Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUPERIOR FARMING COMPANY, Respondent, and SYLVIA MENDEZ AND UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Parties.	)	Case No. 80-CE-54-D 8 ALRB No. 40

DECISION AND ORDER

On December 21, 1981, Administrative Law Officer (ALO) Mark E. Merin issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief, and General Counsel and the United Farm Workers of America, AFL-CIO, each filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[1/] 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 attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent consistent herewith.

The ALO concluded that Respondent violated section 1153 (a) of the Act by constructively discharging three employees on April 22, 1980. As we find merit in Respondent's exception thereto,

[1/] All code citations herein will be to the Labor Code unless otherwise specified.

we shall reverse the ALO's conclusion. However, for the reasons set forth below, we find that Respondent violated section 1153(a) of the Act by disciplining the three employees because they engaged in protected concerted activities.

The alleged discriminatees, Sylvia Mendez (Mendez), her twin sister Maria Mendez Leyva (Leyva), and Maria Arevalo (Arevalo), first worked for Respondent through a labor contractor, and subsequently were hired by Jesse Marquez, the head of Respondent's labor department, to work for Respondent directly. After completing Respondent's 1979-1980 pruning season, the three women checked leaks in the irrigation system until they were laid off because of lack of work. They were recalled about five weeks later, on April 18, 1980, and began suckering grape vines. They worked all day on Friday, April 18, half the day on Saturday, April 19, and all day on Monday, April 21 (except for Mendez, who was four months pregnant and left early to consult her doctor).

The allegations of the complaint in this case are based on events which occurred Tuesday, April 22, 1980. It was raining that morning when the three women and another employee, Sara Montes, arrived at Respondent's property. Most of the other crew members were already at the property, waiting in their cars. Mendez testified that there was water in the field from the rain and from overflowing irrigation ditches.

Foreman Vicente Perez told the workers to sign a crew list and said that they were free to leave if they chose not to work because of the rain. After signing the list, Mendez, Leyva, and Arevalo talked to the other members of the crew while they waited

in their cars, trying to convince the other workers not to work because the field was too wet. Perez was nearby while the three women talked to the other workers. Perez asked the crew members whether they wanted to work, and all the crew members except the three women and Sara Montes entered the field and started working. The four women remained in their car for a few minutes, and then Sara Montes left to join those who had decided to work.

A few minutes later, the three women drove their car around the field and, when they found some drier rows, began to work. Mendez had opened the trunk of her car and was taking out her tools when Perez approached her. Mendez testified that Perez was angry and said that he was going to give the women "a paper" that afternoon to take to Aurelio Menchaca, Respondent's labor superintendent. He said that the women were far behind the other workers, and that he had given them many chances. Mendez testified that she believed the paper would be used to discharge them.[2/] Since the women did not want to wait until the afternoon, when they might be embarrassed in front of the other crew members, Mendez told Perez that they would talk to Menchaca right away. Mendez told Arevalo that they were being fired, and Arevalo said that she had been fired from better places. Perez then took the women's tools and said that the tools would be used by the new people who would replace them. Perez turned his back on the women and told them to go.

The three women went to Respondent's office to speak with

[2/] Perez testified that he told the women that they were going to get a written warning in the presence of Menchaca.

Menchaca, but instead found Paul Gonzalez, the ranch supervisor. They told Gonzalez that Perez had fired them, and that they could not work because the field was too wet. Gonzalez said he would check the field and told the women to wait. Leyva also complained to Gonzalez about the condition of the toilets in the field, and he said he would check the toilets as well.

After the women had waited near the office for several hours, they saw Jesse Marquez arrive with Gonzalez. The women approached Marquez and told him that they had been fired. Although there was some conflict in the testimony concerning Marquez's response, the ALO credited the testimony of both Marquez and Arevalo that Marquez told the women they could go back to work. This credibility resolution is also supported by the testimony of Mendez. On direct examination, Mendez testified that Marquez told the women that Perez had fired them and there was nothing he could do about it. However, on cross-examination, Mendez testified that she felt it was unjust for Marquez to try to get the women to go back to work, and she asked him if he would go to work in the wet fields. Mendez also testified that she wanted to go back to work, but not in Perez's crew. Instead, she wanted Marquez to transfer her to another crew, but he refused.

We affirm the ALO's finding that the three women believed that Perez had discharged them in the field, even though, pursuant to Respondent's personnel policies, Perez was not authorized to fire anyone, but only to give verbal warnings, followed by a written warning in the presence of someone, such as Aurelio Menchaca, from Respondent's labor department. We also affirm his finding that,

even if Perez fired the women provisionally or without authorization, his decision was not ratified by Marquez, who instead told the women that they could return to work. We therefore find that the General Counsel failed to establish that Marquez, Perez, or any other agent of Respondent discharged the three women on April 22.

The ALO found, however, that Respondent constructively discharged Mendez, Leyva and Arevalo on April 22 when Marquez required that they return to work in the field under the wet conditions present on that day. The ALO found that the conditions in the field were in fact dangerous, since the leaves were wet, exposing the workers to colds and other illnesses, there was irrigation water in the rows, making the ground slippery, and the workers held sharp tools that could cause injury if the workers slipped and fell. The ALO therefore concluded that Respondent violated section 1153 (a) by constructively discharging the three women. We find merit in Respondent's exception to that conclusion.

The evidence does not support the ALO's finding that the conditions in the field on April 22 were so dangerous or the work so onerous that the three women were forced or induced to quit. In order to establish a prima facie case of constructive discharge in violation of section 1153(a), the General Counsel ordinarily must establish that, because of an employee's union or protected concerted activity, the employer made his or her assignments or working conditions so difficult or unpleasant as to cause the employee to quit. (Merzoian Brothers Farm Management Company, Inc. (July 29, 1977) 3 ALRB No. 62; Tanaka Brothers (Nov. 30, 1978} 4 ALRB No. 95.) "An ostensible resignation may be a discharge if

the employer has imposed upon the employee conditions that induce him to quit. If the employer's reason for applying the conditions is discriminatory, the NLRB will hold that the employer has constructively discharged the employee unlawfully, applying the same rules as in outright discharge." (Labor Relations Expediter, p. 200, § 4 (BNA).)

The evidence in this case does not establish that Respondent imposed a level of difficulty in work conditions sufficient to force or induce the employees to quit. On the contrary, although it was raining when the workers arrived and there was water in the field, several witnesses testified that the conditions for working were tolerable, and all the other crew members decided to work. Moreover, the three alleged discriminatees had searched for drier rows, had located some, and had in fact started to work when Perez approached them. Since the three women had previously, and voluntarily, decided to work under the wet conditions prevailing, we find that Marquez's suggestion that they return to work did not constitute the imposition of unusually difficult or unpleasant conditions. We therefore reverse the ALO's conclusion that Respondent violated section 1153(a) of the Act by constructively discharging the three women, and we dismiss that allegation in the complaint.

Furthermore, the evidence does not support the ALO's finding that Marquez offered the women an ultimatum; i.e., to either return to the fields or be fired. Instead, the evidence suggests that the women may have been confused about whether they could go back to work. However, their confusion, if any, cannot be

attributed to Respondent, and we find that Respondent did not discharge, or intend to discharge, any of the three women.

We do find, however, that Respondent violated section 1153(a) of the Act when foreman Perez approached Mendez, Leyva, and Arevalo in the field and disciplined them for starting work late, in retaliation for their engaging in protected concerted activities.[3/]

The ALO found that Perez disciplined the women for exercising their right to engage in concerted activity for the purpose of mutual aid or protection, and therefore interfered with and restrained employees in the exercise of rights guaranteed in section 1152 of the Act. Respondent did not specifically except to this finding, and it is well supported in the record.

Mendez, Leyva and Arevalo were engaged in protected concerted activities when they spoke to their fellow workers and tried to convince them not to work because of the wet conditions in the field. Perez's testimony reveals that he gave the crew the option of working or deciding not to work because of the rain. Perez was aware of the three women's activity, since he stood nearby while they spoke to the other members of the crew and urged the others not to go to work because of the wet working conditions. After all other employees had started to work, the three women took a few minutes to decide whether they would work, and then drove around the field, looking for drier rows. Their search for dry rows

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[3/] Although this conduct was not alleged as a violation in the complaint, it was an integral part of the events alleged in the complaint and was fully litigated at the hearing. (Anderson Farms Company (Aug. 17, 1977) 3 ALRB No. 67; Prohoroff Poultry Farms v. ALRB (1980) 107 Cal.App.3d 622.)

should not have caused any problems, since Perez testified that he told the workers they could skip the wet rows.

Perez testified that, although the women were good workers, they had arrived at work late before and had lagged behind the other workers during the day, talking and "playing." He discussed the problem with Menchaca, who suggested that Perez give the women a chance to improve their work. Menchaca testified he told Perez that if the women continued their poor work performance, they should be given a written warning, pursuant to Respondent's warning procedure. As noted above, such a written warning could only be given in the presence of a representative from Respondent's labor department. There is, however, no evidence that Perez had any cause to discipline the women on April 22. Although Perez testified that the women arrived 15 minutes late on April 22, we affirm the ALO's finding that the women arrived that morning before work began and before Perez asked the workers to sign the crew list. When Perez approached Mendez in the field, Leyva and Arevalo had already begun to work and had completed one or two vines, while Mendez was removing her tools from the car. Perez testified that the other workers in the crew had completed only five or six vines by the time he approached Mendez. Since Respondent's records indicate that the crew of 24 workers suckered 16,895 vines on April 22, the three women must have started working only a few minutes later than the rest of the crew.

We therefore find that Perez's asserted reason for initiating the discipline procedure was pretextual, and that Perez told the women they would have to take a "paper" to Menchaca because

they engaged in protected concerted activity by attempting to dissuade other employees from working due to the wet condition of the field. In Hartz Mountain Corp. (1977) 228 NLRB 492 [96 LRRM 1589], enforced sub nom., Dist. 65, Distributive Wrkrs. of America v. NLRB (D.C. Cir. 1978) 593 F.2d 1155 [99 LRRM 2640], the NLRB found that the employer violated section 8(a)(1) of the National Labor Relations Act by issuing warnings to a group of employees because they left their assigned work area. The workers in Hartz Mountain went to their supervisor on an especially hot day and asked for a fan in the work area. The next day, they went to the plant manager, who installed a fan within 10 minutes. The national board found that the employees' visit to the plant manager and their request for a fan were classic examples of concerted activity, and that the workers were entitled to complain about the heat without the risk of retaliation, penalty, or hazard to their jobs.

Like the workers in Hartz Mountain, Mendez, Leyva and Arevalo were engaged in protected concerted activity when they complained about the wet fields and tried to convince the other workers not to enter the field. Perez had knowledge of this activity. As Perez disciplined the women after they actually started work and after he had given them the option of deciding whether to work, we infer from the timing of his conduct that Perez acted out of retaliation because of the women's protected concerted activity. By giving an oral discipline, to be followed by a written discipline, Perez interfered with the women's section 1152 right to engage in protected concerted activities, and thereby violated

section 1153(a) of the Act.[4/] (See, Hamlin Products, Inc. (1965) 151 NLRB 774 [58 LRRM 1559].)

ORDER

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

1. Cease and desist from:

(a) Disciplining any agricultural employee because of the employee's protected concerted activity.

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

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

(a) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

[4/] When Perez indicated that he would give the women a "paper" to take to Menchaca that afternoon, he was initiating the written warning process, since the warning had to be given in the presence of a member of Respondent's labor department. However, even if we were to construe Perez's statement as a threat to discipline the three women, his conduct would still be violative of section 1153 (a), since a threat to discipline an employee because of protected concerted activity also interferes with section 1152 rights. (See, Roadway Express, Inc. (1979) 241 NLRB 397 [100 LRRM 1631]; United States Postal Service (1980) 250 NLRB 1195 [105 LRRM 1014]; Southern Moldings, Inc. (1981) 255 NLRB No. 115 [107 LRRM 1203].)

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

(c) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between April 22, 1980, and May 31, 1980.

(d) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of 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 an opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their 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.

(e) 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

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periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: June 9, 1982

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties were given an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by initiating discipline against employees who complained about the wet condition of the field and tried to convince other workers not to work because of the wetness. 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 other farm workers in California 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 about 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 and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT initiate discipline against any employee because that employee talked to other employees about their wages and working conditions, or tried to convince other employees not to work because of the condition of the field.

Dated: SUPERIOR FARMING COMPANY

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

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

Superior Farming Company
(Sylvia Mendez and UFW)

8 ALRB No. 40
Case No. 80-CE-54-D

ALO DECISION

The ALO found that the Employer violated section 1153(a) of the Act by constructively discharging three employees. The employees had complained in the morning about working in the fields, which were wet from rain and overflowing irrigation ditches. When their supervisor attempted to discipline them for starting work late, the employees believed they were being discharged and protested to a management representative. The ALO found that since the conditions in the field were dangerous, the representative's statement that the women had to go back to work constituted a constructive discharge.

BOARD DECISION

The Board reversed the ALO's conclusion that the Employer constructively discharged the three employees, noting that the field conditions were not so onerous or dangerous as to justify quitting, that all the other crew members went to work, and that the alleged discriminatees themselves had belatedly decided to start working when their supervisor first approached them. However, the Board concluded that the Employer violated section 1153(a) of the Act by the action of its supervisor in disciplining the employees in retaliation for their engaging in protected concerted activities.

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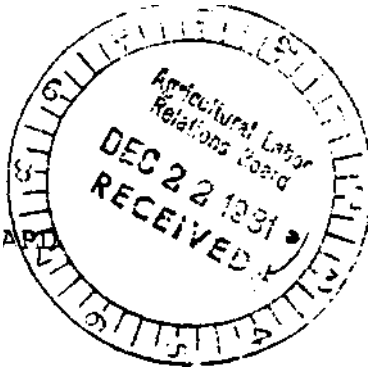

BEFORE THE AGRICULTURE LABOR RELATION BOARD

STATE OF CALIFORNIA

SUPERIOR FARMING COMPANY,

Respondent,

and

SYLVIA MENDEZ and UNITED FARMWORKERS OF AMERICA, AFL-CIO,

Charging Party.

Case No. 80-CE-54-D

Appearances:

Nicholas F. Reyes, ALRB Fresno Regional Office, 1685 E Street, Fresno, CA 93406

For the General Counsel

Burt Hoffman
Quinlan, Kershaw, Fanucchi and Hoffman
2409 Merced Street, Suite 3
Fresno, CA 93721

For the Respondent.

DECISION

STATEMENT OF THE CASE

MARK E. MERIN, Administrative Law Officer: This case was heard before me in Delano, California, on March 17,18,19, April 1, 2, and 8, 1981. On August 15, 1980, a Complaint was issued based on two charges, one of which was eliminated in the First Amended Complaint which issued on December 1, 1980. The First Amended Complaint was based on a charge filed against Respondent on April

22, 1980 by Sylvia Mendez and United Farmworkers of America, AFL-CIO. The First Amended Complaint alleges a violation of 1153(a) of the Agriculture Labor Relations Act (hereinafter the "Act")[1/]. By answer filed December 10, 1980, Respondent denied committing any violation of 1153(a) of the Act.

All parties were given full opportunity to participate in the hearing. The General Counsel and Respondent filed post-hearing briefs.

Upon the entire record, including my observations of the demeanor of the witnesses and after consideration of the briefs filed by the parties, I make the followings

FINDINGS OF FACT

I. Jurisdiction

Superior Farming Company (hereinafter sometimes referred to as "Superior", "Respondent", "the Company", or "the employer") is a subsidary corporation of Superior Oil, a Nevada-based corporation, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

II. The Alleged Unfair Labor Practice

The Complaint alleges Respondent violated Sec.1153(a) of the Act by discriminatorily discharging Sylvia Mendez, Maria Mendez Leyva and Maria Arevalo [2/] because of their protected concerted activities in protest of working conditions.

[1/] All statutory references herein are to the California Labor Code unless otherwise indicated.

[2/] The Complaint was amended at the outset of the hearing to add Maria Arevalo as an additional alleged discriminatee.

Respondent denies that it violated the Act by discrimina-torily discharging the three alleged discriminatees and further specifically denies that said persons were discharged at all.

III. The Facts

A. Background

Sylvia Mendez, her twin sister Maria Mendez Leyva, and Maria Arevalo all were working in Respondent's fields while employed by a labor contractor when they were solicited for employment at the Company by Respondent's Labor Department head, Jess Marquez. They began working directly for the Company during the pruning season of 1979-80. The three women worked under three foremen during that pruning season and thereafter checked leaks in the Respondent's orange grove irrigation system until they were laid off for shortage of work for approximately five weeks. They were recalled on April 18 to begin suckering grapes vines.

Aurelio Menchaca, labor superintendent, telephoned Arevalo, told her when work was scheduled to begin, and asked her to contact Mendez and Leyva. The site of the crew's meeting place was communicated to Arevalo but the three alleged discriminatees lost their way on the morning of April 18 and were directed to where Vicente Perez, the temporary crew foreman, had taken the crew to begin work.

The threw women were issued pruning shears and hoes for the suckering work and worked all April 18, one half-day on April 19, a Saturday, and all April 21, with the exception of Mendez, who, being four months pregnant, left early for a doctor's appointment on the 21st.

B. The April 22 Events - Alleged Discriminatee's Version

On the morning of April 22, Mendez, Leyva, Arevalo, and Sara Montes arrived in the car driven by Mendez to find it was drizzling and most of the crew, already assembled, were waiting in their cars.

According to Mendez, not only was it drizzling but the fields were wet from irrigation water and she and those she rode with did not want to work. Crew foreman Perez reportedly told the group to sign in and that they could then go home if they wished. The workers signed and returned to their cars to wait a while to see if the rain would stop. Mendez testified that Perez told the people they could work if they chose and that the Company would pay a minimum of four hours if the rain later forced them to stop.

According to Mendez she, Leyva, Arevalo and Montes told the people that it was impossible to work under those conditions and decided not to work themselves. A lame worker, overhearing her comlaints about the possibility of contracting pneumonia, volunteered that they had to die from something, anyway.

When the other workers elected to work, Mendez, Leyva and Arevalo stayed in the car. Montes, however, decided to work, took her lunch, and left the car. According to Mendez, Leyva and Arevalo then left the car to look for dry rows and, finding some, elected to start work. She moved the car close to where they had found dry rows, got out, opened the trunk of the car to get out her tools and was intending to take a dry row when Perez arrived. Mendez testified Perez was angry and told her that they were

already far behind, that he had given them a lot of chances, and that he was going to give them a paper to take to Menchaca in the afternoon. Mendez testified she replied that Perez should not wait until the afternoon, that they would go and talk with Menchaca then. At that point Arevalo asked what was happening, Mendez replied that they were being fired, and Arevalo responded, "I been fired from better places." Mendez testified that Perez told her "you're going to Menchaca and give me the hoes," gathered up the three women's tools, turned his back and left.

Mendez, Leyva, and Arevalo drove off seeking Menchaca. They went to the company office at Ranch 75, were unable to find Menchaca, but found and told the ranch supervisor, later identified as Paul Gonzalez, that Perez had fired them. Mendez testified the three women told Gonzalez that the fields were too wet to work, and that he should go see them, himself. Gonzalez asked the women to wait and said he would go check the field and return.

While waiting for Gonzalez to return the women saw Marquez arrive and went to meet him, telling him that Perez had fired them. Marquez was walking and talking with Gonzalez and responded to them that it was their fault because they did not go into work, adding that "there is nothing I can do for you." One of the women asked if the three could be transferred and Marquez, according to Mendez, reiterated that there was nothing he could do for them. After Marquez walked away the women decided that since they had been fired they should go into the office to see if they could get their accumulated pay. In the office they again met Marquez and

asked him for their time. Marquez ordered the checks made out and the following day the women picked up their checks. Mendez denied that Marquez ever told them to return to Perez' crew.

Leyva testified that it was raining and the workers were in their cars when she, Mendez, Arevalo and Montes arrived in their car on the morning of April 22. After a few minutes Perez called the crew and had them sign in. It stopped raining and, according to Leyva, Perez told the people that they could begin work. Leyva testified she leaned out the window of the car she was in, asked people how they could possibly work, and told them that no reasonable person would work. Perez announced to the people, Leyva recalled, that if they worked one-half hour they would be paid for four and Montes decided she would work.

Leyva and Arevalo then decided that they would work since there was irrigation water on only one side of the rows. They took their tools and went to find dry rows. Then, according to Leyva, Mendez got her tools to begin work and Perez arrived. Leyva was already beginning on vines in the row she selected and Mendez was ready to take a row. She heard Perez tell Mendez that "the people are in the fields and you are just barely beginning." He had given them many opportunities, she heard Perez say, and "I'm going to give you a paper and you can take it to Menchaca." Leyva heard Mendez respond, "Why don't you give it to us right now?"

While Leyva's recollection is not clear, she recalls Perez telling Mendez that she might as well leave then, to which Mendez replied, "We're going to go and we're going to give our grievance

with Menchaca." As the three began to leave with their tools to find Menchaca, according to Leyva, Perez took their tools from them. Prior to surrendering the tools, Leyva heard Arevalo say she had been fired from better places.

The three women went to find Menchaca, met Gonzalez and told them Perez had fired them because they did not want to go into the field when told. Gonzalez told them to wait and that he would find out what the situation was. They waited awhile in the office and went out to meet Marquez when they saw him coming. They reiterated that they had been fired and Marquez responded, "It's your fault." He also said that he had had problems with the women and that all the other people were working. Arevalo asked to change crews and Marquez responded, "I'm sorry, I can't do anything for you. The people are up there." According to Leyva, Marquez did not direct them to return to work and the women decided that since Marquez was not going to do anything for them, that they would ask for their time, which they did. Marquez directed the secretary to make out their time and they received their checks the following day.

Maria Arevalo, called as a witness by Respondent, testified that it was raining when she and the other women arrived on the morning of April 22, the fields were wet and the irrigator "had let the water go by." She recollected that Perez told the crew members to sign the crew sheet and said that if it continued to rain they would still get paid for four hours. After signing in the crew members, with the exception or herself and the women Arevalo rode with, entered the field and began work. She, Mendez and Leyva decided to see if they "could get into work because it was very wet." They found no dry rows but decided to work anyway, after the other workers had already suckered about four vines. Arevalo was beginning work when Perez arrived and asked them if they were going to start work. According to Arevalo "we told him, yes, but we want to go to the office so that they could go and see how wet the rows were." Arevalo said Perez told them to wait and that he was going to give them a paper to give to Menchaca. Arevalo responded "I told him that if he was going to fire us then there was no need because before he would fire us, we would leave."

Arevalo indicated that Perez told them he could not fire the women but that they would have to take a paper to Menchaca, According to her the women told him they were going to the office that morning whereupon Perez took back their tools "for the new people who would be coming." Arevalo said she, Mendez and Leyva went to the office and spoke with the ranch supervisor, telling him that the rows were very wet and that he should go and check them because the people were working. The supervisor responded,

according to Arevalo, that he had told Perez the people should not go into the fields if it was "real wet" and that he would go "check it out."

After waiting awhile the three went outside where they met Marquez and told him that they could not return to work because it was very wet and the foreman did not want them there. Marquez responded that the rest of the people were working and asked why they did not return to which Arevalo recalls Mendez responding with a question: "would he go into work there where it was wet?" Arevalo testified that it was her impression that Marquez had talked to the person they first approached [Gonzalez] and that they could return to work. Marquez was asked but refused to transfer the women to another crew.

Testifying on rebuttal, Sara Montes recalled that she worked on April 22nd when it was wet. It was raining when she, and the women she rode with, Mendez, Leyva and Arevalo, arrived that morning. Perez told them to sign in so they could start work. She recalled the women she rode with saying she could work if she wished but they were not going to because "we're liable to get sick because it's very wet."

C. The Company's Version

The testimony of Vicente Perez, crew foreman, was taken by deposition as Mr. Perez had relocated to Texas by the time of the hearings and was therefore unavailable as a witness at the hearings.

Perez testified that he started as a crew foreman on April

18, 1980. There were approximately 26 to 28 workers in his crew and each one was given a hoe and shears on the first day of work and were responsible for bringing the tools back and forth to the job.

He testified that on the morning of the 13th the three alleged discriminatees, Mendez, Leyva and Arevalo, lagged behind the other members of the crew, and worked adjacent rows suckering. He told them they would have to hurry up "a little bit" to be even with the others. He characterized their work as not real work but "playing."

Perez spoke with Menchaca about the pace of the three women and was told to "give them two opportunities more."

On Saturday, April 19, Perez recalled the three women arriving eight to ten minutes late. He gave them a second warning, that they had to hurry but the warning did not appear to affect them.

On April 21, according to Perez, the three women were saying bad things to others in the crew, working slowly, and hanging on the wire which supports the vines but he did not give them a warning that day.

On April 22, Perez recalled it was cloudy and drizzling slightly. He met the crew and discussed with them waiting until the rain stopped in order to work. The workers signed before 6; 30 and it was his inclination not to work if it was too wet because the vine leaves absorb a lot of water and get the people too wet. The members of the crew, according to Perez, decided to work.

It was Perez's recollection that the three alleged

discriminatees again arrived late and he was going to give them a written warning which had to be delivered in Aurelio Menchaca's presence. His reason for intending to give them a written warning was that they had arrived late and were not working. According to Perez the women had not started work when he told them he was going to give them a written warning, and after he made that statement, they left to see Menchaca. He testified he did not fire them.

Perez indicated that the three women did good quality work but were too slow. Perez did not recall seeing either Marquez or Gonzalez on April 22. Perez denied telling the crew that if they worked one-half hour and had to stop they would get paid for four hours.

Marquez testified that immediately prior to his meeting the alleged discriminatees he was briefed on the situation by Paul Gonzalez who told him that the women had walked off of the fields and that the rest of the crew was working. The women told him, as he recalled, that they wanted to work in the field but that it was too wet and it was not right for them to go into that field. He responded that they should go back but they said they "weren't sold to the company."

Marquez testified that he did not ask Mendez, Leyva and Arevalo what happened and did not investigate the situation but told them to go back to work because he had been told that everyone else was working. He did not recall being asked by any of the women for a transfer to a different crew. Marquez recalled that after the short conversation he had with the three women, he

went to the office where about five minutes later the women came in and told him that they wanted to quit. He instructed checks to be made up for them.

D. The General Counsel's Argument

The General Counsel argues that the facts established that Mendez, Leyva and Arevalo were protesting unsafe and unhealthy working conditions under which their foreman was requiring them to work and that this protest was protected concerted activity, regardless of whether the conditions were in fact hazardous or not. Thus, the General Counsel argues that the actions of the employer in responding to the protest must be judged as to their tendency to interfere with the free exercise of employee rights: The General Counsel argues that the facts show that the Company discharged the alleged discriminatees.

E. Respondent's Argument

Respondent views the facts as establishing that the three affected workers unjustifiably refused to work under normal working conditions. Thus Respondent argues, the women were not discharged but after receiving appropriate warnings refused to continue working in their assigned crew and requested a transfer. This action, Respondent argues, constituted continuing inadequate performance and a voluntary quit. Marquez' direction to the women to return to the field, Respondent argues, was not a constructive discharge because the work assignment on April 22 was no different than that of the other persons in the crew and latitude was permitted the workers to skip areas that were too wet to complete. Thus, as the Respondent argues, there was no evidence that the

conditions in the field on April 22nd were "injurious to the health of either these three women or that of any crew member."

In its Brief, the General Counsel anticipated and addressed Respondent's argument that the women were not discharged but rather quit their employment with Superior Farming. To this General Counsel responds that the women all testified that they did not quit their jobs, but rather described having their tools taken away and being told by their superiors that there was nothing they could do.

General Counsel also addressed the employer's attempt to establish that the "discharges" were for cause, and attacked the adequacy of the Company's cause for termination as not being sufficient.

ANALYSIS AND CONCLUSIONS

When Mendez, Leyva and Arevalo arrived at the fields on the morning of April 22, whether they arrived before or after 6:30, it was raining, the crew was not yet working and no decision had been made to work or not.

Although Vicente Perez denied mentioning any company practice about "four hours", there was sufficient testimony both from the alleged discriminatees and other workers to convince me that it was either announced or understood that if the employees worked even one-half hour and were forced from the fields by the conditions, they would, nonetheless, be paid for four hours' work. Mireya Lopez, called by the company, and a member of the crew on April 22, testified that while she may not have heard Perez mention anything on April 22 about the four hours "we know that we

get paid for four hours. It didn't seem to me to be necessary to hear that or whatever it was that he said."

The alleged discriminatees admit, and every witness testified that the three women attempted to dissuade workers from working in the fields as the crew began to work. Unsuccessful at convincing the crew that the conditions were not healthy, Mendez, Leyva and Arevalo inspected the field and decided to find manageable rows and work.

When Perez approached the three women, complained of their being late once again, and informed them of his intent to give them a written warning, he was disciplining them not for previous late arrivals, but for delaying that morning in entering the field. He could not have been justifiably disciplining them for having arrived after the other workers (if indeed that was the case), but still prior to the beginning of work, because the late arrival did not cause the late entry into the field and there was no company rule requiring workers to present themselves for work in the rain. Instead, the written warning of which the three women were informed that morning related to Mendez, Leyva, and Arevalo's independently considering whether or not they would work under the conditions they found, delaying until they decided they would work, and entering the field after the rest of the crew had already made and acted upon its decision to work.

It was precisely the period of deliberation, however, which constituted the concerted activity in which Mendez, Leyva and Arevalo had engaged and which, if protected, may not be the ground

for discipline.

Respondent argues that the refusal to work in the field that day was not a protected activity since all the rest of the crew decided to work and the three women, alone, refused.

Aside from incorrectly characterizing the women's delay as refusal to work, Respondent's analysis also suggests that the decision of the rest of the crew to work under the conditions complained of by the women constitues a determination that the conditions were normal.

Perez testified that he gave to the workers the choice of whether or not to work. He did not testify that the majority of the workers would bind the minority to work. Instead, his testimony was that it was an individual decision whether or not to work. He did not indicate that the decision had to have been made by any particular time, although that appears to be the fault he found with the alleged discriminatees on the morning of April 22 -that they were the last to decide to work that day. An employee's right to object to working under hazardous conditions is not curtailed by a majority vote of workers willing to risk the hazard. Since the choice of whether or not to work involves also a choice of whether or not to earn an hourly wage for that work, workers may not apply to the determination of whether or not the conditions are hazardous the same standards that an objective observer would. Yet whether working conditions are so injurious to health as to make the employer's requirement that workers submit to them a constructive discharge is an objective determination.

When Perez indicated his intent to discipline the three women for again being late or lagging behind the others, his intent was misread by the three who believed he was announcing that they would be fired that afternoon. Although the nature of the specific intended discipline was apparently misunderstood by the three women - and I find that Perez neither believed he had the power to terminate, nor intended to terminate the women at that time - any discipline for the exercise of their right to engage in concerted activity "for the purpose of . . . mutual aid or protection" interfered with and restrained the exercise of rights guaranteed in Section 1152 of the Act and constituted a fit subject for protest.

Mendez, Leyva and Arevalo protested the inflicting of discipline (termination they thought) by seeking out Menchaca, and talking with Gonzalez and Marquez, two company supervisors with the power to hire and fire them. If the company's version, principally enunciated by Marquez, is credited, Marquez told the three women to return to work in the crew, impliedly overturning Perez' "termination". Under this theory the women's refusal to accept Marquez' offer to permit them to return to work, constituted a refusal to work and a voluntary termination.

Both Mendez and Leyva testified that Marquez did not tell them that they could return to work or that they should return to work, but instead indicated that there was nothing he could do for them, not even transfer them. The testimony of Arevalo conflicts with that of Mendez and Leyva. Arevalo testified as follows in relation to the conversation she, Mendez and Leyva had with

Marquez after he was briefed by Paul Gonzalez:

Q: What was that conversation about?

A: That we could not return to work up there because it was very wet and the foreman didn't want us there.

Q: Did Mr. Marquez tell you that the rest of the people were workinq?

A: Yes.

Q: Did he tell you to go back to work?

A: He said that the other people were working, why didn't we return? But Sylvia asked him, would he go into work there where it was wet? He answered and said that that wasn't his job.

Q: Then what happened?

A: Then Sylvia repeated again that would he go in there? And he said, no, because it wasn't his job. Then I asked him if he would be able to transfer us to another crew.

Q: What did Mr. Marquez say to you?

A: That he couldn't.

Q: Did he tell you to go back to the crew that Vicente was in?

A: I don't remember.

Q: Did Mr. Marquez tell you that he had talked to the superintendent and that it was all right for you to return to work?

A: Yes.

Q: And that's when Sylvia told him that it was too wet and would he like to work in those conditions?

A: Yes.

Q: It was only after that that you asked to be transfered to another crew?

A: Yes.

Q: And then he told you that that would not be possible?

A: He said no, that he couldn't.

Q: When he told you that he couldn't, is it at this point in time that Sylvia said, ok, then we'll go home?

A: I believe so.

Weighing the testimony of Mendez and Leyva, particularly their version of the conversation with Marquez, against the versions given by Marquez and Arevalo, I conclude that Marquez understood the women to have left the fields after a dispute with Perez about the working conditions, that regardless of their belief, Perez had not terminated then, and told them he would not transfer them but they could return to work in Perez' crew.

Had Marquez, in fact, supported Perez' unauthorized termination, I find it probable he would have taken some specific steps to have the alleged discriminatees' cnecks issued, instead of waiting for them later to come in and request their time. Thus, I credit the company's version that it gave the women whom it understood to have walked off of the job an opportunity to return to the work they left.

Respondent correctly anticipated and addressed the possibility that Marquez' directive to return to work could be construed as a constructive discharge. Whether or not there was a constructive discharge in this case hinges upon the resolution of this question: did the workers have a right to refuse to work

under the field conditions then extant? If so, the requirement that they work under those conditions required them to choose between exposing themselves to an unacceptable risk of injury or illness or ceasing to work for the company. Such a Hobson's choice is an epitome of a constructive discharge. If the conditions were close to normal, however, and the three protesters merely picky or squeamish, then the directive to return to work was more an opportunity than it was discipline.

Weighing all of the testimony I have concluded that the conditions were such as to preclude the Company from requiring workers to continue suckering. The rain had drenched the vine leaves which would wet the workers as they moved through the fields. The wet vines and the rain exposed workers to colds and other illnesses. Irrigation water in the rows made the fields slippery, necessitating gripping the wires to maintain balance, and threatened injuries from falls the seriousness of which could be aggravated by the sharp instruments carried by each worker. The recognition of these problems prompted Perez to commit to the workers the decision of whether or not to go into the fields on April 22. Regardless of the women's understanding of the conversation with Perez prior to their visiting the ranch office, even the statement that they should return to the fields which Marquez and Arevalo recalled, constituted a retraction of the choice which Perez had previously given to the workers. Choosing to work under a hazardous condition is different from being required, as a condition of continued employment, to accept the risk of the hazard. While some employes may choose to earn a

negotiated amount by subjecting themselves to risks inherent in that type of employment, workers who demur to unusual or unacceptable risks may not be penalized for holding their health in higher regard than those who continue working.

Had Marquez intended to make return to the fields on April 22 optional, he need only have stated that the women could return the following day if they did not choose to work under the wet conditions in the field that day. There was no testimony he offered the women this choice.

Much could be said about what type of activity constitutes protected concerted activity. For an adequate summary of the extent of the employee's right to engage in concerted activities, I refer to the analysis and conclusions of Administrative Law Officer Ron Greenberg beginning at page 12 of his Decision and Order in Jack Brothers and McBurney, Inc., 78 C.E.47-E (6 ALRB No. 12). Without doubt the protests of the three women here involved related to the safety conditions existing in the field, were matters of mutual concern to all affected employees, and were protected. Foster Poultry Farms, 6 ALRB No. 15 at page 5.

The Remedy

Having found that Mendez, Leyva, and Arevalo were engaged in protected concerted activities in protesting the working conditions on April 22 and delaying their entry to the field until they found a place where they could start, I find that the requirement that they return to the field once they were disciplined for delaying their start, constituted a constructive discharge in violation of Section 1153(a) of the Act. Therefore I

shall recommend that the Board order the company to cease and desist from the offensive activity and take certain affirmative steps designed to effectuate the policies of the Act. Specifically, I shall recommend that the Board order Respondent to offer to Sylvia Mendez, Maria Leyva and Maria Arevalo reinstatement to their former positions with the Company, and to make them whole for any loss of earnings they may have suffered as a result of the unlawful actions against their, by paying to them a sum of money equal to what they would have earned had they remained in Vicente Perez' crew, and thereafter been rehired as were other seasonal employees, together with interest at seven per cent per annum from April 22, 1980 to and including the date of payment, in accordance with the formula set out in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

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

ORDER

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

1. Cease and desist from:

a. Suspending or discharging or otherwise disciplining employees for engaging in concerted activities for mutual aid or protection.

b. In any manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them 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 reinstatement to Sylvia Mendez, Maria Leyva and Maria Arevalo to positions comparable to those they occupied on April 22; and

b. Make whole Sylvia Mendez, Maria Leyva and Maria Arevalo for any loss of earnings they incurred as a result of the Respondent's constructive discharge by paying to them an amount of money equal to that earned by employees in Vicente Perez' crew who were not discharged on April 22, 1980 and who secured subsequent seasonal employment with the Company up to the time when the three discriminatees are either reinstated or offered reinstatement with the company?

c. Preserve and make avaialble 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 actualize the backpay due to the foregoing named employees;

d. Distribute the following NOTICE TO EMPLOYEES (to be printed in English and in Spanish) to all present employees and all employees hired by Respondent within six months following initial compliance with this Decision and Order and mail a copy of said NOTICE to all employees employed by Respondent between April 22, 1980 and the time such NOTICE is mailed if they are not now employed by Respondent. The NOTICES are to be mailed to the employees' last known address, or more current address if made known to Respondent.

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

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

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

Dated:

AGRICULTURE LABOR RELATIONS BOARD

by MARK E. MERIN, Administrative Law Officer

NOTICE TO EMPLOYEES

After hearing in which each side presented evidence, the Agriculture Labor Relations Board has found that we violated the Agriculture Labor Relations Act by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 1152 of the Agriculture 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 Agriculture Labor Relations Act is a law that gives all farmworkers these rights:

1. To organize themselves;

2. To form, join or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another;

5. To decide not to do any of these things.

Because this is true, we promise that:

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

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

WE WILL PAY to Sylvia Mendez, Maria Leyva and Maria Arevalo an amount of money sufficient to compensate them for the time they would have worked with the company following April 22, 1980, had we not constructively discharged them after they engaged in protected concerted activities.

Dated:

SUPERIOR FARMING COMPANY by

_____

Representative (Title)

This is an official Notice of the Agriculture Labor Relations Board, an agent of the State of California.

DO NOT REMOVE OR MUTILATE