Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROYAL PACKING COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-409-SAL 79-CE-417-SAL 8 ALRB No. 6

DECISION AND ORDER

On September 4, 1980, Administrative Law Officer (ALO) Stuart Wein issued the attached Decision in this proceeding. Thereafter, both General Counsel and Respondent each timely filed exceptions and a brief in support thereof.

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[1/] and to adopt his recommended order, with modifications.

The General Counsel alleged in the Complaint that Respondent violated section 1153 (a) and (c) of the Act by discharging the employee-members of celery-harvest crew no. 1

[1/] In view of our decision herein, we do not adopt the ALO's analysis of the case law nor his application of the law to the instant facts concerning Respondent's alleged violation of section 1153 (a) by discharging the employees in celery harvest crew no. 1.

because of their concerted work stoppage over compensation.

The ALO found that Respondent did not discharge the members of celery-harvest crew no. 1 because of their union activities, and, accordingly, recommended dismissal of the section 1153 (c) allegation against Respondent. As we affirm that finding and the ALO's analysis in support thereof, that allegation of the complaint is hereby dismissed.

The ALO also found that Respondent discharged the members of celery harvest crew no. 1 because of their protected work stoppage over wages, and accordingly concluded that Respondent thereby violated section 1153 (a) of the Act. While we agree with this finding and conclusion, we reach it on different grounds.

We find no merit in Respondent's contention that the crew members voluntarily quit their jobs. On the contrary, the evidence establishes that they wished to continue working for Respondent, if Respondent would accede to their wage demands. To induce Respondent to accede to their demands, the workers engaged in an economic strike.[2/] This characterization of the employees' activity is supported by Jeffrey-DeWitt Insulator Co. v. NLRB (4th Cir. 1937) 91 F.2d 134 [1 LRRM 634], See also D'Arrigo Bros, of California (Apr. 25, 1977) 3 ALRB No. 34, in which we stated that the distinctive feature of a strike is the "withholding of labor from the employer." Id. p. 7. Here, the crew members refused to continue working as a means of inducing Respondent to

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[2/] An economic strike is a withholding of services by employees to induce their employer to effect a change in their wages, hours, or conditions of employment.

pay them an hourly wage rate for the afternoon and to allow them to keep the piece-rate earnings they had accumulated throughout the morning. Respondent's supervisor, Solario, rejected that demand. By their work stoppage the employees engaged in protected concerted activity in the form of an economic strike. See Sigma Service (1977) 230 NLRB 316 [95 LRRM 1559]; Crenlo Div. v. NLRB (8th Cir. 1975) 529 F.2d 201 [91 LRRM 2065]. See also Morris, The Developing Labor Law (1971) p. 517.

When confronted with an economic strike, an employer is free to hire other workers to replace the striking employees at any time prior to an unconditional request by the strikers for reinstatement. NLRB v. MacKay Radio Telegraph (1958) 304 U.S. 33 [2 LRRM 610]; Seabreeze Berry Farms (Nov. 16, 1981) 7 ALRB No. 40. However, an employer commits an unfair labor practice by discharging, laying off, or otherwise discriminating against employees for engaging in an economic strike. NLRB v. U. S. Cold Storage (5th Cir. 1953) 203 F.2d 924 [32 LRRM 2024]; Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13. Here, credited testimony [3/] establishes that both crew foreman Villalobos and supervisor Solario told the employees, in response to their protected work stoppage, that they were "fired." By so discharging these workers Respondent violated section 1153 (a) of the Act.

[3/] Respondent excepts to certain of the ALO's credibility resolutions. We will not disturb such resolutions unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; El Paso Natural Gas Co. (1971) 193 NLRB 333 [78 LRRM 1250]; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531]. We have reviewed the record and find the ALO's credibility resolutions to be supported by the record as a whole.

The General Counsel also alleged in the complaint that Respondent violated section 1153(a) of the Act by discharging employee Francisco Lopez in reprisal for his protests against alleged poor working conditions. The ALO found those protests to be concerted activity which is protected under section 1152 of the Act. In his decision the ALO found that Respondent discharged Lopez because of his protected concerted activity and thereby violated section 1153 (a) of the Act.

The record supports the ALO's finding that Lopez acted as a spokesman for other members of the crew when he confronted Respondent's foreman Cortez with grievances concerning the alleged lack of drinking water and the alleged unsanitary condition of the portable restrooms supplied by Respondent. Credited testimony established that Lopez discussed these matters with other workers prior to presenting his and their shared concerns to foreman Cortez. He presented these grievances to Cortez in the presence of his co-workers in order to show Cortez "that all the workers were unhappy because of the water condition and also the toilets." This factual situation is similar to that in Bill Adam Farms (Dec. 21, 1981) 7 ALRB No. 46. In that case we found that the employer had knowledge of the concerted nature of a spokesperson's efforts where a group of employees stopped working and listened to the conversation which ensued between a supervisor and the spokesperson.

Respondent's contention that, because two workers failed to recognize Lopez and because Lopez was a relatively recent addition to Respondent's work force, he could not have been a

spokesperson for the crew is unpersuasive. Neither an employee's length of service, nor whether he or she represents the entire work force is material in determining whether he or she is acting as a spokesperson for other employees, or otherwise engaged in protected concerted activity. NLRB v. Guernsey-Muskingum Electric Co-op, Inc. (6th Cir. 1960) 285 F.2d 8 [47 LRRM 2260]; Hugh H. Wilson v. NLRB (3d Cir. 1969) 414 F.2d 1345 [71 LRRM 2827]; Jack Brothers & McBurney, Inc. (Feb. 25, 1980) 6 ALRB No. 12. The NLRB has held that:

> Even individual protests are protected as concerted activity if the matter at issue is of moment to the group of employees complaining and if the matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group.
> Hugh H. Wilson (1969) 171 NLRB 1040 *at* 1046 [69 LRRM 1264].

The record also supports the ALO's finding, based upon circumstantial evidence, that Lopez's protected conduct was a basis for Respondent's decision to discharge him. The burden of establishing an unlawful basis for the discharge may be met by circumstantial evidence which reasonably gives rise to the inference of a discriminatory disciplinary action. Betts Baking Co., Inc. v. NLRB (10th Cir. 1967) 380 F.2d 199 [65 LRRM 2568]. Shattuck Denn Mining Co. v. NLRB (9th Cir. 1966) 362 F.2d 466 [62 LRRM 2401]; Petropak, Inc. (1978) 238 NLRB 991 [99 LRRM 1639]. See also Abatti Farms, Inc. (Oct. 28, 1981) 7 ALRB No. 36.

The evidence reveals several factors which give rise to the inference that Lopez was discharged because of his protected concerted activity. First, Lopez received no written warning or

reprimand for unsatisfactory work prior to this discharge. Second despite supervisor Solario's testimony that other celery cutters did not cut properly, no other employee was discharged for unsatisfactory work performance. Third, Lopez was discharged after a period of only eleven working days after he was hired. Fourth, Respondent's foreman, Cortez, placed Lopez, who had limited experience as a celery cutter, with a crew of experienced celery harvesters three days prior to his discharge. Such an assignment would undoubtedly place pressure on an inexperienced celery cutter who must set the harvesting pace for the rest of the workers, pressure all the more intense because the employees' wages were being determined on a piece-rate basis.

Respondent's asserted business justification for discharging Lopez, that his work performance was unsatisfactory, does not overcome the strong inference raised by the factors discussed above. While Respondent stresses that its witnesses testified that Lopez was a poor worker, the ALO credited the testimony of the General Counsel's witnesses that Lopez was a satisfactory worker. As the clear preponderance of the evidence supports the ALO's credibility resolutions, we affirm this finding, and his finding that Respondent's profferred explanation was pretextual.

Accordingly, we conclude, in agreement with the ALO, that Respondent discharged Lopez in violation of section 1153 (a) of the Act.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Baord hereby orders that Respondent

Royal Packing Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off, 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 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 the employee-members of celery harvest crew no. 1 who were discharged on or about October 23, 1979, and to Francisco Lopez, full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole the employee-members of celery harvest crew no. 1 who were not rehired to work for celery harvest crew no. 2 for any loss of pay and other economic losses they have suffered as a result of their discharge on or about October 23, 1979, 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, photocopying, and

otherwise 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 January 1980 until the date on which the said Notice is mailed.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the period and places 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

this 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 date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 2, 1982

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 Salinas Regional 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 discharging the Villalobos crew on or about October 23, 1979, and by discharging Francisco Lopez on or about November 7, 1979. 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 farmworkers 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 discharge the Villalobos crew because they participated in a concerted work stoppage over wages on or about October 23, 1979. The Board also found that it was unlawful for us to discharge Francisco Lopez because of his concerted protests over working conditions on or about November 7, 1979.

WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate the Villalobos crew and Francisco Lopez 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, plus interest computed at 7 percent per annum.

Dated: ROYAL PACKING COMPANY

By: _____
Representative (Title)

If you have a question about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is 408/443-3160.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Royal Packing Company

8 ALRB No. 16
Case Nos. 79-CE-409-SAL
79-CE-417-SAL

ALO DECISION

The consolidated complaint alleged that Respondent violated section 1153 (a) and (c) of the Act by discharging the employees in a celery harvest crew because of their protected concerted work stoppage over wages, and violated section 1153 (a) of the Act by discharging an employee because of his protest, on behalf of himself and other workers, about working conditions. The ALO concluded that Respondent's discharge of the crew violated section 1153 (c) because the crew's protected concerted work stoppage activities were unrelated to any union activity. The ALO concluded that Respondent's discharge of the employee violated section 1153 (a) of the Act.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions and adopted his recommendations, but rejected his application of the law to the instant facts concerning the discharge of the celery-harvest crew. The Board found that when the crew members withheld their services in order to induce Respondent to effect a change in their compensation, they were engaged in an economic strike, a concerted activity protected by section 1152 of the Act. While Respondent could have lawfully replaced the economic strikers, the Board held, Respondent violated section 1153 (a) of the Act by discharging them.

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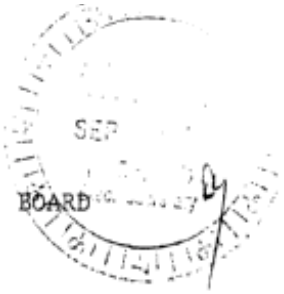
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS



In the Matter of:	
ROYAL PACKING COMPANY, INC., Respondent,	Case Nos. 79-CE-409-SAL 79-CE-417-SAL
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	
and	
FRANCISCO LOPEZ, Charging Party.	

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Ned Dunphy
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for the Charging Parties

DECISION

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer: This case was heard by me on June 11, 12, 13, 16, 17, 18 and 23, 1980 in

Salinas, California.

Two Complaints, issued on March 24, 1980, and May 30, 1980, respectively, are based on two charges -- the first filed by the UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereafter the "UFW" or Union"), and the second by worker, FRANCISCO LOPEZ. The charges were duly served on the Respondent ROYAL PACKING COMPANY, INC. on October 24, 1979 and 7 November, 1979. The Complaints were consolidated pursuant to Section 20244 of the Regulations of the Agricultural Relations Board by order of the General Counsel filed 2 June 1980.

The consolidated Complaints allege that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the "Act").

All parties were represented at the hearing and were given I a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs after the close of the hearing.

Based on the entire record, including my observations of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following

FINDINGS

I. Jurisdiction:

Respondent ROYAL PICKING COMPANY. INC., is a corporational engaged in agricultural operations - - specifically the growing, 1 Unless otherwise specifice all the dates herein mention refer to 1979.

harvesting and shipping of lettuce, celery, and other crops in Monterey County, California, as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

I also find that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act, and that FRANCISCO LOPEZ was at all relevant times an agricultural employee within 8 the meaning of Section 1140.4(b) of the Act, as was admitted by Respondent.

II. The Alleged Unfair Labor Practices

The General Counsel's consolidated Complaints charge that Respondent violated Section 1153(a) of the Act by firing its celery harvest Crew No. 1 on October 23, 1979 because of the latter's concerted activity. They further charge that the termination of said crew constituted a violation of Section 1153 (c) of the Act because the crew was sympathetic to the UFW, and that Respondent discriminated in the conditions of employment of said crew from October 19 through October 23 in violation of Section 1153(c). Additionally, the consolidated Complaints charge that Respondent violated Section 1153(a) of the Act by firing FRANCISCO LOPEZ on November 2, 1979 because of his concerted activities.

Upon the conclusion of its case, General Counsel withdrew 04 its charge with respect to the allegation of the Section 1153(c) 25 I violation during the period October 19 through October 23, and I 25 consequently recommend that Paragraph 6 of the Complaint issued

March 24, 1980 be dismissed.

General Counsel produced no evidence with respect to the allegations contained in Paragraph 4 of the Complaint issued March 24, 1980 (threatened discharge of Crew #1 on October 19) and I further recommend that that Paragraph be dismissed..

With respect to the allegations concerning Crew No. 1, the Respondent denied that it violated the Act in any respect. Rather, Respondent contended that the crew unilaterally decided to stop working on October 23 because of a dispute over wages. There was no work in the celery fields for the next five days, and those who sought work with Respondent following that time were allowed to join Crew #2 until the end of the celery harvest on or about November 18. Respondent also denied that FRANCISCO LOPEZ was terminated because of any concerted activity, but alleged that he was fired because he did not properly cut the celery.

III. Background.

Respondent had been in the produce business for some thirty (30) years when it decided to grow, harvest and ship celery for the first time in 1979. Similar to its practices with respect to other products, Respondent was determined to grow, harvest and ship a "quality type" pack, which would be competitive in the celery industry. Thus, it endeavored to do a "neat job" of trimming the bottom decay and cleaning the mud off the celery plants, as well as pack the celery in uniform size groups.

Celery was harvested with the utilization of "burras" or three-wheel platforms which were pushed by the packers in the

fields as they loaded the celery into the cartons. The workers were grouped around these "burras" -- with three "cutters" and three packers for each "burra". Additionally, the crew would contain one "closer" for every two "burras", one "stitcher" for every two "burras" and one "loader" per "burra". Depending on market conditions and need, the size of a particular crew would vary anywhere from 2 to 4 "burras" (15-30 workers). Supervisor Frank Solorio, in conjunction with his foremen Jesus Villalobos and David Cortez would make the decisions regarding crew size, and the location of a particular day's work.

Two crews -- Crew #1 headed by foreman Jesus Villalobos and Crew #2 led by foreman David Cortez -- were hired in 1979 to harvest Respondent's first celery crop. Both were under the supervision of Frank Solorio. Mr. Villalobos' crew commenced work on July 6 and remained until October 23. The crew members were hired by Villalobos personally -- many of them having worked with the foreman previously at other locations -- and he sought experienced celery harvesters. In order to teach the workers Respondent's methods, and to assure that the crew worked approximately the same speed, Mr. Cortez hired inexperienced workers from August 18 through October 23. the day of the work stoppage of Villalobos' Crew #1 which gave rise to these unfair labor practice allegations. Following that time, experienced workers were hired to complete the harvest.

Although Respondent was under no collective bargaining agreement during all relevant times, UFW organizer Celestino

Rivas took access on at least three occasions onto Respondent's properties. On the first visit, during the summer of 1979, wearing a red UFW button on his T-shirt, Mr. Rivas spoke with workers Antonio Perez and Domingo Garcia of Villalobos' Crew #1 during the morning break in the fields. On the second occasion, Mr. Rivas spoke with worker Perez in the fields after the latter had finished his "line" ahead of the rest of the crew. On the third occasion (sometime in August), various workers of the villalobos crew were sitting on Respondent's bus eating lunch when there was a confrontation between UFW organizer Rivas and foreman David Cortez [2] as to who had the right to be with the workers during this lunch break. The outcome of this episode was a rousing chant of "Viva Chavez" and "Arriba Chavez" which the workers expressed in loud tones as supervisor Cortez conferred with Respondent personnel manager Joe Chavez directly outside the bus. That very evening, workers Antonio Perez and Salvador Rivera were appointed UFW representatives for Respondent's celery crew and would wear their union insignia to work on future occasions.

From October 24 through October 28, there was no work at Respondent's celery fields because of the condition of the celery market, and of the product itself. Because of weather and other factors, a very high percentage of Respondent's celery had

[2] Mr. Cortez served as Mr. Villalobos' assistant in Crew #1 until his own Crew #2 was formed.

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become "pithy" and unmarketable. Only after a five-day respite were workers to resume the harvest operations. All members of David Cortez's crew were to return. Only eight workers of the Villalobos crew -- which had participated in the "work stoppages" of October 19 and 23 -- joined the members of Crew #2 and worked until the end of the harvest season in mid-November.

The alleged unfair labor practices occurred on October 23 8 involving the employment status of the members of Jesus Villalobos' crew who engaged in a work stoppage regarding the conditions of the field and wages to be paid for the work on that date. Additionally, Respondent is alleged to have violated the Act by firing employee FRANCISCO LOPEZ from Mr. Cortez's Crew #2 on November 2. Findings of Fact and Conclusions of Law and Analysis will be discussed first for the events involving the Villalobos crew, and then for the case of FRANCISCO LOPEZ.

IV. Work Stoppage of Jesus Villalobos' Crew of October 23.

A. Facts:

Foreman Jesus Villalobos hired the members of his Crew #1 at the commencement of the celery harvest on July 6. He sought experienced workers and hired the crew on an informal basis. That is, workers would approach him and ask for work. They would start working and later fill out formal application forms. Some workers, like Valdemar Espinoza, had worked with Mr. Villalobos 24 in other ranches on previous occasions. The two were familias with each other's union sympathies - - Mr. Espinoza for the UFW and Mr. Villalobos for the Teamsters -- as both had worked in

organizational campaigns at Hanson Farms in 1975. Others, such as Antonio Perez and Salvador Rivera, had no prior dealings with 3 Mr. Villalobos, but informed him of their UFW sympathies, wore UFW buttons and engaged in conversations with Mr. Villalobos subsequent to the time they were designated UFW representatives of Respondent's celery crews in August. Both Perez and Rivera testified that they received "more harassment" from Mr. Villalobos following the revelation of their union sympathies and activities.

As experienced workers, Mr. Villalobos' Crew #1 were to be paid piece rate with a guaranteed minimum of $6.00/hour if they could not "make" the piece rate on a particular day. With the exception of a one week period in August, the workers were paid by this piece rate formula [3], and worked without significant problems or incident until Friday, October 19. On that date, it rained lightly, as the crew worked in different parts of Panzierra Field #9A, off Cooper Road in Salinas, California. At some point after the mid-afternoon lunch break, workers requested, and some were given rain gear-- jackets, and overshoes because of the drizzle. There were also complaints about the quality of the celery in the field at the lunch break as the workers noted that the celery was "bofo" or pithy -- a quality that could only be determined after the celery had been cut. Since the pithy quality of the celery made the product unmarketable,

[3]The average per hour earnings from this formula varied from $6.52/hour to $11.47/hour. (See Respondent's Exhibit No. 3).

the work was slowed as the crew members attempted to find and harvest celery which could be packed and shipped. The workers agreed to speak with Mr. Villalobos and have the latter consult with supervisor Frank Solorio so that they could be moved to another part of the field.

Approximately one hour later, Solorio approached the "stopped" workers and spoke with crew members. Apparently, foreman Villalobos brought a pack of celery over from the portion of the field where Mr. Cortez's Crew #2 was working and demonstrated to Mr. Solorio that only three (3) of twenty-four (24) cut celery plants did not contain the ruinous "pithiness". Mr. Solorio was alleged to have retorted, "If you don't want to work, let God help you." The crew responded by requesting piece - rate wages for the day, and a request to harvest another field on Saturday, October 20. Mr. Solorio approved this request, giving the workers their checks at that time, with the admonition that he expected everyone at work on Saturday (the following day).

On October 20, the workers continued in the same field, but harvested a different portion without incident. On Monday, October 22 the crew harvested some three different parts of the same field, but the celery continued to be bad (pithy). On Tuesday, October 23, Crew #1 returned to the same portion of the Panzierra Ranch where they had worked Friday, October 19. They worked approximately 4.5 hours by the noon hour. Because of the I poor condition of the celery, the workers gathered together and

requested foreman Villalobos to pay them by piece work for the morning's labor, and by the hourly minimum for the afternoon. The workers had estimated that they had earned some $38.00 by noon but feared that they would not be able to make the piece-work rate for the entire day given the condition of the celery.

Foreman Villalobos denied the workers' request, stating that "If you don't want to work, you're fired." Four workers then approached Supervisor Solorio who was standing at the edge of the field, and repeated the request to be paid by piece work for the morning and by the hour for the afternoon. Solorio said that they could not be paid in that manner, and that they were fired. The workers then requested to be laid off, but Mr. Solorio said that he would not, because the workers were the ones who quit work.

Several of the workers then proceeded to Respondent's office to speak with personnel manager Joe Chavez. However, foreman Villalobos met the group at the front door and stated that Mr. Chavez was in Huron, that he had just spoken with the latter, and that he had confirmed that the workers were fired.

When worker Antonio Perez want to pick up his final check and return his gear on October 26, foreman Villalobos stated that it was not his fault that the crew had been fired, and that he (Villalobos) had been fired also.

There was no work for either Crew #1 or Crew #2 between

[4]After a one-hour lunch break -- an extra half hour attributable to a "sympathy protest" in support of the actions of Crew #1--Crew *#2* finished their work on the Panzierra field.

October 24 and October 28. Only certain members of the Villalobos crew returned on October 29 -- Pedro Guillen, Miguel Jimenez, Miguel Moreno, Simon Sanchez, Juan Carriedo, Jose Maldonado, Manuel Silva, and Jorge Maravilla. (See General Counsel Exhibit #6). Loaders Miguel Jimenez and Miguel Moreno spoke with foreman Villalobos, personnel manager Chavez, and finally with foreman Cortez to resume working. Mr. Gortez apparently called up Mr. Moreno to invite the latter and his friend, Miguel Jimenez, back to work in Crew #2. Packer Pedro Guillen saw foreman Cortez at church on Sunday, October 28 and was invited to return to Respondent's Crew #2. The others apparently solicited work either by telephoning foreman Cortez prior to the 29th of October, or simply by returning to work on that date. They, along with the entire Crew #2, and others, worked as one large crew until the end of the celery harvest on 18 November.

B. Analysis and Conclusions:

1. The Discharge of the Villalobos Crew.

I find that the Villalobos crew (Crew #1) was fired on October 23, rather than voluntarily quit *as* alleged by Respondent. In doing so, I have considered the following factors:

General Counsel witness Antonio Perez testified that foreman Villalobos gave the following edict upon learning of the workers' request to be paid piece rate in the morning and hourly in the afternoon. "If you don't want to work, you're fired." (R.T., Vol. II, p. 104, l. 3). This version of the Villalobos crew dialogue was essentially confirmed by workers Salvador

Rivera (R.T., Vol. Ill, p. 40, 1. 9), and Valdemar Espinoza (R.T., Vol. Ill, p. 91, 11. 25-38). Worker FRANCISCO LOPEZ testified that his foreman David Cortez warned Crew #2 on October 23 that "those that want to work, go ahead and work, and those that don't, they will be fired like we did the other crew." (R.T., Vol. IV, p. 74, 11. 25-27).

The workers further confirmed that Supervisor Frank Solorio gave the crew a "farewell" by stating "Dios le ayuda" -- "God help you"; and that they were unable to speak with personnel manager Joe Chavez because foreman Villalobos preceded them to Respondent's office and announced that he himself had spoken by telephone to Joe Chavez (who was in Huron) and that the personnel manager agreed that all had been fired.

Additional corroboration of the fact of firing was evidenced also by various witnesses' recollection that upon returning to pick up the final paychecks, foreman Villalobos conceded that he too had been fired and that it was the crew's "fault" for his having been terminated.

While Respondent contends that the workers "voluntarily resigned", none of its witnesses could recall with any clarity the precise dialogue between crew and supervisory personnel which occurred on October 23. Indeed, Respondent's own witness, Pedro Guillen, (packer) testified that foreman Villalobos had told everybody "that we were fired, that we didn't have a job there anymore." (R.T., Volume VII, p. 7, 11. 7-9). Mr. Villalobos'

recollection of the precise dialogue of October 23 was particularly murky, and I credit the testimony of General Counsel's witnesses, as well as that of Mr. Guillen in that regard.

Nor do I find persuasive Respondent's contentions that those who wanted to return when the harvest resumed on October 29 were allowed to do so if they merely asked foreman Cortez. While some eight members of the Villalobos' crew did return with the Cortez 8 crew on October 29, there is evidence that these workers separated themselves from the "work stoppages" of October 19 and 23. Miguel Moreno and Miguel Jimenez disassociated themselves from the protest when requesting personnel manager Joe Chavez to 12 rehire them. Both would be invited back at foreman Cortez's request. Pedro Guillen was asked by foreman Cortez in church on Sunday, October 28 whether he wanted to work. Protest activists -UFW sympathizers Antonio Perez, Salvador Rivera, and Valdemar Espinoza -- were not invited to return. Respondent's own witness tractor driver Dionesio Perez, testified that he had been sought out by Frank Solorio to return to work on the 29th. (R.T., Vol. VII, p. 22, 11. 6-7).

Supervisor Solorio's explanation that there was no more work and everyone had to be laid off after October 23 is similarly not persuasive. The payroll records of crew activity for the period immediately preceding October 23 indicate that Crew #1 consisted of 15-20 workers while Crew #2 ranged from'20-35.' -Following October 29, the "new" enlarged Crew #2 was composed of 40-45 workers-- the exact number contained in the two crews before October 23. The difference, of course, was that twelve (12) of

the members of Jesus Villalobos' crew were discharged on October 23, and not "rehired" after the five-day lull [5] Thus, whether the firing of these twelve members of the Villalobos crew was a violation of Section 1153 (c) and/or Section 1153(a) of the Act becomes central to the analysis.

2. The Section 1153(c) Charge.

Section 1153 (c) of the Act makes it an unfair labor practice for an employer "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." The General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the discharges. Maggio-Tostado, 3 ALRB No. 33 (1977), citing NLRB v. Winter Garde Citrus Products Co-Operative, 260 F.2d 193 (5th Cir. 1958). The test is whether the evidence, which in many instances is largely circumstantial, establishes by its preponderance that employees were laid off for their views, activities, or support for the union. Sunnyside Nurseries, Inc. (May 20, 1977) 3 ALRB No. 42, den. in part; Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board (1979) 93 Cal. App. 3d 922. Among the factors to weigh in determining General Counsel's prima facie case

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[5]Respondent apparently did not violate its own written policy (see Respondent Exhibit #3) by not rehiring these twelve members of the Villalobos' crew, in that Respondent, at least considered them to have resigned voluntarily thus losing any seniority rights to which they might be entitled. This characterization of the termination by Respondent, however, would not immunize it from violation of the employees' Section 1152 rights.

are the extent of the employer's knowledge of union activities, the employer's anti-union animus, and the timing of the alleged unlawful conduct.

Although not conceded at the hearing, Respondent's knowledge of the UFW sympathies of foreman Villalobos' Crew #1 was apparent. UFW organizer Celestino Rivas took access on Respondent's properties on at least three occasions during the summer months of 1979. Foremen were in the near vicinity on all three occasions as the organizer spoke to the interested workers. Antonio Perez and Salvador Rivera wore UFW insignia following their designations as UFW crew representatives.' Foreman Villalobos had occasion to discuss the union affiliations of these members, and was knowledgeable of worker Valdemar Espinoza's UFW sympathies through previous work experience. The Villalobos crew would become particularly identified as a pro-UFW group because of the bus incident involving foreman Cortez and organizer Rivas. The crew yelled in unison "Viva Chavez" and "Arriba Chavez" -- "Hooray for Chavez" -- with foreman Cortez and personnel manager Joe Chavez in hearing distance, discussing the confrontation with organizer Rivas. It was obvious that the "Chavez" referred to in the workers' chant was "their leader" Cesar Chavez rather than personnel manager Joe Chavez. I thus find that the Respondent was fully aware of union sentiments of Crew # prior to their termination on October 23 (See S Kuramura, Inc., (June 21, 1977) ALRB No. 49, review den. By Ct. App. 1st Dist., October 26, 1977 hg. den. December 15, 1977.

Apart from Jesus Villalobos' alleged observations that the workers' UFW sympathies "would not mean anything" on Respondent's ranches, and his disparaging comments regarding a UFW inarch in August which I consider protected free speech under Section 1155 of the Act (and therefore not supportive of General Counsel's case), there is sparce suggestion of anti-union animus in the record. There was a denial of access to UFW *organizer* Celestino Rivas -- albeit only a momentary one -- when foreman David Cortez disputed the latter's right to speak with the workers on the bus during the lunch hour. While the incident was not raised as a separate unfair labor practice, nor argued as such in General Counsel's brief, it does suggest some union hostility. This suggestion is buttressed somewhat by the peculiar pattern of rehire following the five-day layoff on October 23. While the total crew requirements before October 23 and October 29 were identical, the most vocal UFW partisans -- particularly Valdemar Espinoza, Antonio Perez, and Salvador Rivera -- were selectively omitted from the enlarged Crew #2. Foreman Villalobos who had hired the union adherents would also be fired, and only those disassociating themselves from the activities of October 19 and 23 would be invited back.

However, the timing of the discharge --on the day of the work stoppage, and immediately prior to the five-day layoff--belies General Counsel's claim that there was a connection or causal relationship between the union activity and the subsequent terminations. See Jackson & Perkins Rose Co., 5 ALRB 20 (1979).

The discharges occurred because Villalobos' crew engaged in a work stoppage on October 23. Because they requested to be paid by piece rate in the morning and hourly in the afternoon -- and rejected Mr. Villalobos' "offer" to be paid hourly for the entire day -- they were fired. Supervisor Solorio confirmed the firing, and the workers were informed that personnel manager Joe Chavez was in accord with Mr. Villalobos' decision. Foreman Cortez told his crew that they risked a similar fate if they did not complete the work assigned on October 23.

I find that the preponderance of the evidence establishes that the discharge of the twelve members of the Villalobos crew was motivated by the crew's conduct of October 23 rather than by any anti-union motivation. (See Maggio-Tostado, 3 ALRB No. 33 (1977), relying on NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967). Had there been no work stoppage on October 23, the entire Villalobos crew would have returned to work on October 29.

Nor do I find that any anti-union motive constituted the "last straw which broke the camel's back". See NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582, 64 LRRM 2656 (5th Cir. 1967). Foreman Villalobos hired at least some of these workers after he had learned of their UFW sympathies. There were no alleged discharges, or selective layoffs of UFW adherents during the period of the union's organizational efforts in July and August, I even though there was a large turnover and wide variations in the number of workers in Mr. Villalobos' crew. The UFW adherents

worked for some two months following these union activities and did so without incident. They were considered . by management to be experienced workers who did a decent job of cutting Respondent's celery. I thus determine that the circumstances surrounding the termination refute any inference of anti-union discrimination, and find that Respondent did not violate Section 1153(c) of the Act by the discharges of the twelve members of the Villalobos crew.

3. The Section 1153(a) Charge.

Since I have found that the real reason for the firing of Crew #1 was for the work stoppage of October 23, the only further question presented for resolution of the 79-CE-408-SAL "charge" is whether the Villalobos crew was involved in protected concerted activity.

Section 1152 of the Act provides in pertinent part that

[E]mployees 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...." (Emphasis added). It is designed to assure employees the fundamental right to present grievances to their employer to secure better terms and conditions

[Of employment, recognizing that employees have a legitimate interest in acting concertedly to make their views known to management without being discharged for that interest. (See 26 Jackson & Perkins Rose Co., 5 ALRB 20 (1979), citing Hugh H. Wilson

Corp. v. NLRB, 414 F.2d 1345, 1347-50 (3d Cir. 1969), cert, denied 397 U.S. 935 (1970)).

While mere "griping" about a condition of employment is not protected, when "griping" coalesces with expression inclined to produce group or representative action, the statute protects the activity. Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). Hugh H. Wilson, supra, 414 F.2d at 1348.

Under the NLRB, employers may discharge employees who engage in "partial, intermittent or recurrent work stoppages". NLRB v. Blades Mfg. Corp., 344 F.2d 998 (8th Cir. 1965), 59 LRRM 2210; NLRB v Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946), 19 LRRM 2008. However, a brief one-time work stoppage to protest working conditions is not "partial","intermittent", or "recurrent and the National Labor Relations Board has recently held that two stoppages of short duration do not constitute the type of pattern of recurring stoppages which would deprive the employees of the Act's protection. Michael Palumba dba American Homes Sys ., 200 NLRB 1151, 82 LRRM 1183 (1972) (one-day strike to protest working in inclement weather) ; Shelby & Anderson Furniture Mfg. Co. 20 v. NLRB, 497 F.2d 1200, 86 LRRM 2019 (9th Cir. 1974), enforcing 1199 NLRB 250, 82 LRRM 1162 (1972) (brief one-time protest demonstration against employer's dilatory bargaining tactics); Robertson Indus., 216 NLRB No. 62, 88 LRRM 1280 (1975) (two stoppages involving a total of two days absence from work); Crenlo Div. of G.F. Business Equip., Inc., 215 NLRB No. 151, 88 LRRM l277 (1975) (two stoppages on two successive days). There is a

presumption that a single, concerted refusal to work overtime is protected strike activity. Polytech, Inc., 195 NLRB 695, 79 LRRM 1474 (1972).

In the instant case, it is difficult to even categorize the conduct of Crew #1 on October 19 as a "work stoppage". Although they received their Friday pay checks "early", and worked only six hours on that date, there is nothing in the record to indicate that foreman Villalobos or supervisor Solorio believed their conduct to require disciplinary action. The workers were requested to return, and they did so on Saturday, October 20. They worked without incident on that day as well as on Monday, October 22. It was only when they returned to the same "bofo" celery on October 23 (which they had encountered on the 19th) that they requested the piece-rate pay for the morning, and the hourly guarantee for the afternoon. I thus find that the stoppage was part of a plan or pattern of intermittent action which was Inconsistent with the genuine performance by employees of the work normally expected of them by an employer. See Herman Buns & Sons, Inc., 200 NLRB 401, 81 LRRM 470 (1972); Lodge 76, IAM v. wisconsin Employment Relations Commissions, 92 LRRM 2881 (1976).

While there is no clear ALRB precedent on the issue, this Board has ruled that "picking dirty" is unprotected activity, (O.P. Murphy Produce Co., Inc., dba O.P. Murphy & Sons, 5 ALRB 68 (1979). However, refusal to work overtime may be part of a concerted protest-retaliation for which would be a Section 1153(a) violation. (Sam Andrews' Sons, 5 ALRB No. 68 (1979). Ultimately,

the NLRB's balancing test -- the employees' right to engage in concerted activity against the employer's right to control the conduct of its employees in the plant (field) -- may provide the best guideline to resolving these issues in the agricultural context. (See Morris, The Developing Labor Law, Cumulative Supplement 1971-75, p. 11.)

Balancing the interests herein, the workers in the Villalobos crew had a legitimate cause for concern given the "bofo" quality of the celery. Because the portion of Panzierra Ranch 9A that they harvested October 19 and 23 was hopelessly unmarketable, it was impossible to make the piece rate. Because they were "experienced" workers who normally did not work hourly, they were understandably upset about losing the piece rate which they had worked for during the morning of the 23rd. Given the quality of the crop, it was not an unreasonable assumption that they would have had to accept the hourly minimum had they completed the day.[6]

Respondent, on the other hand, presented no compelling evidence that the crew's conduct was particularly inimical to its enterprise. Crew #2 finished a normal work day on the 23rd, and there was no more work for anyone for a five-day period. Owner Don Hart conceded that the crop was practically 100% "bofo" by the close of business on the 23rd, and the workers confirmed

[6]For the first 4.5 hours, the workers had earned approximately $38.00. If they did not make the piece rate for the entire day, they could have expected to earn $48.00 for an eight-hour day, or an additional $10.00 for some three hours of afternoon work.

that only some 3 of 24 stalks did not contain the pithiness which ruined the crop. The product was clearly not marketable, and Respondent would decide on its own that there was no more work for the balance of the week.

While the protections accorded employees under the Act may not be dependent upon the merit or lack of merit of the concerted activity in which they engage (Bob Henry Dodge, Inc., 203 NLRB 78 (1973); Anaconda Aluminum Co., 160 NLRB 35, 40 (1966), it does not seem irrelevant that the Villalobos crew accurately assessed the working conditions which they chose not to endure on October 23. Short-term work stoppages in the agricultural context may have more inimical consequences than in the industrial sphere because of the perishable quality of the product. However at least in the instant case, there is no evidence that the Respondent suffered any adverse effects from the stoppage of October 23. And, as in Bob Henry Dodge, it must be borne in mind that there was no contract herein providing for any grievance machinery, nor were there any established work rules. Respondent' employee handbook advised dissatisfied employees only to talk to their head foreman, field supervisor or personnel director. (Respondent Exhibit No. 8, p. 9.) This they attempted to do on October 23 without success.

While it may seem ironic that precisely the most effective I activities will be those least likely to be designated protected because of their inimical impact on the agricultural process, these considerations do afford some reasonable guidelines

consistent with the protection of employee rights, and the preservation of the employer's control over its economic enterprise. In the instant case, I find the work stoppage to be somewhat less than critical to the Respondent's economic interests given its short duration, the condition of the crop, and the subsequent five-day "lay off" of the entire labor force. While the workers, on the other hand, had never before been paid by piece rate for the morning, and hourly by the afternoon, their concern about working the balance of the day to earn $10.00 cutting unmarketable celery seems legitimate.

In weighing the interests involved, I conclude that Respondent discharged the twelve members of the Villalobos crew because of the work stoppage, and that this one-time, four hour refusal to pick "bofo" celery was protected concerted activity. I thus find that Respondent's termination of Domingo Garcia, Antonio Perez, Antonio Padilla, Salvador Rivera, Juan Vela, Valdemar Espinoza, Jose Ortiz, Jaime Gonzales, Miguel Lopez, Trino Maciel, Carlos Nateras, and Jesus Perez violated Section 1153(a) of the Act.

V. Discharge of Francisco Lopez of November 2.

A. Facts:

FRANCISCO LOPEZ was hired by foreman David Cortez as a celery cutter for Respondent's Crew #2 on October 16, filling out; the application form on the following day. He had had a little over one month experience cutting celery with Sun Harvest Company sometime prior to obtaining employment with Respondent.

Worker Lopez chronicled a series of difficulties he had with Respondent during his short two and one-half week tenure in its employ. During his first week, Mr. Lopez requested an advance from his foreman but was not given one immediately, apparently because he had asked too late in the week. While foremen customarily gave advances to new hirees to cover the first week of work, Respondent's policy was to deny these sums if not requested by Tuesday of the given week. Since Mr. Lopez did not commence work until Tuesday, (October 16) he did not timely request his advance, and had to make a special request at Respondent's office to obtain the needed funds. Mr. Lopez made this request and was given the advance.

Mr. Lopez subsequently noticed that there was frequently a lack of drinking water for the crew in the mornings. He discussed this matter with other crew members, and "publicly" raised the issue with foreman David Cortez during his second week with Respondent. He also complained about the condition of the toilets that were made available to Respondent's workers -- because they were not sanitary and because there was no paper. This problem was also discussed by Mr. Lopez with crew members, and publicly with foreman Cortez. Because Mr. Cortez did not "pay attention" to Mr. Lopez's complaints, the matter was subsequently raised with supervisor Frank Solorio. Additionally, Mr. Lopez spoke with crew members and foreman Cortez about the problem of gloves becoming torn before the end of the week, and of the need for Respondent to issue replacement

gloves on these occasions. He also recalled difficulty in obtaining rubber pants and a rain jacket which protected the workers from dampness in the fields.

Mr. Lopez further testified that foreman Cortez gave no instructions about the proper manner of cutting the celery and did not complain about Mr. Lopez's work until the third -- or final week-- of the latter's employment. During the second week, Mr. Cortez directed his remarks to the crew in general and urged them to do a good job. "Don't cut too much off the roots, and clean up the leaves." (R.T., Volume IV, p. 102, 11. 11-12). During the third week, apparently Mr. Lopez was placed with more experienced "burras" -- or workers who had formerly been with the Villalobos crew. Worker Lopez conceded that he had difficulty in keeping up with these more experienced celery cutters, and that the quality of his work consequently suffered, although he averred that his work "wasn't any better but wasn't any worse than the others." (R.T., Volume IV, p. 82, 11. 26-27). During this third week, foreman Cortez became irritated with Mr. Lopez's work -- at one point hitting the cut celery with his foot and commenting that it looked like there had just been a dog fight where Mr. Lopez had been cutting.

On November 2 Lopez was fired by Cortez. The foreman stated at that time that Lopez's work was no good and the company couldn't keep on losing. (R.T., Volume IV, p. 83, 11. 27-28). Respondent denied that FRANCISCO LOPEZ was terminated for any reason other than his poor work performance. Foreman Cortez

testified that he checked Lopez's work (as well as that of the entire crew) on a daily basis, and instructed this inexperienced crew on the cutting and packing methods desired by Respondent. No prior written warnings were given to worker Lopez, because as a probationary employee -- i.e. during his first thirty (30) days of work -- he was not entitled to written reprimand under Respondent's existing employment policy. (See Respondent Exhibit #8) The delay in Mr. Lopez's termination was alleged to have occurred because of foreman Cortez's efforts to teach the new workers Respondent's methods during their first few weeks in the harvest.

B. Analysis and Conclusions:

Similar to the discussion with respect to the Villalobos crew, the questions presented for resolution in FRANCISCO LOPEZ' matter are (1) whether he was involved in protected concerted activity; and (2) whether his discharge was motivated, at least in part, by his involvement in said activity.

As suggested in Jack Brothers & McBurney, Inc., 6 ALRB No.12 (1980), anything directly involving the employment, wages, hours, and working conditions of the employees involved qualifies as protected concerted activity. See Spinoza, Inc., 199 NLRB 525 (1972) Chemvet Laboratories, Inc., 201 NLRB 734 (1973). The trier of fact need only reasonably infer that the alleged discriminatees involved considered that they had a grievance with management. NLRB v. Guernsey Mushingium Electric Co. Operative, inc., 285 F.2d 8, 12, (6th Cir. 1960). Under the NLRB, an

individual's efforts to enforce the provisions of a collective bargaining agreement even in the absence of a similar interest by fellow employees may be protected. Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1537 (1966) enforced, 388 F.2d 495, 67 LRRM 2083 (2nd Cir. 1967). The same rule has been applied in the absence of a collective bargaining agreement. Alleluia Cushion Co., 221 NLRB No. 162, 91 LRRM 1131 (1975). The determining factor seems to be whether the nature of the complaint has significance and relevance to the interests of the Respondent's employees, regardless of the presence or absence of a collective bargaining agreement. Supra at p. 1133

In the instant case, FRANCISCO LOPEZ discussed publicly with his supervisor David Cortez the need for early morning water, cleaner sanitary facilities, and gloves which protected the workers' hands when cutting the celery. These issues were discussed between Mr. Lopez and the other workers, but he acted as a spokesperson in bringing these matters to the attention of Respondent's supervisory personnel. Since the discussions directly involved the crew's working conditions, and since they affected all crew members even though there was no collective bargaining agreement, I find that FRANCISCO LOPEZ engaged in concerted protected activity during his eighteen (18)-day tenure with Respondent, and that said conduct was known to Respondent agents, to wit, supervisor Frank Solorio, and foreman David Cortez.

In reaching this conclusion, I decline to apply the dictum

in NLRB v Bighorn Beverage (9th Cir. 1980) 614 F.2d 1238, cited by Respondent in its post-hearing brief (p. 29). I read the Bighorn, decision to reject the legal fiction of the "implied consent" of other employees when an individual employee acts alone in filing a safety complaint in the absence of a collective bargaining agreement. (NLRB v. Bighorn, supra, p. 1242.) In the instant case, however, FRANCISCO LOPEZ did not act alone, but g rather spoke with others regarding the working conditions encountered at Respondent's properties. He served as spokesperson for the workers in pointing out the unsanitary conditions of the portable toilets, and the lack of drinking water in the morning. Other employees -- Humberto Rivas and Eduardo Guirola -- confirmed the existence of these problems as well as the frequent discussions of these matters which occurred among the members of Mr. Cortez's Crew No. 2, and Respondent's supervisory personnel.

While the Ninth Circuit specifically rejected the expansion of the definition of "concerted activity" as unsupported by a statutory basis in Bighorn, citing City Aro, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); NLRB v Dawson Cabinet Co., Inc., 566 F.2d 1079 (8th Cir. 1977); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973); NLRB v. Northern Metal Co., 440 F. 2d 881 (3d Cir. 1971), I find sufficient indicia of aggregate

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[7]Employees shall lose 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 and/or protection.(Emphasis added.

economic conduct here to distinguish the Bighorn factual situation Thus, no expansion of the definition of protected concerted activity is required in the instant case, as the statutory basis of the Argicultural Labor Relations Act Section 1152 protections is identical to the language of Section 7 of the National Labor Relations Act.[7]

Given that FRANCISCO LOPEZ was engaged in protected concerted activity, the ultimate question for resolution is Respondent's motivation for discharging this employee. Where the discharge is motivated in any part whatever by the purpose of discouraging legitimate concerted activity, the existence of contemporaneous, legitimate grounds for such discharge affords no defense to a finding of an unfair labor practice on the part of the employer. Jack Brothers & McBurney, Inc., 6 ALRB No. 12 (1980), citing Oklahoma Allied Telephone Co., Inc., 210 NLRB 916, 920 (1974); Hugh H. Wilson Corp., 171 NLRB 1040, 1046 (1968). The ultimate question for resolution is whether or not I there is substantial evidence to support the conclusion that the employee would not have been discharged but for his protected activities. (Royal Packing Company v. Agricultural Labor Relations Board (May 3, 1979) 5 ALRB No. 31, enf'd. (1980) 101 Cal. App. 3d 826, 835, citing NLRB v. Eastern Smelting & Refining Corp. (1st Cir. 1979) 198 F.2d 666, 670.)

Here, Respondent has contended that FRANCISCO LOPEZ was fired because he did not cut celery properly. Testimony of foreman David Cortez suggested that worker Lopez had been shown

the proper celery cutting techniques on numerous occasions, but was unable to successfully complete his probationary period. Thus, he was discharged on November 2, and his termination slip confirms that he did not do the work well, and that he trimmed too much celery. (See Respondent's Exhibit No. 7). I find, however, that Mr. Lopez's repeated discussions with foreman David Cortez regarding working conditions, and his role as "spokesperson" with respect to these grievances played a substantial role in the ultimate decision to fire him. I base this finding on the following considerations:

(1) There were no written warnings to Mr. Lopez regarding the "poor" quality of his work during his employment with Respondent. Although Respondent contended that no written warnings were required or even the usual policy with respect to probationary employees, this absence of documentation of reprimand gives credence to Mr. Lopez's contention that he was not singled out until the last week of his employment. The absence of written warnings further belies Respondent's explanation as to why Mr. Lopez had not been terminated during his first two weeks of work. While foreman Cortez averred that this two crew to teach week "grace" period was given to his inexperienced them in Respondent's methods, it appears somewhat inappropriate to discharge Mr. Lopez as soon as the "grace period" was completed, in the absence of prior warning.

(2) Mr. Lopez's testimony that his work was comparable -- no better or worse -- than those of his fellow crew members was

confirmed by witnesses Eduardo Guirola and Humberto Rivas. Respondent's own witness (packer Roberto Ruiz) also confirmed that Mr. Lopez worked at an average speed, and that there were others who worked through the end of the harvest who did not properly clean the celery. (R.T., Vol. VII, p. 74, 11. 2-4; p. *75,* 11. 11-12, 17). Mr. Lopez's testimony was further in accord with the events surrounding the addition of experienced workers

(some from Mr. Villalobos' crew) on October 29. Mr. Lopez explained the predicament of his last few days by his inability 10 to keep up with these experienced workers, despite his best efforts to do so. His request to be given a second chance -- made to foreman Cortez on the day of his termination -- does not seem to be an unreasonable one under the circumstances.

(3) Because no other employees had been terminated for not properly cutting celery, there is the undeniable thought that Respondent's reasons for the firing were pretextual in nature. Others who had been terminated -- e.g. Messrs. Rivas and Guirola- either had poor reliability records, or were constantly tardy.

(4) The manner in which foreman Cortez "showed" Mr. Lopez the problems with his work also seems singularly inappropriate given the latter's relative inexperience as a celery worker. Kicking at the cut celery plants, and stating that "there appeared to be a dog fight" where Mr. Lopez had been working reflected a certain lack of common decency on the part of Mr. Cortez. Had Mr. Lopez not been vocal in his criticism of working conditions, this brusque manner of Mr. Cortez could

perhaps be explained as an archetypal supervisor-employee relationship. However, in the instant context, where Mr. Lopez was spokesperson for other workers[8], and where he was terminated immediately following Respondent's admitted "grace period" of instructions, the inference lingers that Mr. Lopez's protected concerted activities were partially the explanation for his discharge.

(5) I credit FRANCISCO LOPEZ's version of the celery kicking incident because of the clarity, consistency, and openness of his testimony. Mr. Cortez on the other hand, at first denied the incident, but later conceded that he might have "lined up some celery with his foot." (See R.T., Vol. 7, 13 p. 99, 11. 4-6, 12-15; p. 100, 11. 20-23).

(6) I do not credit David Cortez's testimony that Mr. Lopez had been warned or shown how to properly cut "every day", or that FRANCISCO LOPEZ never complained about anything. Foreman Cortez vacillated in referring to Mr. Lopez's complaints, conceding that the latter did complain about the equipment. (R.T., Vol. V, p. 40, 1. 6; p. 42, 1. 3, p. 42, 11. 17-18; p. 20 |i 48, 11. 18-20). Had there actually been daily warnings, Mr.

[8]Respondent witness Vincente Gonzalez admitted to having heard workers complain about the toilets (R.T., Vol. XII, p. 32, 11. 3-4). General Counsel witness Eduardo Guirola and Humberto Rivas confirmed the existence of these problems. (R.T. Vol. V, p. 17, 11. 3-7; p. 51, 1. 17; p. 52, 11. 23-24; p. 55 11. 16-17; p. 55, 11. 2-3.) At least one other worker -- Humberto Rivas -- also told foreman Cortez that the toilets were too dirty. (R.T., Vol. V, p. 62, 1. 5).

Lopez would have been discharged at an earlier time. In light of the foreman's concession that he saw members of the Villalobos crew approach his own crew on October 23 and ask his workers to join the stoppage, I further find a preponderance of the evidence; to be that David Cortez did threaten to fire Crew #2 had they decided to join the stoppage. The testimony of worker Humberto Rivas closely parallels that of FRANCISCO LOPEZ in this regard (R.T., Vol. V, p. 56, 11. 23-24), and foreman Cortez never specifically denied this threat to his own crew. I consider it inherently improbable that he merely commented that the Villalobos crew had stopped, and then called his crew back to work without further discussion. While there is no direct evidence linking Mr. Lopez to the work stoppage of the Villalobosi crew, Crew #2 did spend an .extra one-half hour on their lunch break on October 23 and foreman Cortez was aware of the Crew #1 effort to have his crew join the stoppage.

(7) Respondent's employee manual lists eleven causes for disciplinary action and/or termination.(See Respondent's Exhibit ' No. 8, p. 9). Only the first is remotely related to the alleged reason for Mr. Lopez's discharge: "Any negligence resulting in waste or spoilage. This also applies to any carelessness that results in a product not up to the standards of Royal Packing Co." In reviewing the credible evidence, I find no indication of any negligence or carelessness on the part of Mr. Lopez during the first two weeks of his 19-day tenure with Respondent. Only during the last week -- when Mr. Lopez was unable to keep pace

with more experienced workers who had been hired on October 29,. did his work arguably became subpar. Indeed,. Mr. Lopez's termination slip refers only to "not doing the work well", and cutting too much celery"-- reasons that do not mesh precisely with Mr. Cortez's displeasure over the cut celery not being properly aligned for the loaders and packers.[9]

(8) Respondent's regulations with respect to temporary or "probationary" employees (see Respondent's Exhibit No. 8, p. 6) do not negate the protections afforded all agricultural employees under Section 1152 of the Act. Section 1140.4(b) of the Act makes no distinction between probationary or permanent workers, and I would be particularly hesitant to imply such a distinction in the agricultural context where the labor force fluctuates widely from season to season. Although the manual permits any "trial basis" employee to be discharged without recourse, I further do not interpret that language to nullify the rules and regulations pertaining to termination of Respondent employees (Respondent Exhibit No. 8, p. 9).

While the Act does not prohibit an employer for discharging any employee for cause, the thought lingers that had FRANCISCO LOPEZ not been considered a "sore thumb" of the group, had he not constantly agitated about water, the toilets and equipment, he would have been allowed to complete the harvest season

[9]Further, the termination slip indicates that Mr. Lopez "quit without notifying the company" rather than being discharged for cuase.

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with his fellow crew members. Whether or not his celery cutting performance was actually subpar, I find that he was fired at least in part because of his protected concerted activity.

In reaching this conclusion, I am mindful of the principles enunciated by the United States Supreme Court in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 285-86, 97 S. Ct. 568, 575, 50 L. Ed. 2d 471 (1977), 507 F. 2d 90, 98-99: An employee should be placed in no worse a position than if he had not engaged in the protected conduct. The borderline or marginal employee should not have the employment question resolved against him because of constitutionally protected conduct. In Royal Packing, supra, the Fourth District, Division One found no 1153 (c) violation because the record lacked substantial evidence from which the Board could draw the inference of a causal nexus between the discharge and the employee's union activities. There, the record demonstrated evidence of employee insubordination and profane language, as well as vigorous union activities. However, because the discharged employee was a member of the union favored by the employer, and because the termination followed immediately after what the employer perceived to be the employee's encouragement of an assault, the Court of Appeals found that the union activity was not the "moving" or "substantial" cause of the discharge. (Royal Packing, supra, p. 834, citing Polynesian Cultural CTI, Inc. v. NLRB (9th Cir. 1978) 582 F.2d 467, 473.)

In the instant case, FRANCISCO LOPEZ publicly engaged in

protected activity. He was fired allegedly because he did not cut the celery properly, but no others were discharged for that offense, nor did Respondent's policy manual list this violation as grounds for termination. Mr. Lopez was neither insubordinate nor possessed of a poor attitude toward his work. He attempted to do the best he could. (R.T., Vol. VII, p. 91, 11. 6-9.)

While the Respondent certainly has a legitimate concern that the work performed by its employees meet its standards of quality, I find in the instant case that no one incident triggered the firing of FRANCISCO LOPEZ. Without sufficient documentation or corroboration of Mr. Lopez's alleged poor work, and with no clear indication that the worker was given a sufficient opportunity to improve his performance, I find that there is more than a "mere suspicion" that FRANCISCO LOPEZ was terminated because of his concerted protected activity.Although there is no evidence relating Mr. Lopez's discharge to the stoppage activity of Crew #1, I find the record reflects an effort on the part of Respondent to "select" out perceived troublemakers. The work stoppage "activists' from Crew #1 were not invited back on October 29, and FRANCISCO LOPEZ was asked to leave on November 2. While there was sufficient work for all those employed on October 23 following the five-day lay off, the Respondent selectively chose those who would return. While I do not view the Board's function under the Act to dictate the Respondent's methods of recall, or to review firings for cause, it is apparent from this record that the Respondent's termination of Mr. Lopez was motivated by

impermissible considerations. I therefore find that Respondent's termination of FRANCISCO LOPEZ violated Section 1153(a) of the Act.

SUMMARY

I find that Respondent violated Section 1153(a) of the Act by the termination of Domingo Garcia, Antonio Perez, Antonio Padilla, Salvador Rivera, Juan Vela, Valdemar Espinoza, Jose Ortiz, Jaime Gonzales, Miguel Lopez, Trino Maciel, Carlos Nateras and Jesus Perez on October 23. I find that Respondent further violated Section 1153(a) of the Act by the termination of FRANCISCO LOPEZ on November 2. I recommend dismissal of all other fully litigated allegations raised during the hearing and incorporated in the complaints as consolidated on May 30, 1980. Because of the importance of preserving stability in California agriculture and the importance of protecting employee rights, 15 I recommend the following:

REMEDY

Having found that Respondent engaged in certain unfair labor practices within the meaning of Section 1153(a) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Domingo Garcia, Antonio Perez, Antonio Padilla, Salvador Rivera, Juan Vela, Valdemar Espinoza, Jose Ortiz, Jaime Gonzales, Miguel Lopez, Trino Maciel, Carlos Nateras, Jesus Perez, and Francisco Lopez,

I shall recommend that Respondent be ordered to reinstate them and make each whole for any losses incurred as the result of Respondent's unlawful discriminatory action in the manner set forth in Sunnyside Nurseries, Inc. (May 20, 1977), 3 ALRB No. 42, enf. den. in part; Sunnyside Nurseries, Inc. v. Agricultural Relations Bd. (1979) 93 Cal. App. 3d 922.

I further recommend that the twelve discharged employees from the Villalobos crew need not have formally applied for reinstatement to be entitled to back pay under the principle enunciated in Abilities and Goodwill, Inc., 241 NLRB No. 5, 100 LRRM 1470 (1979) enforcement denied on other grounds subnom. Abilities and Goodwill v. NLRB, 103 LRRM 2029 (1st Cir. 1979). There, the NLRB decided to treat discharged strikers in the same manner as unlawfully discharged employees who were not striking--entitling them to back pay from the date of discharge until the date he or she is offered reinstatement. The rationale of this rule is to resolve the uncertainty as to whether or not the strikers would have returned to work but for the employer's unlawful action against the wrongdoer. It therefore presumes --absent indications to the contrary -- that the discharged strikers would have made the necessary application for reinstatement "were it not for the fact that the discharge itself seemingly made such application a futility." Abilities and Goodwill, Inc., supra.

In the instant case, there is no evidence that any of the twelve discharged crew members intended to do other than return

to work following resolution of the dispute concerning the wages and working conditions. Indeed, they requested immediateresolution of this problem first from supervisor Solorio and then from personnel manager Joe Chavez. The Respondent had only to contact the discharged members prior to October 29 -- the day the "expanded" Crew #2 returned to work -- to nullify the discharge.

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

ORDER

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

1. Cease and desist from:

a. Discharging employees from engaging in concerted activities for mutual aid or protection.

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

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

a. Offer Domingo Garcia, Antonio Perez, Antonio Padilla, Salvador Rivera, Juan Vela, Valdemar Espinoza, Jose Ortiz, Jaime Gonzales, Miguel Lopez, Trino Maciel, Carlos Nateras, Jesus Perez, and Francisco Lopez full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges and to make

each of them whole in the manner described above in the section called Remedy" for any losses suffered as a result of their terminations.

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

c. Distribute the following NOTICE TO EMPLOYEES (to be printed in English and Spanish) to all present employees and all employees hired by Respondent within six months following initial compliance with this Decision and Order and mail a copy of said NOTICE toa all employees employed by Respondent between October 23, 1979, and the time such NOTICE is mailed if they are not employed by Respondent. The NOTICES are to be mailed to the employees' last known address, or more current addresses if made known to Respondent.

d. Post the attached NOTICE in prominent places on its property, in an area frequented by employees and where other NOTICES are posted by Respondent for not less than a six-month period.

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

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

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

DATED: September 4 ,1980.

AGRICULTURAL LABOR RELATIONS BOARD

By _____
STUART A. WEIN
Administrative Law Officer

NOTICE TO EMPLOYEES

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

The Agricultural Labor Relations Act is a law that gives all farm workers on this rights:

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

Because this is true, we promise, that:

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

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

WE WILL OFFER Domingo Garcia, Antonio Perez, Antonio Padillaj Salvador Rivera, Juan Vela, Valdemar Espinoza, Jose Ortiz, Jaime Gonzales, Miguel Lopez, Trino Maciel, Carlos Nateras, Jesus Perez and Francisco Lopez their old jobs back and we will pay each of them any money they lost because we discharged them.

ROYAL PACKING COMPANY, INC.

BY _____

(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.