

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

ROYAL PACKING COMPANY,	)	
	)	
Respondent,	)	Case Nos. 80-CE-15-EC
	)	80-CE-30-EC
and	)	80-CE-57-EC
	)	80-CE-58-EC
JAVIER NORIEGA, SALVADOR	)	80-CE-197-EC
RIVERA, JOSE LUIS PEREA,	)	
RUDOLFO MURILLO, and	)	
FAUSTINO DIAZ,	)	8 ALRB No. 17
	)	
Charging Parties.	)	

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DECISION AND ORDER

On June 26, 1981, Administrative Law Officer (ALO) Kenneth Cloke issued the attached Decision in this proceeding. Thereafter, the Respondent timely filed exceptions and a supporting brief and the General Counsel filed a brief in response to those exceptions.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or 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 brief and has decided to affirm the rulings, findings, conclusions, and recommendations of the ALO as modified herein.

Respondent excepts to the ALO's finding that Javier Noriega "was provoked to justifiable anger over an improper assignment." We find merit in this exception and reject the ALO' s analysis to the extent he finds that Noriega was being "selectively harassed" when foreman Juan Cuevas ordered him to change from

cutting to packing lettuce.

The record indicates that Noriega had been the UFW representative in meetings with Respondent involving working conditions during 1978. In December 1979, Noriega led a campaign to remove Juan Cuevas from his foreman position because of Cuevas' mistreatment of the workers. On January 8, 1980, Noriega was cutting lettuce in Cuevas<sup>1</sup> crew and fell behind the other cutters. Cuevas ordered Noriega to switch from cutting to packing, ostensibly so that a faster cutter could catch up to the other cutters. Noriega felt that, because of his seniority, he should be allowed to continue cutting, a job he believed was less strenuous. Noriega therefore questioned Cuevas' order to change work assignments. Cuevas became incensed by Noriega's insubordinate attitude and challenged him to fight. Supervisor David Leon then arrived and intervened, preventing any further confrontation. Noriega was given no discipline at the time, however, the following day he was informed that he had been fired for gross insubordination and challenging a supervisor to fight.

We do not agree with the ALO that Cuevas' order to Noriega was improper or an attempt to harass. Noriega had fallen behind in the cutting and the reassignment was a legitimate move to bring all the cutters even again. Noriega's complaints were therefore insubordinate. However, Cuevas' response, according to credited witnesses, was an angry, personal challenge to fight.

Respondent has a history of anti-UFW animus. Royal Packing Co. (Feb. 5, 1976) 2 ALRB No. 29 and Royal Packing Co. (May 3, 1979) 5 ALRB No. 31, enforced in part (1980) 101 Cal.App.

3d 826. Noriega was a known UFW advocate and had recently led an anti-Cuevas campaign. These factors support the inference that Noriega's union and concerted activity were a motivating factor in Respondent's decision to discharge.

We are not persuaded that Noriega's incipient insubordination alone, which never rose to the level of an outright refusal to obey Cuevas' order, would have caused his discharge, absent his union and concerted activity. See Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18. We therefore conclude that Respondent has violated Labor Code section 1153 (a) and (c) by discharging Javier Noriega.

Respondent also excepts to the ALO's finding that Faustino Diaz was terminated for engaging in protected concerted activity, since Diaz' involvement in protected activity was minimal and Diaz was legitimately discharged for an unexcused absence. We find merit in these exceptions.

Diaz acted as an interpreter between employee representatives and company officials on several occasions prior to his discharge, however, he himself never acted as an employee representative. On one occasion, after he had requested information about standby time from supervisor Ricardo Ramirez, Ramirez told Diaz he should read the UFW-Sun Harvest contract. We do not find Dias' role as interpreter or his isolated request for information about working conditions sufficient to identify Dias as an activist. It is therefore unlikely that Respondent was motivated by Diaz' protected activity when the decision to discharge was made See, George Lucas & Sons (Oct. 31, 1973) 4 ALRB Mo. 86.

Further, even if Respondent did identify Diaz with other

pro-UFW employees or concerted activities, it appears that Respondent had a policy against unexcused absence. As Respondent correctly cites, it is not for this Board to judge the reasonableness of a company policy. Our role is only to assure that the actual violation of a policy is the real reason for the discharge, and not the employee's protected activity. See, Tenneco West, Inc. (Jan. 18, 1980) 6 ALRB No. 3; NLRB v. McGahey (5th Cir. 1956) 233 F.2d 406 [38 LRRM 2142]. Since Diaz was absent for over 20 days without an acceptable excuse, we find that Respondent would have fired Diaz even absent his involvement in protected activity. We therefore dismiss the allegation as to Diaz.

ORDER

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

1. Cease and desist from:

a. Discharging 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 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 Javier Noriega, Salvador Rivera, and Rudolfo Murillo full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

b. Make whole Javier Noriega, Salvador Rivera, and Rudolfo Murillo 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, 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 back pay period and the amount of back pay 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 3, 1980, until the date on which the said Notices are mailed.

f. Post copies of the attached Notice, in all

appropriate languages, for 60 days in conspicuous places on its property, the period 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 times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees 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: March 3, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN P. MCCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which 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 three of our employees, because they attempted to improve working conditions. 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 Javier Noriega, Salvador Rivera, and Rudolfo Murillo because they attempted to improve working conditions. WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities

WE WILL reinstate Javier Noriega, Salvador Rivera, and Rudolfo Murillo 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:

ROYAL PACKING 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 any questions 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 319 Waterman Avenue, El Centro, California. The telephone number is (714) 353-2130.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Royal Packing Company

8 ALRB No. 17  
Case No. 80-CE-15-EC  
80-CE-30-EC  
80-CE-57-EC  
80-CE-58-EC  
80-CE-197-EC

ALQ DECISION

The ALO found tha Javier Noriega, Salvador Rivera, Rudolfo Murillo, and Faustino Diaz were discharged by Respondent for participating in protected union and other concerted activity. The ALO dismissed the allegation regarding Jose Luis Perea, finding that Perea's discharge was caused by his unexcused absence, and not his protected activity.

Respondent contended that Rivera, Murillo, and Diaz were all legitimately fired for absence without leave or excuse. The ALO rejected these contentions, finding that Rivera, Murillo, and Diaz, in fact, complied with Respondent's leave policy. As to Noriega, Respondent contended that he was fired for refusing a work order and challenging a supervisor to fight. The ALO found that Noriega was harassed into insubordination by an unfair work order and did not start the fight with his supervisor.

BOARD DECISION

The Board adopted the ALO's findings, conclusions, and recommendations regarding Rivera and Murillo. As to Noriega, the Board agreed that he was fired for his protected activity, but rejected the ALO's finding that Noriega was given an unfair work order. As to Diaz, the Board reversed the ALO, finding that Diaz' protected activity was minimal and that he would have been fired for his unexcused absence even absent the protected activity.

\* \* \*

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

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BEFORE THE  
AGRICULTURAL LABOR RELATIONS BOARD  
OF THE STATE OF CALIFORNIA

ROYAL PACKING COMPANY,	)	
	)	
Respondent,	)	Case Nos. 80-CE-15-EC
	)	80-CE-30-SC
and	)	80-CE-57-EC
	)	80-CE-58-SC
JAVIER NORIEGA, SALVADOR	)	80-CE-197-EC
RIVERA, JOSE LUIS PEREA,	)	
RUDOLFO MURILLO, and	)	
FAUSTINO DIAZ,	)	
_____Charging Parties.	)	

Appearances:

For the General Counsel: Jorge A. Leon  
915 Capital Mall, Third Floor  
Sacramento, CA 95814  
(916) 322-7024

For the Respondent: Daniel D. Haley  
Dressier, Quesenberry, Lauos & Barsamian.  
P.O. Box 2130  
Newport Beach, CA 92663  
(714) 641-5931

Kenneth Cloke, Administrative Law Officer

## DECISION

### Statement of the Case

This case was heard before me on October 28, 29, 30, November 3, 4, 5, 6, 12, 13, 14, 19, 20, and 25, 1980.

Charges were duly filed on January 10.(80-CE-15-EC), January 14 (80-CE-30-EC), January 22 (80-CE-57-EC), January 23 (80-CE-58-EC), and March 3, 1980 (80-CE-197-EC) and served on the Respondent. A Consolidated Complaint was issued on June 27, 1980, and an Answer was filed on July 8, 1980, denying violation of the Agricultural Labor Relations Act (hereinafter referred to as "Act").

The Complaint alleges five separate, though not always completely distinct, violations of section 1153(a and (c) of the Act, by discharge of five employees of Respondent for having exercised their rights to engage in protected concerted activity under the Act, Respondent counter-alleges that none of the individuals was involved in protected conduct, and that just cause existed for their discharge independent of any activity protected by the Act.

All parties were afforded full opportunity to conduct a hearing, call and examine witnesses, present documentary evidence, and argue their positions. On the basis of the record as a whole, including observation of the demeanor of the witnesses, I reach the following findings of fact and conclusions of law,

### Findings of Fact

Jurisdiction and General Background: Respondent is an agricultural employer, the charging parties are agricultural employees, and all named foremen and supervisors are supervisors within the meaning of section 1140.4 of the Act.

Respondent grows and harvests lettuce and mixed vegetables in four separate locations: Salivas, Huron,; the Imperial Valley, and Yuma, Arizona. At the beginning of each year, the crew begins work in the Imperial Valley, In March or April they move to Huron, in May they go to Salivas, they return to Huron in October, and return, at the close of the year, to Yuma and the Imperial Vally. (Reporter's Transcript, vol. I, pp. 14-15, hereinafter cites as RT. (I,14-15) Prior to 1978, Respondent's employees were represented by the International Brotherhood of Teamsters, and governed by a collective agreement which established separate seniority systems for each geographical area. While the contract between Respondent and the Teamsters expired in July, 1973 (RT II, 24) this practice continued.

Following expiration of the Teamster contract, the United Farm Workers of America (AFL-CIO) attempted to organize Respondent's employees (RT II, 11-12), and the employees became involved in two work stoppages. The first occurred in Yuma, Arizona, in February, 1973, after Respondent attempted to alter working conditions by introducing a new method of packing (RT I, 24, 60). The second occurred in Salivas in August, 1979, and concerned pay for work which was prevented by failure to pass an inspection.

Three of the five charging parties worked in the crew of Juan Cuevas, whose character and demeanor have been placed in evidence by the nature of the incidents which has formed the basis for the discharges in question.

Discharge of Javier Noriega: Mr, Noriega began work at Royal Packing in March, 1976 as a lettuce packer and cutter, and was discharged on January 9, 1980.

During a work stoppage which occurred in Yuma, Arizona, in February, 1989, Noriega had "been selected to act as spokesperson for his crew. Respondent had directed a change in working conditions, from the "quinteto" to the "buna" system of harvesting lettuce, which workers believed would cost them wages, and cause injuries, and make their work more difficult, Two of the principal organizers of the stoppage were Noriega and Robert Godinez. Both were discharged for their leadership role in the strike, (RT III, 14-31) but were reinstated due to pressure from the other strikers.

On other occasions, Noriega had acted as a representative of employees who had grievances against Respondent. He had assisted Salvador Rivera in his discharge on January 3, 1980, and spoke with company representatives about rehiring him. (RT II, 101) His foreman, Juan Cuevas, told' him he should "worry about himself", and not concern himself over others. (RT II, 102)

Noriega had actively participated in getting workers in his crew involved in a petition campaign in December, 1979> directed at the removal of Cuevas as foreman. Many crew members believed Cuevas was difficult to work with, and continually abusive. (See, e.g., RT II, 94-5, 129? III, 79)

Just before Cuevas took. over as foreman, his predecessor, Jose Alfaro, announced to the entire crew: "There are those of you who have been picked out, As soon as Cuevas arrives, he'll take care of you," (RT II, 121-2) When Cuevas arrived, the workers found him to be abusive, profane, and extremely difficult to work with. He swore at them, constantly pressured them to work faster (Particularly when his supervisors came near), and challenged several of them to fight, (RT II, 94-5, 129; VI, 79. VII, 40-1)

Noriega and Rivera confronted Cuevas directly with his failures as a foreman, and informed him that they intended to circulate a petition against him. They drafted and circulated the petition (General Counsel's Exhibit 2, hereinafter cited as GGX 2) for several days, and handed it in to the Company on January 11, 1980.

On January 9, 1980, after the petition had become known to Cuevas, Noriega was discharged for "gross insubordination", "use of profane language", and "challenging a foreman to a fight". (See XX 3 and 4) On January 8, 1980, Noriega had finished making his first pass as a lettuce packer, and was due to begin his second pass as a cutter, as was customary in the crew. (RT II, 133) III 76) Cuevas, observing that Noriega had fallen somewhat behind, ordered him to pack again on his second pass, Noriega had received assistance from some "riders", who help workers who have fallen behind, and had caught up with the other workers. (RT II, 134) At this point the testimony begins to differ markedly. According to Noriega, and General Counsel witnesses, Noriega informed Cuevas he had already completed his pass as a packer, which is considerably heavier work than cutting, and asked Cuevas not to bother him. Cuevas ordered him to pack or leave, challenged him to fight, and swore at him. According to Cuevas and Company witnesses, Noriega challenged Cuevas to fight and used profanity. Several workers observed the incident and did not hear what was said, or saw that Noriega was angry, but did not situate his anger with any exactitude, or indicate who did or said what first. While Noriega was seen assuming a "fighting stance", this could as easily have been defensive, as offensive.

Jose Lopez and Jesus Silva were in close proximity to Noriega, overheard much of what was said, and confirm his version of the

events. RT VI, 76-7; VII, 36) Both of these individuals worked for Respondent at the time of their testimony, and both had been challenged to fight by Cuevas prior to the incident with Noriega.

Noriega's version is the more reliable also due to the likelihood that Cuevas was angry, as a relatively new foreman concerned over the opinion his supervisors had of his work, when notified by Noriega of the petition to have him removed and Noriega was well-known as a union sympathizer and employee representative.

While credibility resolutions based on demeanor of the witnesses are not always reliable, a comparison of the honest, direct, and non-self-serving demeanor of Noriega, with the evasive, circuitous, entirely self-serving, and often belligerent attitude of Cuevas, both in manner and in substance, leads to increased support for Noriega's version of the events,

Added to these factors is the illogic of Cuevas' order, which contradicted custom in the assignment and rotation of work, and was unsupported by rational argument, inasmuch as Noriega had caught up with the other workers, It appears likely that Cuevas, angered by Noriega's effort to make him look bad in front of his superiors, harassed him by ordering him to perform extra heavy work. Noriega refused, and Cuevas, angered further and unsupported by logic, challenged him to a fight and fired him.

David Leon, who was Cuevas' assistant foreman, while confirming Cuevas<sup>1</sup> testimony, notably did not move to restrain Noriega or hold him back, but placed himself between Noriega and Cuevas, and attempted to get both of them to calm down. While Noriega was undoubtedly "hot" over the incident, this could be anticipated as a

reasonable response to selective harassment, and an order to perform arduous work in violation of past practice and custom at Respondent's ranch.

Even if Cuevas' version were correct, Respondent has only proved Noriega was provoked to justifiable anger over an improper assignment. Even if Noriega had fallen behind, riders could have been assigned to assist him, and Respondent failed to show it had ever been customary under such circumstances to switch a worker from cutting to packing. Against these arguments, Respondent cites minor inconsistencies in record evidence, friendship with Noriega, and allegations regarding statements made by the witnesses backing Noriega, Yet these errors are cancelled by identical errors on Respondent's side, and disregard clear testimony that Cuevas had challenged employees to fight on earlier occasions. Obviously, in the heat of the moment, no one observed with complete accuracy what was taking place. We must therefore begin with the order given to Noriega, and the petition against Cuevas, if we are to make any sense of the incident. If we examine these events, we must conclude that his discharge was not based on just cause, but was provoked by reason of his involvement in protected activity.

Discharge of Salvador Rivera: Mr. Rivera worked as a lettuce cutter and packer at Royal Packing since 1972, and at the time of his discharge on January 2, 1980, was a member of Juan Cuevas' crew.

Rivera, with Noriega, was concerned over working conditions, and spoke on several occasions to crew members about problems they faced, and of the benefits of unionization. He spoke on the company bus and in the presence of company officials about the union, and the advantage of having a certification election. He was a close friend of Noriega's, participated actively in the petition drive to remove Cuevas as foreman, and was with Noriega in mid-December when

Cuevas was notified of the petition drive. (RT III, 61) On December 29<sup>t</sup> the last working day before his discharge, Rivers told David Leon that the company was "doing with us whatever it wanted to, because we did not have a union." (RT III, 60)

On Friday, December 28, 1980, Rivera became ill with a cold and fever, and asked David Leon, the Assistant Foreman, if he might have Saturday off, Leon reportedly told him that work on Saturdays was mandatory, but that any other day was acceptable. Rivera reported to work on Saturday, though he was quite ill, and had an obvious cough. He told Noriega that if he were not there on Monday, to tell Leon that he was ill.

On Monday, December 31 Rivera did not appear for work, and Noriega informed Leon of Rivera's illness. (RT III, 49) On the next day, January 1, there was no work. On January 2, Rivera was again absent, and was terminated by Leon,

On January 3, Rivera came to take the bus to work, though he was still ill. Cuevas told him he would need a note from his doctor (RT III, 44), and Rivera returned the following day with the note. (See GCX 7)

Jose Chavez, Respondent's Personnel Director, informed Rivera that he would have to reapply for work as a crew employee, since he had been absent for two consecutive days without notice, Rivera's termination slip (GCX 6) was dated January 2, 1980, while the work records (RX 3) show an absence on January 3 and termination January 4.

Rivera testified he had missed, three consecutive days of work before and had notified the company through a fellow employee and not been fired. (RT III, 69; IV, 26-7) It appears from RX 3 that Rivera was absent on February 18, 19, and 20, 1979, without termination.



These records are made further confusing by the fact that Rivera was listed as absent on the day he arrived with a medical notice, and the fact that while he was absent on December 31, there was not work on January 1, and he was not listed as absent again until January 2. While the company testified they considered these absences consecutive, employees could have been confused over how the days were to be counted. Respondent does not cite January 3 as a date of absence, but relied on Rivera's admission that he missed December 31 and January 2, and contests Noriega's assertion that he informed Leon of Rivera's absence. General Counsel, on the other hand, argues that RX 3 shows Respondent did not consider the 31 and 2 adequate, but marked him absent on the 3 to show two days for termination, which conflicts with his termination slip date of January 2. (General Counsel's Brief, pp. 14-15)

Respondent had no explanation for these discrepancies.

David Leon testifies he asked the crew about Rivera but no one responded (RT IX, 41), whereas Noriega states Leon asked, and he responded that Rivera was sick. (RT II, 110)

Several reasons may be found for crediting Rivera's and Noriega's version of these events<sup>5</sup> First, they occurred in close proximity to their confrontation with Cuevas regarding the petition to remove him; second, there may be more than coincidence in the fact that Rivera and Noriega were terminated within a week of each other; third, Rivera had been absent under similar circumstances before and not been terminated, either because he knew the rules and obeyed them earlier, suggesting he also obeyed them later, or because enforcement was lax, and became tighter once Rivera began to exercise his statutory rights; fourth, Noriega and Leon knew Rivera was ill on his last day of work; fifth, after placing their jobs in jeopardy by directly confronting

Cuevas, it would be unlikely that they would make the foolish errors attributed to them; sixth, the inconsistencies in Respondent's records suggest either a desire to terminate Rivera, or sloppy bookkeeping, both of which support Rivera<sup>5</sup> seventh, Noriega is obviously, in demeanor, both intelligent and supportive of his friends, and while he and Leon gain indirectly from the versions they recounted, it would be unlikely that Noriega, if asked, would fail to support his friend, while it is entirely plausible that Leon, if informed casually by Noriega, would discount the explanation. For these reasons, as well as those based on observation of the demeanor of the witnesses, I credit the testimony of Rivera and Noriega over that of Leon,

Discharge of Rudolfo Marillo: Mr. Murillo had worked at Royal Packing since March, 1978, and was terminated on January 7, 1960, from Rosalio Ahumada's machine crew.

Murillo had been an active participant in the Salivas work stoppage in September, 1979, and had been among the identifiable leadership. (See RT IX, 77-78), and was present at meetings with company representatives, including his foreman. Murillo had also been active in the petition campaign of August, 1979, regarding seniority. He had spoken with workers in his crew, secured their signatures, and delivered them to Jose Chavez, (See RT IV, 72-4) He had also handed out authorization cards on behalf of the United Farm Workers of America, and had gathered signatures in front of the company's office in Salivas, in full view of management who could be seen observing him through the window. (RT II, 11-13, 60)

Following expiration of Respondent's contract with the Teamsters in 1978, the company distributed an Employee Handbook (see GCX 10), which Murillo took to several government agencies, including

the Employment Development Department, the Labor Commission, and the ALRB, to obtain information regarding its legality. Following an investigation, he reported back to his fellow employees, on what he had found, in the present of Jose Chavez. (RT II, 10)

In November, 1979i several employees asked Murillo to assist them with a dispute they were having with their foreman, Mr. Loreuzana, over working conditions. Murillo began to speak with Jose Chavez and Mark Sinis about the problem, and was ordered back to work, (RT V, 78-85)

Murillo was terminated on January 3, 1980, for having missed two consecutive days of work without notice. (XX 8) At about 1:30 AM on January 2, he was notified that his mother, who lived in Mexican, was severely ill and had to be taken to a hospital. He left immediately, and later the same day attempted to telephone the company office to notify them that he would be absent from work until the 7<sup>th</sup>. He called two numbers which were on a card given to him by Daniel Castillo (GGX 9) but did not receive an answer at either number. He tried calling several times without success. Later that day, Murillo called a co-worker, Paula Olivas, and asked her to notify the foreman. (RT IV, 51) Murillo again spoke with Ms. Olivas the following day, and she told him that she had spoken to the foreman. Mr. Ahumeda, and told him Murillo had family problems and would be absent from work until the 7<sup>th</sup>. (RT 17,52, 55)

Ms. Olivas corroborated Murillo, and stated she had notified Ahumeda shortly after speaking to Murillo on the telephone. (RT 71, 4)

On January 4, Murillo went to Olivas' house to pick up his pay check, and spoke with Ahumeda, who told him he had been fired and was wanted in the office. When he went to the Yuma office, he was told by

Jose Chavez that he had been terminated. (RT IV, 63)

On appeal from a denial of unemployment insurance, and after investigation, an Unemployment Insurance Appeals Board referee found Murillo qualified for unemployment benefits because he "did notify a fellow employee" of his absence. (GCX 11)

While Murillo may have mis-dialed the area code in his effort to contact the company, Respondent's foreman testified he was notified by Ms. Olivas after work on the second day of Murillo's absence, and after he had submitted the notice of termination (RT IV, 75) of Murillo's problem. It was uncontested that Ms. Olivas regularly performed the function of providing notice to her foreman of employee absences. Given the fact that she in fact provided Ahumeda with notice on the second day, even if his testimony were credited, the fault, on investigation, should have been attributed to Olivas, not to Murillo, who made a good faith effort and used a method which had been accepted by the Company in the past for notifying the foreman. It was well within Ahumeda's power to let the company know that he had been in error and withdraw the termination. His failure to do so and insistence on proceeding with a mistaken discharge place his testimony in considerable doubt, and support an inference that the Company was not acting even-handedly, but looking for an excuse to terminate employees who had engaged in concerted efforts to improve their working conditions.

Discharge of Faustino Diaz: Mr. Diaz began working at Royal Packing in February, 1976, and was discharged on November 3, 1976, from Jesus Loreuzana's crew, where he had worked as a boxer and stapler.

Diaz was active in discussions with employees regarding working conditions, and because he is bilingual, frequently acted as an interpreter in meeting between employees and the company. He was an

interpreter at a meeting held in September, 1979. following the Salivas work stoppage at which his foreman was present (RT V, 101), and corroborated the testimony that Rudolfo Murillo had been an employee representative during that work stoppage. He spoke with employees, at the request of Mr. Ramirez, a company representative at the September 9 meeting, about the Sun Harvest collective bargaining agreement and explained its terms especially as they related to the work stoppage (RT V, 96)

Diaz spoke with UFW organizers who came to the field to address Respondent's employees, and observed Respondent's supervisors Mark Sinis and Ricardo Raimirez observing him, (RT V, 99-100) He also discussed the union and working conditions in the company bus, while in the presence of supervisory personnel.

On November 6, 1980, Diaz was arrested along with another worker at a motel where employees were being housed in Huron. His wife was present at the time, and he asked her to notify the company of his arrest and obtain a leave of absence for him. Gilberto Ramirez, one of Respondent's supervisors, was present during the incident, and observed Diaz being arrested, (See RT VII, 78) There was no allegation that Diaz' conduct prior to his arrest was at all responsible for his termination.

Mrs. Diaz immediately notified Jose Chavez regarding a leave of absence for her husband, but he stated he could not grant one, Later that day, Chavez went to the jail to see if there was anything the company could do to help. (RT VIII, 17-18) Diaz could not, make bail, and remained in jail until his trial, when he was sentenced to 2C days in confinement. (RT V, 30)

Mark Sinis, Respondent's Chief Field Supervisor, testified that jail tine was not considered a valid reason for absence, and that

Diaz had been discharged for failing to notify the company and obtain permission for missing the last two days of work in Huron. (RT VIII, Jose Alfaro, Respondent's foreman, corroborated this testimony, (RTIX, 93)

On November 28, 1979, the date of his release, Diaz traveled to Yuma where his crew had gone, and was told by Mark Sinis to go to the office and fill out an application form. He did go, and returned the next day, and was told the application had been lost, and to fill out a new one. He did so, and on November 29 and 30 spoke with Sinis, Chavez and Castillo regarding his application, but no one would tell him whether it had been accepted, or that he had been terminated. (See RT V, 83-5) He heard through friends that another of Respondent's employees had been arrested, jailed, and been allowed to return to work. (RT V, 91)

While Chavez denied Diaz' wife had asked for a leave of absence, Jose Alfaro, a company foreman, recalled she had asked him for a leave of absence, and he had said he could not provide ~~te~~ for jail time (RT IX, 95), but that she should see Joe Chavez or Mark Sinis. While Mrs. Diaz may not have made a formally correct request for a leave of absence from Mr, Chavez, it must have been obvious that that was what she wanted, and Alfaro's corroboration suggests she asked Chevez, but perhaps in terms he did not associate with a formal request for leave time, It would not make sense for her to ask one supervisor for a leave, be referred to another supervisor, and fail to make the same request, where that was the central reason for speaking to him.

Diaz was discharged on November 3, 1979, for missing the last two days of work in Huron. (RX 6) Yet at hearing, two reasons were advanced for his discharge; first, that he had failed, to give proper notice of his absence; and second, that jail time was considered by the

Company to be unexcused, regardless of notice of fault. Company rules provide that verbal leaves may be given for two days absence, and that leaves will not be issued for employees to work elsewhere or attend school full-time. (GCB 10, p. 8) No mention is made of jail time, and no prior history was convincingly established.

Regarding the first reason, it is apparent that Respondent had actual notice of Diaz's impending absence, both from observation and conversation, and no more could be required of him. Any discharge for this reason would be without just cause,

Regarding the second reason, it is apparent from Respondent's rules, that verbal permission for a two day absence must be obtained from the foreman, and that Mr. Alfaro's advice to Mrs. Diaz, that she make the request of Mr. Sinis or Mr, Chavez, was incorrect. While Respondent urges that its rules provide that all leaves must be in writing (Respondent's Brief, p. 39), the rules themselves provide for verbal leaves. Respondent similarly urges that when Mrs. Diaz applied to Mr. Alfaro for a leave, that it was denied. Yet a more careful construction of Mr. Alfaro's answer was that he lacked the authority to grant the leave. (RT IX, 95)

Discharge of Jose Luis Perea: Mr. Perea began working at Royal Packing in March, 1978, and was discharged on November 28, 1979. He worked as a loader, and had acted as an employee spokesman in disputes with Juan Cuevas, who regularly failed to pay the loaders for actual hours worked. (RT VI, 33-37) Perea complained repeatedly to Cuevas about this problem, and finally had to speak with Jose Chevez, (RT VI; 33: Because of his constant complaints, Perea was transfered to Mr. Lorenzana's crew. (RT VI, 36) These complaints were corroborated by a fellow loader. (RT VII, 5}

In June, 1979, Lorenzana passed out lay-off slips to Perea and several others, indicating they were to check back regarding work on August 1, 1979. Toward the end of July, Perea became ill, and was informed by his doctor that he had high blood pressure. Perea notified Ramirez and Chavez of his problem, was granted a leave of absence, and told to return with a note from his physician, Perea told them he expected to be off for approximately four months, and Chavez said he could have whatever time- he needed, as long as he had a medical excuse. (RT VI, 21)

Perea's physician informed him he could not perform the heavy work required of him as a loader, but agreed to approve lighter work if Perea would come in for treatment every week. (See RT VI, 22) Perea found employment at another ranch close to his physician's office and worked as an irrigation assistant until he felt able to return. Early in November, 1979, he returned to Royal Packing and spoke with Chavez who informed him he needed a release from his physician before he could be returned to work. He brought the papers the following day, Chavez spoke by telephone with the physician, and permitted Perea to return to work. He worked for eleven days, and on November 26 was told by Jose Cuevas that he had been fired, and later learned it had been for using his leave of absence to work for another company.

Respondent's rules provide that leaves of absence may not be provided "for the purpose of working elsewhere". (GCX 10, p. 8) General Counsel alleges the leave was not "for the purpose" of working elsewhere, but to remedy Mr. Perea's medical condition, and that he worked out of need at a task that was considerably lighter than any that were available with Respondent, By answer, Respondent argues Perea worked 10 hours a day in the heat, working overtime hours, in order to stay close



to his home while maintaining his., seniority in Salinas. There is no evidence in the record other than Mr. Perea's description of his work during the period of his absence from Respondent's ranch, that would permit any question of regarding a non-medical motivation. The physician's records seem perfectly clear, both as to the existence of the problem and the length of time required for its remedy. According to Perea, the work was quite light, with no heavy lifting and a great deal of waiting for water to cover a field. The overtime was minor, and the job simply temporary. His doctor was in Mexicali, so it would have been impossible for him to work in Salinas. The question of just cause thus turns on the interpretation of Respondent's rule, which rests not on fact, but legal distinction.

### Conclusions of Law

#### A. Discharge in General

With each of the discharges, similar issues must be addressed: (1) were their activities concerted in nature; (2) did their activities form a "substantial part" or "motivating factor" in the decision to discharge; and (3) did "just cause" exist for their discharge?

Section 1152 of the Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 1153 of the Act includes dual unfair labor practice violations for discharges of employees for engaging in protected conduct, and make it an unfair practice.

Section 1153 states in pertinent parts

"It shall be an unfair labor practice for an agricultural employer to do any of the following!

- (a) To interfere with, restrain, or coerce agricultural employees in the exercise or the rights guaranteed in Section 1152 . . .
- (c) 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 standard of proof required by section 1160,3 of the Act is that of a preponderance of the evidence.

"If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person and order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part," (Emphasis taken)

The facts to which this standard must be applied, have been identified in a recent decision based on identical statutory language. In Wright Line. 251 NLRB no. 150, 105 LRRM 1169 (1980), the NLRB held;

"First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct,"

Knowledge, on the part of the Company, of the employee's activities, is prerequisite to a finding of discriminatory intent, but

knowledge, like discrimination, may be inferred from circumstantial evidence and need not be proven directly,

1. Discharge of Javier Noriega: Respondent did not contest Noriega's involvement in concerted activity, or whether that activity formed a substantial or motivating part in the discharge, except in so far as it alleged just cause for his termination,

Inasmuch as Noriega was discharged following a concerted effort to remove Cuevas as foreman, pursuant to an order that contradicted customary work assignment, and under circumstances that indicate considerable harassment by his foreman, it is apparent that just cause did not exist for his discharge. Having observed the demeanor of the witnesses, their relative height and weight and tolerance of critical questioning under hostile examination, there is no question but that Cuevas, rather than Noriega, is the more likely candidate to issue a challenge to fight. Both logic and reason support this conclusion, based on Noriega's history of involvement with employees in concerted activity, and that of a foreman whose conduct provokes a petition to remove him, signed by nearly all his crew. Noriega acted defensively, if inappropriately, and cannot be found to have provided just cause for termination by his failure to cooperate in an order designed to harass him.

I therefore find that Javier Noriega was discharged without just cause, in violation of Section 1153 la) and (c) of the Act.

2. Discharge of Salvador Rivera: With regard to concerted activities, Rivera not only spoke on the bus about unionization in the presence of Leon, who may or may not have overheard his declarations, but was a close associate and friend of Noriega's, mentioned unionization to Leon shortly before his termination, and most importantly, was with Noriega when Cuevas was confronted with the threat of an employee petition

to remove him. This is more than adequate notice to the Company of Mr. Rivera's sympathies.

Having accepted, the testimony of Rivera and Noriega over that of Leon, for reasons cited earlier, it remains to consider the adequacy of the notice given, which Respondent does not contest, and the interpretation of "consecutive" as applied to the dates in question.

Respondent's employee rules (GGX 10) provides for voluntary quit where an employee "misses two consecutive work days without notification." A commonsense definition of consecutive would be "in a row", or "in series", which would continue in effect even where interrupted "by a holiday, Rivera therefore missed two consecutive days of work, but gave notice as required by the rules, and was improperly discharged under Section 1153 (a) and (c) of the Act, due to discrimination for having engaged in concerted activities protected by the Act,

3. Discharge of Rudolfo Murillo: While Respondent offered testimony to the effect that Mr. Murillo was not the union representative, for his crew, he was certainly a representative, both during the Salinas strike and in subsequent encounters with management. While several crew members stated they did not select him as a representative, he acted as a representative of his crew in a dispute with Mark Sinis and Joe Chavez. And while Murillo's activities were not so pronounced as those of Noriega or Rivera, the fact of his discharge for failing to notify the Company after his foreman had received evidence of his good faith effort to provide notice through Ms. Olivas, suggests that some pretext was sought for an effort to discharge him. The fact that the termination slip had already been handed in is a flimsy excuse when an employee's livelihood is at stake.

Murillo was called away in the middle of the night on a bona fide emergency, and made genuine efforts to contact the company. If Ms. Olivas did not make contact until late on the second day, that should not be assessed as Mr. Murillo's fault. Since Ms. Olivas had been used to deliver messages to the foreman on prior occasions, Murillo was entitled to rely on her, and Mr. Ahumada ought to have asked her if she had heard from Murillo. The lack of any valid reason for refusing to withdraw the discharge is convincing evidence of pretext and discriminatory intent.

I therefore find that Rudolfo Murillo was discharged in violation of Sections 1153 (a) and (c) of the Act.

4, Discharge of Faustino Diaz: While the role of interpreter may not always be evidence of concerted activity, and ,z was not a primary actor in disputes with the Company, Ramirez' suggestion that he read the Sun Harvest agreement suggests he, along with others, may have confused the bearer with the news. While Respondent argues this simply demonstrates that "a foreman took time to help educate field workers to rights given by union contract" (Respondent's Brief, p. 37), this misses the point, Respondent was not under union contract at the time, Diaz had not requested a copy of a union contract, the Sun Harvest agreement was not in question, and it is equally possible that a foreman was attempting to tell an employee whom he had identified as a union spokesperson that he should read his own contract.

The central issue raised by Diaz' discharge is that of just cause vs. pretext. Respondent's employee rules do not mention All time directly, but simply state that leaves of absence may be granted, and that they may not be granted for working elsewhere or going to school full-time, yet both of these categories imply a

possibility that the employee will not return, but may find an alternative interest elsewhere. This rationale is supported in the second paragraph which considers pregnancy leaves. Jail-time does not fit this rationale, but where employee fault is not at issue, more closely resembles medical absences, over which the employee has little or no control. While Respondent may be entitled to refuse leaves of absence for jail time, it may not do so selectively, discriminatorily, or for pretextual reasons arising out of protected conduct, Mrs. Diaz gave Respondent all the notice it required, and short of the assertion, unsupported by its rules, that leaves of absence could not be granted for jail time, Respondent offered no reason why leave could not have been granted for the two days remaining in Huron.

This arbitrary refusal to extend leave time to an employee in apparent distress belies Mr. Chavez' assertion that he went to the jail to see if he could assist Mr. Diaz, when all he required was a simple two-day leave. While it may have a perfectly acceptable reason for its refusal, none was offered.

By reason of its lack of explanation, shifting reasons, actual notice, brevity of absence, error in advice, clarity of rules regarding permissible leaves, absence of explicit prohibition, and rational ground for granting the request, it may again be inferred that Respondent seized an available pretext for firing Mr. Diaz due to his concerted activities, which, though not substantial, were recognized by management.

I therefore find that Fausino Diaz was discharged in violation of sections 1153 (a) and (c) of the Act,

5. Discharge of Jose Luis Perea: While Mr. Perea was shown to have engaged in concerted activities, these were not of a union nature, as were those of the other discriminatees, they occurred long before his discharge, and the reason cited by Respondent for his termination has rational connection with its rules. While General Counsel is correct that Mr. Perea did not request his leave of absence "for the purpose" of working elsewhere, that is what resulted. Mr. Perea must be permitted to eat and pay his medical bills while on long term leave of absence from arduous work, but given an explicit prohibition in the rules, he ought to have applied for light work first with Respondent, or at least notified it of his intentions in advance. While Mr. Perea may therefore be correct in his assertion that his discharge was unjust, there is nothing to indicate, as with the other discriminatees, that concerted activities were the reason for his treatment. Without some nexus between protected conduct and discriminatory result, there is no jurisdiction under the Act.

I therefore find that Jose Luis Perea was not discharged in violation of Sections 1153 (a) or (c) of the Act,

Dated: June 26, 1981

Respectfully submitted,



Kenneth Cloke,  
Administrative Law Officer

ORDER

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

1. Cease and desist from:

a. Discharging 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 Javier Noriega, Salvador Rivera, Rudolfo Murillo, and Faustino Diaz full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

b. Make whole Javier Noriega, Salvador Rivers, Rudolfo Murillo, and Faustino Dias 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 (August 12, 1980) 6 ALR3 No. ^3, plus interest thereon at a rate of seven percent per annum.

c. Preserve and, upon request: make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records



and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back-pay period and the<sup>1</sup> 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 3 1980, 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 property, the period 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 times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees 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.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano 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 four of our employees, because they attempted to improve working conditions. The Board had 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 you 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 Javier Noriega, Salvador Rivera, Rudolfo Murillo, and Faustino Diaz because they attempted to improve working conditions. WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate Javier Noriega, Salvador Rivera, Rudolfo Murillo, and Faustino Diaz 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:

ROYAL PACKING 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 farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board.

DO NOT REMOVE OR MUTILATE