization cards. Pancho was again present, watching the workers leave the fields, meet with the Union organizers, and sign the cards. Ramirez was among the workers talking with the organizers, yelled to some field workers to come out to sign cards, and was elected as the crew's Union representative.

As his crew's Union representative, Ramirez was one of five who signed the petition for certification and was among the small delegation which delivered the petition to Company president Hector Saikhon at the Company's office. On the day of the election, Ramirez was again visably supporting the Union handing out election leaflets at the restaurant assembly point (Roberto's) before work, acting as a Union observer at the election and signing off on the tally of ballots. Pancho and other Company foremen were present to observe Ramirez' Union activities and his demonstration of support for the Union.

Late in the season which was winding up 'in Blythe in April, Ramirez defended the Union when he heard Rodriguez joking about Governor Brown's attitude toward the Union. Ramirez told field supervisor Rodriguez that even if Rodriguez did not like the Union he should not make jokes about it in front of the workers.

Rodriguez also testified at an ALRB election objections hearing during the summer of 1979 on behalf of the

Union, Company president Hector Saikhon was also present as were some unidentified Company supervisors.

B. Vargas' Union Support and Activities

Vargas supported the Union by signing an authorization card on the day Union organizers came to the field when his crew was working about 20 days before the election, by accompanying the authorization cards to the ALRB office, by being one of the five Company employees signing the petition for certification, by participating in the delegation which delivered the petition to the Company's office, by talking about the Union to workers assembled at the restaurant meeting place, and by sporting a Union button while at work.

One or both of his crew's foremen, Roberto de la Madrid and "El Monicero" was present both at the field and at the restaurant at vantage points from which they could observe Vargas' display of Union support.

C. Employer's Knowledge of the Employees' Union Activities and Support

1. Ramirez

By commenting to Ramirez the day after he extolled the advantages of the Union and urged his fellow workers to leave the fields on the rainy day, that Ramirez was too favorable to Chavez, Company supervisor Francisco Sandoval evidenced his awareness of Ramirez' pro-Union sentiments and his advocacy of Union membership.

Company officers, not to mention the general field supervisor Fidel Rodriguez, could not have avoided noticing

that "El Grande" (Ramirez) had signed the petition for certification, evidencing his union support, although the knowledge may not have passed supervisors Sandoval and Rodriguez that Ramirez had a leadership role in the organization drive as his crew's elected Union representative and election observer. No reasonably aware Company supervisor could have missed noticing Ramirez' prominence as a Union supporter. In an environment where open Union support was rare (Robarto de la Madrid testified he never heard any worker in his crew talking about the Union), Ramirez' open identification as a Union representative called his sentiments to the Company's attention.

2. Vargas

Vargas' openness about his Union support was not of the same quality as Ramirez'. He supported the Union among his crew and was recognizable as a supporter, as he credibly testified, by his habitual wearing of a Union button.^{3/} His more profound display of Union support, however, was his signature on the petition for certification. Directed as it was to the Company's office, the petition signed by only five Company employees must have subjected these employees to particular scrutiny and marked, him as a Union supporter.

^{3/} Company supervisor Madrid testified he never saw Vargas wearing a Union button but I do not credit his recollections since he also testified that he saw some people wearing buttons but does not recall their names.

D. Company Refusal to Rehire Ramirez

The Company asserts that the reason Ramirez was not rehired was because he only had seniority in crew 3 which was not in existence when he first applied for work at the start of the season. Ramirez, however, having completed the previous season, should have had seniority over new employees in crews 1 and 2 and over those employees in crews 1 and 2 with less seniority than he even though the previous season he had been primarily a loader. Voluminous business records were received in evidence and General Counsel has extracted from these records, and I have corroborated through my own review of them, that at least six men with less seniority than Ramirez were hired in his stead at the start of the season.

In view of Rodriguez' statement to Ramirez on the day he filled crew 3 without including Ramirez that he had an over surplus of people, Rodriguez' encouragement to Ramirez to wait for crew 3 seems somewhat suspect. That crew 3 included five novices without Company seniority doing the loader-closer job in which Ramirez supposedly 'had seniority, makes Rodriguez' statements to Ramirez as to- his reason for not including Ramirez clearly false. Other excuses subsequently advanced by the Company as their real reasons for not hiring Ramirez pale even as pretexts. At the hearing the Company brought out that Ramirez sold beer to his fellow workers during lunch breaks, even over the objection of his foreman that the discarded beer cans caused litter, and asserted that this insubordination was a reason for

not re-hiring Ramirez. This reason, however, was never given to Ramirez by either foreman with authority to hire and fire when Ramirez applied for work. Instead this weak excuse was first offered at the hearing despite Rodriguez' admission that on occasion he himself provided whiskey to the workers and that it was paid for by the Company.

Finding that there was no legitimate reason advanced for denying rehire to Ramirez when he had seniority, under normal Company practices, to qualify for available employment, and in view of the Company's knowledge of Ramirez' Union activities, and considering the expressed anti-Union animus of the Company's agents, I find that the Company's refusal to rehire Ramirez was motivated at least in significant part by an illegal discriminatory motive. The absence of any legitimate business reason itself permits the inference that the refusal to rehire was affected by illegal discriminatory considerations. Presumably the Company could defeat such an inference with factual material but a failed attempt at the hindsight construction of a legitimate business reason will not generally suffice and those advanced here have not convinced me that there was any legitimate business reason for denying rehire to Ramirez.

E. Company Response to Vargas.' Application, for
Employment

According to Vargas he applied for work by contacting Rodriguez at Roberto's Restaurant in Calexico about 10 days before the start of the season. At that time Rodriguez reportedly told him that he did not want any "Chavistas" at the Company. Thereafter Vargas approached Roberto de

Madrid, again at Roberto's, about a week after work started and was told that he should wait until the new crew was formed as he had lost seniority in crew 1 which was filled at that time. Instead of continuing to wait for work at Verde, Vargas obtained employment elsewhere and filed his complaint against the Company.

The Company's version of the salient facts relating to Vargas differs substantially from the employee's. According to Rodriguez he did not appear at Roberto's until the first of the season. While Rodriguez did not specifically deny saying to Vargas that he didn't want any Chavistas at the Company, his denial of his presence at the restaurant during the time Vargas reported the conversation as taking place constitutes a sufficient denial of the alleged anti-Union statement.

Madrid acknowledged that Vargas asked him for a job after the season began (his recollection was that it was about 10 days after the season began while Vargas recalled it was seven days), but testified that at that time he already had a full crew and Vargas had lost seniority as he had not presented himself within three days of the season's start. Madrid testified that he suggested to Vargas that he wait until crew 3 was formed.

The General Counsel argues that Vargas' timely appearance would have been futile in light of Rodriguez' alleged earlier "Chavista" statement and that for that reason his failure to request work during the first three

days of the season should be excused. While the facts in the cases cited by the General Counsel, in support of his argument (Abatti Farm, Inc. v ALRB, 107 Cal.App.3d 317, 165 Cal.Rptr. 87 (1980), and C. Mondavi & Sons, 5 ALRB 53) are somewhat parallel on this point, the argument hinges on crediting wholly Vargas' testimony and discounting Rodriguez'.

While I have earlier discounted Rodriguez' testimony, various factors lead me in this instance to believe that Rodriguez did not make the critical "Chavista" statement attributed to him by Vargas. Not only did Rodriguez testify that he was not present at Roberto's before the first day of the season, his duties were such that he would have had no reason to appear 10 days prior to the start of the work at the place where workers assemble for work. More importantly, however, Vargas did apply for work subsequently, although not timely, and therefore apparently was not dissuaded from seeking work, suggesting that the conversation Vargas reported having with Rodriguez did not have the definitive character he later ascribed to it.

Having so concluded, I find that the Respondent followed its ordinary business practice in denying rehire to Vargas on the day he applied for work which was after the three day grace period permitted before the loss of seniority, and at a time when no work was available.

V. Motion to Strike

The General Counsel contends the ALO erred in

granting, after hearing evidence in support of an allegation of lack of Respondent's cooperation, Respondent's motion to strike the allegation of non-cooperation and the prayer for attorney's fees from the Complaint. I agree that the ruling on the motion was incorrect. I should have denied the motion instead of striking the allegation even though I did not consider the proof of lack of cooperation so egregious as to warrant the award of attorney's fees, a severe sanction justifiable in certain circumstances.

The record is complete, however, and General Counsel's citation to Sun Harvest is appropriate though not offended by the state of the preserved record.

The main lack of cooperation alleged is the failure of Verde's counsel to make particular Company managers available for interview by the Board investigator. I do not consider this type of refusal to provide information so egregious as to bring into play the sanctions prayed for.

Were depositions available in preparation for ALRB unfair labor practice hearings, then, perhaps, as in civil cases, attorney's fees would be a proper sanction for failure to cooperate.

Here it was an attorney who, making a legal judgement, concluded that testimony from his client's witnesses would not be sufficiently favorable to overcome the slight suspicion on which the Regional Director could rest "reasonable cause to believe that an unfair labor practice has been committed" (Reg. 20216). I do not interpret Reg. 20216 to require the Respondent Company to produce witnesses to

be interviewed by the General Counsel, especially when those witnesses may have to testify adverse to the Company's interest. Lack of cooperation in such cases will naturally result in the filing of a complaint which may itself be a sanction to the recalcitrant Respondent.

For the above reasons I reverse my previous Order striking the allegation of lack of cooperation from the Complaint but deny the requested sanction.

VI. Conclusions of Law

For all of the above reasons, I conclude that Respondent unlawfully refused to rehire Alberto Ramirez for the 1979-80 season in violation of §§ 1153 (a) and (c) of the Agricultural Labor Relations Act. I shall recommend/ therefore, that Respondent be ordered to offer employment to Alberto Ramirez and to make him whole for time lost, as outlined below. I have also concluded that the General Counsel, did not by a preponderance of the evidence, demonstrate that Respondent violated the Act by refusing to rehire Eufemio Vargas and, accordingly, I shall recommend that the allegations of the First Amended Complaint relating to Eufemio Vargas be dismissed.

A. The Remedy

It is recommended that the allegations of the First Amended Complaint relating to Eufemio Vargas be dismissed.

It is further recommended that Respondent be ordered to offer to rehire Alberto Ramirez immediately to his former or substantially equivalent position without prejudice

to his seniority or any other rights and privileges.

I further recommend that Respondent make Alberto Ramirez whole for any losses he may have suffered as a result of Respondent's unlawful refusal to rehire him on the first day of the 1979-80 season by paying to him a sum of money equal to the wages he would have earned from the date he applied for but was refused rehire to the date on which he is reinstated or offered reinstatement, less the amount of his actual earnings during that period, together with interest at the rate of 7% per annum, such back pay to be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc., 3 ALRB 42 (1977).

In order to further effectuate the purposes of this Act and to insure to the employees the enjoyment of the rights guaranteed to them in §1152 of the Act, I also recommend that Respondent publish and make known to its employees that it has violated the Act and that it has been ordered not to engage in future violations of the Act.

Accordingly, I recommend that Respondent furnish the Regional Director of the San Diego Region, for his acceptance, copies of the Notice attached to this decision, accurately and appropriately translated into Spanish and that the Notice and translation then be made known to its employees in the following manner:

1. Post a copy of the Notice, including a copy of the Spanish translation, for a period of not less than sixty (60) days at appropriate locations proximate to employee work areas, including places where notices to

employees are customarily posted.

2. Mail a copy of the Notice and the Spanish translation to each employee employed by Respondent for any period from December 1, 1979, to the date of the mailing, excluding employees who are currently employed. The Notice shall be mailed to the employees' last known home addresses.

3. Give a copy of the Notice and the Spanish translation to each employee employed by Respondent at the time of distribution.

4. Have the Notice and the Spanish translation read to assembled employees on Company time by a Company representative or by a Board agent and afford said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act. This remedy is deemed essential because of evidence of illiteracy among Respondent's employees. See text Cal Land Management, 3 ALRB 14 (1977).

5. Upon the basis of the entire record, the findings of fact and conclusions of law herein, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended

O R D E R

Respondent, its officers, agents and representatives shall:

1. Cease and desist from discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging, laying off, or in any other manner discriminating against individuals in regard

to their hire or tenure of employment, or any term or condition of employment, except as authorized by Section 1153 (c) of the Act.

2. Take the following affirmative action:

a. Offer to Alberto Ramirez immediate and full reinstatement to his former or equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any losses he may have suffered as a result of the Company's refusal to rehire him beginning on the first day of the 1979-80 season, in accordance with the manner described in the above section entitled "The Remedy."

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

c. Furnish the Regional Director of the San Diego Region, for his acceptance, copies of the Notice attached hereto, accurately and appropriately translated into Spanish.

d. Post a copy of the Notice attached hereto, including the Spanish translation, for a period of not less than sixty (60) days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

e. Mail a copy of the Notice attached hereto and the Spanish translation to each employee employed by

Respondent for any period from December 1, 1979, to the date of mailing (excluding current employees of Respondent.) The Notice shall be mailed to the employees' last known home address.

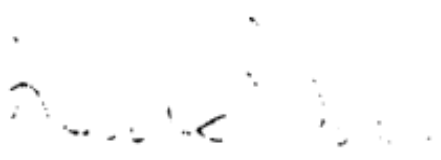
f. Give a copy of the Notice attached hereto and the Spanish translation to each employee employed by Respondent at the time of distribution.

g. Have the Notice attached hereto read in English and Spanish to assembled employees on Company time by a Company representative or by a Board agent and afford the Board agent the opportunity to answer questions which employees might have regarding the Notice and their rights under Section 1152 of the Act.

h. Notify the Regional Director in the San Diego Regional Office within twenty (20) days from receipt of a copy of this Decision of the steps Respondent has taken to comply therewith, and to continue to report periodically thereafter until full compliance is achieved.

It is further recommended that the allegations in the Complaint relating to Eufemio Vargas be dismissed.

Dated:



MARK E. MERIN , Administrative
Law Officer

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we engaged in a violation of the Agricultural Labor Relations Act by refusing to rehire one of our employees and has ordered us to notify all persons employed by the Company since December 1, 1979 that we will remedy this violation, and that we will respect the rights of all of our employees in the future. Therefore we are now telling you that:

The Agricultural Labor Relations Act is a law that gives all farmworkers these rights:

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

Because of the above, we promise that:

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

Especially:

WE WILL NOT fire, layoff, refuse to rehire or do anything against you because you either do or do not support the Union;

WE WILL OFFER Alberto Ramirez his old job back if he wants it and we will pay him any money he lost because we refused to rehire him.

Dated:

VERDE PRODUCE COMPANY

BY: _____
(Representative) (Title)