

Salinas, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ROYAL PACKING COMPANY)	
)	
Respondent,)	Case No. 80-CE-162-SAL
)	
and)	
)	
UNITED FARM WORKERS)	8 ALRB No. 74
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	
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DECISION AND ORDER

On December 15, 1981, Administrative Law Officer (ALO) Ellen Lake issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions with a supporting brief and the Charging Party filed a brief in reply to Respondent's 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 briefs and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt her recommended Order as modified herein.

Respondent excepts to the application by the ALO of the Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], analysis in the Armando Vargas discharge. Respondent contends that the failure of the ALO to make a finding on the employer's reasons for the discharge of Vargas was error and that

had she correctly applied Wright Line to this case she would have found the discharge to have been proper. In Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18 this Board adopted the Wright Line test. In Martori Brothers Distributors (Mar. 1, 1982) 8 ALRB No. 15, we interpreted the Wright Line test as shifting the burden of production to the Respondent, while the burden of persuasion remained with the General Counsel.

Since Martori, we have noted a split among the federal authorities regarding precisely the conflict outlined above. The National Labor Relations Board (NLRB) has consistently maintained, since Wright Line, that both burdens shift to the employer. This interpretation has been approved in seven of the federal circuit courts. (See, Zurn Industries, Inc. v. NLRB (1982) 680 F.2d 683 [110 LRRM 2944] at note 9.) The NLRB interpretation has been rejected by the First and Third federal circuit courts, in favor of the rule stated in our Martori decision. (See, NLRB v. Wright Line (1st Cir. 1981) 622 F.2d 899 [108 LRRM 2513]; Behring International Inc. v. NLRB (3rd Cir. 1982) 675 F.2d 83 [109 LRRM 3265].)

On further consideration, we are persuaded that the NLRB interpretation is consonant with the legislative history of the national labor law and is a reasonable policy decision regarding the purposes of the causality standard. We therefore overrule Martori Brothers Distributors, supra, 8 ALRB No. 15, and hold that in dual motive cases, once the General Counsel has carried its burden of proof as to the prima facie case, the burdens of production and persuasion shift to the employer, and a violation will be found, unless the employer proves by a preponderance of evidence

that the adverse action would have been taken even absent the employee's protected activity.

We believe the ALO's analysis of the Vargas discharge was insufficient in that she declined to make findings on the alleged business reasons asserted by the employer as justification for the discharge. We construe the Wright Line case as requiring such findings and we therefore will examine the record in that light.

Wright Line requires the General Counsel to establish a prima facie case that the discriminatee was engaging in protected concerted activity, that the employer knew of that activity and that the employee was discharged because of that activity. Thereafter, the employer must demonstrate that it would have reached the same decision absent the protected activity of the employee.

In this case, we find that the General Counsel successfully presented a prima facie case of a discriminatory discharge of Vargas for having engaged in protected, concerted activity.

Vargas was selected by the three other loaders to be their spokesman concerning their pay and work problems. He had spoken to David Cortez, Respondent's general foreman, a number of times about such concerns. Cortez confirmed the numerous complaints raised by Vargas on behalf of the other loaders. Cortez testified that Vargas "would say the company wasn't good and that they paid very little. Armando was always making complaints because he would use other companies as an example, what the loaders were earning over there."

Thereafter, the Respondent asserted per Wright Line a business justification for the discharge of Vargas. The essence of

the business justification involved poor work performance by Vargas, who was a probationary employee in that he changed the markings on a celery box, threw the boxes, and had two unexcused absences.

We find that Vargas was a probationary employee not having completed the necessary 30 days to attain seniority status.

We find that mismarking of celery boxes was a problem not confined to Vargas. Several other seniority loaders were given warnings by Cortez for allegedly mismarking celery boxes but they were not discharged. Therefore, we find that mismarking a celery box was not an uncommon error and that Vargas' omissions in that regard were not distinctively different from his co-workers.

We find that Armando Vargas did throw some boxes of celery and that this poor work performance was engaged in by other members of the celery crew. We further find that this practice ceased after the initial warnings given by Cortez during the first week of the season.

We find that Vargas had two absences during his employment by Respondent. The first absence on July 5, was because of illness and Vargas called Cortez and received an excuse for that absence. We further find that on the second absence, Vargas was not excused by Cortez. Vargas testified he had fallen asleep in his car while awaiting the bus transporting workers to the field and that thereafter he arrived late, 8:00 a.m., and was told by Cortez to come back to work the next day. Had his excuse for being late been accepted by Cortez, it is likely he would have been permitted to work that day.

We find that the testimony of Respondent's foreman,

Cortez, that Vargas was fired because "he was never happy working" for Royal Packing and that he "always had complaints on how the company was run," expressed the true motivation for his discharge by Respondent and that the General Counsel's prima facie case of a discriminatory discharge of Vargas has not been overcome by Respondent.

We therefore find that the work performance of Vargas was a pretext and not the true motive for his discharge.

We find in accord with the ALO that Vargas was discharged in retaliation for his participation in protected concerted activity.

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 union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act), or has filed charges or otherwise utilized his or her rights under the Act.

(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 Act.

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

(a) Offer to Armando Vargas immediate and full reinstatement to his former job or substantially equivalent position, without prejudice to his seniority or other rights or privileges.

(b) Make whole Armando Vargas for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

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

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all 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 agricultural employees employed by Respondent at any time during July 1980.

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

(g) 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 the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and/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.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved. Dated:
October 8, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence the Board found that we did violate the law by discharging Amando Vargas on or about July 31, 1980, because he protested against our pay and 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 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 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 Amando Vargas because he acted as a spokesman for the celery loaders in complaining about pay and working conditions in July 1980.

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

WE WILL reinstate Amando Vargas to his former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse him for any pay or other money he has lost because of his discharge.

Dated:

ROYAL PACKING 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 112 Boronda Road. Salinas, California, 93907. The telephone number is (408) 443-3160.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Royal Packing Company (UFW)

8 ALRB No. 74

Case No. 80-CE-162-SAL

ALO DECISION

The ALO found that Respondent violated section 1153 (a) of the Labor Code by discharging Armando Vargas because of his protected concerted activities. The protected concerted activity consisted of acting as a spokesperson for three other loaders in protesting working conditions.

BOARD DECISION

The Board adopted the ALO's rulings and findings although it found that the ALO had not fully examined the discharge of Vargas per the Wright Line analysis. Applying the Wright Line analysis the Board affirmed the conclusion of the ALO relative to the wrongful discharge of Vargas.

* * *

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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STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

ROYAL PACKING COMPANY ,)
)
 Respondent)
)
 and)
)
 UNITED FARM WORKERS OF AMERICA,)
 AFL-CIO)
)
 Charging Party)
)

Case No. 80-CE-162-SAL

APPEARANCES:

Jose H. Lopez, of
Salinas, California
For the General Counsel

Daniel D. Haley
Dressier, Stoll, Quesenberry, Laws &
Barsamian, of
Newport Beach, California
For Respondent

DECISION

STATEMENT OF THE CASE

ELLEN LAKE, Administrative Law Officer: This case was heard before me in Salinas, California, on October 5, 6, 7, 9, and 12, 1981. It was based on a complaint, issued November 24, 1980, which alleged that Respondent violated Sections 1153(c) and (a) of the Agricultural Labor Relations Act ("ALRA" or "Act") by discharging Armando Vargas, Antonio Perez,

and Ruben Perez for protected union activities. Respondent admitted the discharges but denied committing any violations.

At the pre-hearing conference, Respondent moved to disqualify me for bias, alleging that I had formerly represented the Charging Party; that, as chief of litigation for the Agricultural Labor Relations Board General Counsel, I had prosecuted many cases against agricultural employers; and that I had been a member of the ALRB Workers' Union and had represented several members before the State Personnel Board. I denied the motion on the grounds that my 18 months' work with the UFW ended six and one-half years ago; that, as ALRB chief of litigation, I had supervised unfair labor practice prosecutions against both unions and employers and had never personally prosecuted Royal Packing Company; and that I had quit the ALRB Workers' Union in 1979 when I became chief of litigation and part of ALRB management. The Board denied Respondent's interim appeal of my ruling, holding that Respondent had not alleged facts sufficient to constitute "actual bias" as defined in Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781.

All parties were given full opportunity to participate in the hearing; the Charging Party, United Farm Workers of America, AFL-CIO (UFW), made no appearance. The General Counsel and Respondent filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the parties' briefs, I make the following findings of fact and conclusions of law.

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FINDINGS OF FACT

I. Jurisdiction

Respondent admitted, and I so find, that Royal Packing Company is a corporation engaged in agriculture in Monterey County and an agricultural employer within the meaning of §1140.4; (c) of the Act.^{1/} Respondent also admitted, and I find, that the UFW is a labor organization within the meaning of §1140.4(f).

II. Respondent's Operations: Background

Respondent, whose primary operations are in lettuce, raised celery during the 1979 and 1980 seasons. The chief celery foreman during both seasons was David Cortez. Assisting him as second foreman was Daniel Hernandez. Hernandez' job was to watch the cutters, while Cortez supervised the packers and loaders, as well as exercising general supervision over the whole celery crew. Respondent admitted that both Cortez and Hernandez were supervisors within the meaning of §1140.4 (j).

Respondent had experienced problems during its 1979 celery season because of a lack of experienced celery workers. Consequently, in 1980 the Company adopted certain measures to improve the quality of work. Company officials interviewed many applicants for the celery crew before the start of the season to inform them about Royal Packing's quality standards and to introduce them to their foreman, David Cortez. On the first day of the season, all the celery workers were again informed about the Company's quality standards. Additionally, throughout July, the first month of the 1980 harvest season, the two foremen were

^{1/} All statutory references are to the ALRA and to like-numbered sections of the Labor Code.

constantly giving specific instructions and suggestions on how to improve the cutting and loading of the celery. These measures significantly reduced employee turnover. Respondent had only 77 celery workers during the 1980 season compared with 238 in 1979.^{2/}

Royal Packing had a seniority system whereby an employee acquired seniority by working 30 days in a consecutive 90-day period. During these first 30 days, the Company considered employees to be temporary or probationary. Supervisors were instructed to review the work of probationary employees carefully to make sure that unsatisfactory employees did not complete 30 work days and thereby gain seniority.

The Company also had a system of issuing written warnings for serious infractions of Company work standards. David Cortez; Jose Chavez, Royal Packing's personnel coordinator; and Mark Simis, the general field supervisor, all testified that the warning system applied only to seniority workers. Simis explained that there would be no reason to use warning tickets for temporary workers, who were already on a trial basis. The Company employee handbook, which described both the seniority and warning systems, did not mention that warnings were given only to seniority employees.

III. The Discharges

A. Armando Vargas

Armando Vargas worked as a celery loader for Royal

Packing for a total of 20 work days between June 30 and July 31,

^{2/}some of that reduction appeared to be due to the fact that Respondent had two celery crews for part of the 1979 season and apparently only one crew in 1980.

1980, when he was discharged. He had 10 years' experience as a celery loader, but had not worked for Royal Packing before, except for 10 days in the middle of the 1979 season when he worked "to help David" Cortez. He testified that he had recruited six other employees for Cortez in 1979, all of whom were hired.

Vargas applied for work at Royal Packing before the start of the 1980 season. He filled out an application and was called for an interview. Present at the interview were Cortez, Jose Chavez, Mark Simis, and one other man. At the interview Vargas was questioned about his work in 1979 and was told that the Company wanted workers who worked well and slowly so that the work would be better. On direct examination Vargas testified that during the interview, general field supervisor Simis asked David Cortez whether Vargas had participated in a work stoppage during the 1979 season. On cross-examination Vargas was unsure which person had raised that topic but seemed fairly certain that the question had come up. Cortez answered that Vargas had not been in the stoppage.

Vargas was one of four loaders on the celery crew. The loaders' job was to carry the packed boxes of celery from where they were left by the packers to another part of the field, where the loaders made a "roadway" through which a truck could drive to pick up the packed boxes of celery. The packers had marked the side of each box to indicate what size celery was inside. The loaders placed the boxes on pallets according to size of the celery in each box. Each pallet contained celery of a single size.

From the beginning of the season, according to

Vargas, Cortez complained about the work of the four loaders. In early July, Cortez divided the four loaders into two teams, and asked one group to mark an "A" on the boxes they loaded and the other group to mark a "B." Cortez told the loaders that "at times the loading went bad and he wanted to know who was doing that work," Vargas stated. On another occasion, close to the end of July, Cortez took the four loaders to the Company shop to see a pallet that was well loaded. Vargas testified that Cortez told the loaders "frequently" that the loading was not being done well. This criticism began before there was any union or concerted activity, continued throughout July, and was directed at all the loaders, Vargas said.

Other witnesses expressed somewhat different views of the extent of criticism of the loaders. Cortez himself testified that he did not have problems with the loaders generally but only with Armando Vargas. However, he admitted that he did assign the letters "A" and "B" to the two groups of loaders, and gave warning tickets to two loaders, both of whom had seniority. Miguel Arreguin, one of the loaders who received a ticket, testified for the General Counsel that there were conversations about the loading between the loaders and Cortez "all the time." He stated, "sometimes [Cortez] would see a box that wasn't put together right or that was really fat or something else that would go wrong on the job. He would talk with Armando or with any of us." Arreguin, too, corroborated the "A" and "B" marking system, and testified that he and his loading partner received warning tickets during July because the foreman thought, incorrectly, that they had changed the size marked on one of the celery boxes.

Vargas, a probationary employee, received no warning tickets.

Armando Vargas testified that the three other loaders wanted him to be their spokesman concerning their work problems, and that he spoke to Cortez on three occasions about the loaders' concerns. He asked Cortez to add another person to assist the loaders to open the road for the truck; this would permit the loaders to leave work sooner. Vargas also asked Cortez to let the loaders make two roadways instead of one, so that they would not have to carry the boxes so far. He told Cortez on perhaps numerous occasions that it was impossible to do the loading as well as Cortez wanted it done because the boxes were "fat"--i.e., they bulged and were coming apart at the sides, and would not fit neatly onto the pallets.

Arreguin also testified about Vargas' role as spokesman for the loaders. He said that Vargas was chosen by the other three loaders to speak with Cortez and that they met with Cortez "every three or four days whenever there were problems that came up because they would push us too hard." Cortez testified that Vargas spoke to him "many times" about extra pay for the loaders and about other unspecified problems with the loading. He said that the other loaders were present during only one of these conversations. Cortez stated that Vargas "would say the Company wasn't good and that they paid very little. Armando was always making complaints because he would use other companies as an example, what the loaders were earning over there."

During July, 1980, a UFW organizer began visiting the celery crew in the field, pursuant to a notice of intent to

obtain access filed and served July 3, 1980. The organizer first arrived, according to Vargas, around July 20 and made between three and five visits before the end of July. Vargas testified that the organizer talked to him on each visit and that Vargas agreed to help organize the crew. He stated that on several occasions he walked with the organizer to the bus where the other crew members were eating lunch. He also testified that he and three other workers signed authorization cards during one of the organizer's visits, although he variously placed the date of the card-signing as July 20, 27, 29 and 30. Vargas' testimony also varied concerning where David Cortez was when he talked with the organizer and when he signed the authorization card. Cortez denied seeing Vargas talk with the organizer or sign a Union card although he admitted seeing the organizer talking to workers in the field two times around July 28-30.

Vargas was fired at the end of the work day on July 31. He testified that Cortez told him to sign a paper which allegedly stated that Vargas was not "happy working with the company." In fact, the paper, a termination notice, stated that Vargas was being fired for resistance to following orders, absences without notice, and changing sizes on the box. At the hearing, Cortez testified that Vargas was discharged because "Armando Vargas was never happy working there. He always had complaints about how the Company was run and was never in agreement with orders." Asked which orders Vargas disagreed with, Cortez stated that "once in a while" Vargas threw celery boxes after being told not to and twice he changed the size marked on a celery box so that he would not have to move it to a different

pallet. Cortez also testified that Vargas missed two work days without notice and on one of those days went out to the field late and drunk, explaining that he had fallen asleep on the side of the freeway.

Vargas testified that all the loaders were warned once not to throw boxes and that he did not throw any after that. He denied changing the size markings on the boxes but said that "quite often" he marked the sizes on boxes which the packers had failed to mark. He admitted missing work twice. He testified that he called to explain that he was not feeling well on one occasion and Cortez replied "that's okay." The other time Vargas stated that he did not understand where the field was and so he parked next to the freeway, hoping to follow the crew bus when it passed. He testified that he fell asleep and when he awoke at 8:00 a.m., he went to the field to tell Cortez what happened. Cortez said it was "okay" and that he should show up the next day.

B. Antonio And Ruben Perez

Antonio Perez cut celery for Royal Packing for 22 work days between June 30 and July 31, 1980. His brother, Ruben, also a cutter, worked for 20 days between July 5 and July 31, 1980, when both were discharged. Both Perezes had worked for Respondent for several days at the end of the 1979 celery season under David Cortez. Cortez rehired them in 1980 without interviewing them.

Antonio testified that a UFW organizer came to the Royal Packing fields approximately three times between July 28 and July 30. The first day the organizer talked to many workers,

including Antonio, on the bus during lunch. Antonio stated that the two foremen were looking toward the bus from a distance of about 50 meters but that they were standing on the opposite side from where Antonio was seated inside. The same thing happened during the organizer's second visit, although Antonio testified that he and the organizer also spoke outside the bus for about two minutes in the presence of other workers. During this conversation the two foremen were "turning around in the direction of where we were standing" at a distance of 20-25 meters. After the organizer left, Antonio told his fellow workers that it would be good to all sign Union cards together, another two-minute conversation that the General Counsel contends was observed but not overheard by the two foremen.

By prior arrangement, made in the field that second day, the organizer was waiting for the crew members when the Company bus dropped them off at a local Safeway parking lot that afternoon. Antonio and Ruben Perez and eight other employees signed UFW authorization cards there. When the organizer returned to the field the next day, he talked primarily to workers who had not yet signed cards. In general, Antonio did not remember whether he had talked to the organizer more than other workers had.

The day after Antonio and Ruben signed authorization cards, Gregorio, another celery cutter who had been at Safeway the previous afternoon, announced many times that "the little squirrels" had signed Union cards. "The little squirrels" was a nickname applied to the two Perez brothers, one of their cousins, and another friend, all Royal Packing celery workers who

had signed cards at Safeway the prior day.

There was considerable disagreement at the hearing about how loudly Gregorio had delivered his startling message. Antonio and Ruben testified that Gregorio talked "in a loud voice" or "yelled." Antonio said that foreman Hernandez was six to eight feet away one of the times Gregorio spoke and that he saw Hernandez listening. Ruben testified that Hernandez "turned around to see where I was" when Gregorio yelled that the "little squirrels" had signed, and a half hour or hour later asked him, "Is that true that you signed?"—a deed Ruben denied. Andres Flores, another cutter testifying for Respondent, said that Gregorio had spoken in a loud voice so that all the cutters could hear, but that Hernandez, who was 12 feet away, was too far to hear. Hernandez himself denied hearing Gregorio's statements and, denied asking Ruben if he had signed a card.

The following day at the end of work, Antonio and Ruben Perez were discharged by David Cortez, who told each that his work was poor. At the hearing Cortez and Hernandez testified to the following problems with the Perezes' performance. Both Perez brothers worked so fast that they got way ahead of the other cutters and could not be supervised. They "close trimmed" the celery, a criticism noted on their termination slips. Antonio "cut the celery high" or "cut for the hearts," which meant cutting far up on the celery stock, which caused the branches to fall away from the core that held it together. This resulted in wasted celery. Ruben would throw thin celery away

without fixing it.^{3/}

Cortez and Hernandez testified that they warned Antonio and Ruben Perez repeatedly about their poor work and attempted, without success, to improve it. Both Perez brothers denied being told their work was unsatisfactory although admitted that they were told to work more slowly.

Three other employees from the 1980 celery crew testified for Respondent concerning the Perezes' work. One was still a Royal Packing employee; the other two now work for another company, under David Cortez' supervision. All three testified that Antonio and Ruben were poor cutters, whose work was frequently being corrected by the two foremen. Miguel Hernandez Morales, who often packed the celery cut by the Perezes, testified that Antonio "close cut" the celery and that Ruben cut the celery in half and threw it down. He said that Cortez criticized the Perezes more than he did other cutters. Andres Flores, a cutter who worked the next burrow over from Antonio and Ruben, testified that Antonio was told to improve his work two or three times a day and that Ruben was chastised many times. Flores testified that on Antonio's last day of work, the foreman told him "this couldn't go on like this." That same day Ruben was informed that "this had gone on for days, and that if he didn't fix it, then they would have to let him go."

IV. Evidence Of Anti-Union Animus

To show Respondent's anti-union animus, the General

^{3/} Despite considerable effort by both counsel and myself, none of the witnesses clearly explained these different celery-cutting terms. I was convinced, however, that the terms had meaning in the celery industry and signified bad cutting techniques.

Counsel relied on two prior Board decisions concerning the Company. In Royal Packing Company (Feb. 5, 1976) 2 ALRB No. 29, the Board set aside an election conducted in September, 1975, because of a captive audience speech by Jose Chavez, then the Company's payroll clerk, who stated that the Company would have no more lettuce to harvest if the UFW won the election and all the workers would lose their jobs. In Royal Packing Company (May 3, 1979) 5 ALRB No. 31, the Board found that Respondent had committed unfair labor practices during election campaigns in 1976 and 1977. The illegal practices included granting the Teamsters preferential access, instituting a new medical plan during the course of organizing efforts, creating an atmosphere of surveillance by reading aloud a list of UFW supporters in coercive circumstances, and discriminatorily discharging an employee who was Teamster activist. That decision was enforced by the Court of Appeal, except for the discriminatory discharge finding. The court held there was an insufficient nexus between the discharge and the worker's union activities since the employee also engaged in serious insubordination and offensive conduct. Royal Packing Co. v. Agricultural Labor Relations Bd. (1980) 101 Cal. App.3d 826.

In addition to these rather remote events, the General Counsel pointed to certain evidence in the present record. First, the General Counsel cited Vargas' testimony that a company official had inquired during his pre-employment interview whether he had participated in the 1979 work stoppage. There were fleeting references to the work stoppage throughout the hearing, but not sufficient to draw any conclusions about its

context. As discussed above, Vargas was not sure who had asked the question and, since Vargas had not participated, no action was taken by the Company in relation to the inquiry.

Second, Ruben Lopez testified that an unidentified man from the Company came out to the field two or three times in July and told the crew that they would be paid well and they did not need a union. The man spoke before the start of work and during workers would earn. No other witness testified about these statements which, Ruben said, were made to the whole crew. From other evidence it appeared that such statements -- if made -- would have come from Jose Chavez, Respondent's personnel coordinator, but Ruben did not recognize Chavez, who was present during his testimony. Chavez denied ever discussing the Union with the celery crew.

Third, Miguel Arreguin testified that David Cortez talked about the UFW with the loaders. On direct examination Arreguin said that Cortez would say, "don't talk about that" and that the Union was not good on the "many occasions" that the subject came up. However, when I questioned him, Arreguin said that he heard only one conversation involving Cortez about the UFW, in which Vargas said that the UFW was better and Cortez said that it was no good, that the workers should not have anything to do with it, and that Vargas should not be talking to the workers about the Union. Arreguin was working on the other side of the truck at the time and heard only part of the conversation. He did not know who brought up the topic. Vargas did not testify about this conversation. Cortez denied any knowledge that Vargas

had talked with the organizer or signed a Union card but was not asked whether he had discussed the Union with Vargas.

Finally, as discussed above, Ruben Perez testified that Daniel Hernandez asked him whether he had signed a Union card shortly after Gregorio declared that the "little squirrels" had signed cards. When Ruben denied signing, Hernandez just laughed and walked away, according to Ruben. Hernandez denied the conversation.

Respondent stipulated that it was aware of the UFW organizer's visits. Mark Simis, the general field supervisor, testified that the Company, which was only at 20% of peak in July, never felt there was any strong organizational drive that reflected a potential election. He described the Union activity as "sluggish and intermittent" after the access notice was filed in early July. "You would have an organizer show up this week, and then maybe nothing for another week. It was just very—you know, just almost an observing type thing," he said. Simis stated that the Company had not instructed supervisors to report any organizational activity except where the organizers disrupted work or came outside their "normal visitation rights."

ANALYSIS AND CONCLUSIONS

This case seems a perfect one for analysis under the National Labor Relations Board's new decision in Wright Line, Inc., 251 NLRB No. 150 (1980), which has been applied to the ALRA by the California Supreme Court (Martori Brothers Distributors v. Agricultural Labor Relations Ed. (1981) 29 Cal.3d 721) and by the ALRB Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18). That case provides an analytical mechanism for dealing with situations,

such as here, where discharges occur in the context of a mixture of business reasons and statutorily protected activity.

From my review of all the evidence, I am convinced that, during July, 1980, the Respondent was earnestly intent on bettering the quality of its celery pack by improving its employees' work methods. This intention is demonstrated by its pre-employment interviews, which, even Vargas testified, included admonitions that the Company wanted workers who worked well and slowly; by the speech to workers on the first day of the season; and by the foremen's constant instruction and criticism of crew members throughout July, the first month of the harvest. Testimony on all of these points came from employee witnesses, frequently those of the General Counsel. In this regard, I believe that what Vargas viewed as Cortez' constant criticism of the loaders was, in fact, the foreman's attempt to improve the quality of the celery pack.

At the same time, there was a low-key Union organizational campaign, of which Respondent was admittedly aware, occurring in Respondent's fields toward the end of July. I credit Mark Simis' testimony that, during the events of this case, the Company was not particularly concerned about the organizing drive. There was no indication in this hearing of the type of organized anti-union campaign evident in the earlier Board decisions. The vague and isolated anti-union remarks in this case contrast strongly with the active counterattack, involving high Company officials and well-planned coercive tactics, appearing in the prior Royal Packing cases. This contrast, as well as the remoteness of the conduct in the earlier cases, precludes any

strong reliance on those decisions to establish Respondent's anti-union animus four to six years later.

I believe that some of the anti-Union statements reported by witnesses were made, although I am unsure of the exact words or context. For example, I think it is quite possible that Cortez made some anti-union remarks in his conversation with Vargas, recounted by Miguel Arreguin, and that some Company official, probably Jose Chavez, may have made a few anti-Union slurs in his speech to the celery crew on Company benefits, as Ruben Perez testified. However, I find it significant that only one General Counsel witness testified to each of these incidents and that other General Counsel witnesses who were present at the events made no mention of the remarks. This fact, coupled with the inability of Arreguin and Perez to recount clearly what was said or how often, lead me to weigh these comments lightly in judging Respondent's motivation for the three discharges in this case.

I take more seriously Ruben Perez' testimony that Daniel Hernandez asked him whether he had signed a Union card. I believe that Hernandez did hear Gregorio saying that the "little squirrels" had signed for the Union. When asked at the hearing, Hernandez paused for a long time before denying that he overheard Gregorio's statements—which he did not do elsewhere in his testimony. I also believe that Hernandez then asked Ruben whether he had signed and laughed when he heard Ruben deny that which Gregorio had just proclaimed. It seems probable that Hernandez, a novice second foreman, passed the information that the "little squirrels" had signed along to his supervisor, David

Cortez. Although the term "little squirrels" was applied to two other workers besides the Perez brothers, I believe that Respondent's foremen interpreted Gregorio's words as meaning that at least Ruben and Antonio Perez had signed UFW authorization cards.

Thus, this case involves a Company intent on improving its employees' work performance and, therefore, with strong reason to discharge incompetent workers. At the same time the Company was experiencing a minor Union campaign, and its supervisors were aware that some workers had signed Union cards. Against this background, let us examine the discharges of Armando Vargas and the Perez brothers.

A. Armando Vargas

I find that Armando Vargas was discharged because of his protected concerted activities. There was credible evidence that he had been designated as the spokesman by the other three loaders. (Cf. B & B Farms (Nov. 3, 1981) 7 ALRB No. 38.) He spoke to David Cortez numerous times concerning the loaders' working conditions, with the other loaders present on at least some occasions. This conduct is protected by §1153 (a) of the Act. Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13; Fairmont Hotel Company (1977) 230 NLRB 874, 878-9.

Respondent essentially admitted firing Vargas because of his constant statements about working conditions. Cortez testified that he fired Vargas because he was "never happy working" for Royal Packing and "always had complaints about how the Company was run. ..." This testimony echoed what 97 Cortez told Vargas at the time of his discharge. Such comments about an employee's being "unhappy" are frequently a euphemism

for an employer's dissatisfaction with the worker's outspoken I criticism of company practices. See, e.g., Hugh H. Wilson Corporation (1968) 171 NLRB 1040, 1041-3, enfd (3rd Cir. 1969) 414 F.2d 1345, 1351, cert. den. (1970) 397 U.S. 935.

Respondent made some attempt to portray Vargas as a constant complainer who was always carping about Company policies. While "mere griping" among employees about working conditions may not be protected (Mushroom Transportation Company, Inc. v. N.L.R.B. (3rd Cir. 1964, 330 F.2d 683, 685; Lutheran Social Service of Minnesota (1980) 250 NLRB 35, 41), "when the 'griping' coalesces with expression inclined to produce group or representative action, the statute protects the activity." (Hugh H. Wilson Corporation v. N.L.R.B., supra, 414 F.2d 1345, 1348.)

The presentation of employee dissatisfaction to management easily constitutes sufficient "group action" to constitute protected concerted activities under the statute. (id. at 1354; Lawrence Scarrone, supra, 7 ALRB No. 13, p. 5; Chrysler Credit Corp. (1979) 241 NLRB 1079, 1083.) The fact that the complaints to management are frequent and repeated does not eliminate the statutory protection. The law allows employees leeway in presenting grievances over matters relating to their working conditions. Such activity loses its mantle of protection only in flagrant cases in which the misconduct is so violent or of such a serious nature as to render the employee unfit for further service. Giannini & Del Chiaro Co. (July 17, 1980) 6 ALRB No. 38, p. 4; Firch Baking Co. (1977) 232 NLRB 772. As the NLRB recently stated:

The essential thrust of Millner's June 4 memorandum is that Gardner was being fired because of poor attitude and discourtesy evidenced by the persistent complaints about pretip arrangements As already noted, these complaints were a form of protected concerted activity.

That his persistent pressing on these matters was unpleasant for, and unwanted by, his supervisors is understandable. But to broad brush such legitimate complaints as badgering and harassment, as Millner did, is an exaggeration. Nothing Gardner did was so out of line as to remove him from the protection of the Act.

[Fairmont Hotel Company, supra, 230 NLRB 874, 879.]

Because of my conclusion that Vargas was discharged for his concerted activities, I find it unnecessary to decide if Vargas ever changed the markings on a celery box, threw boxes, or failed to notify Respondent when he was going to be absent. Whether any of these acts occurred, Respondent totally failed to demonstrate that Vargas would have been fired in the absence of his frequent and vocal complaints about working conditions, Wright Line, Inc., supra, 251 NLRB No. 150. Likewise, I find it unnecessary to determine whether Vargas' Union activities played any part in his discharge because the remedies for a discharge under §1153 (a) are identical to those under §1153 (c). Lawrence Scarrone, supra, 7 ALRB No. 13 at 5.^{4/}

^{4/}The complaint in this case alleged that all three discharges resulted from the workers' "protected union activities," and did not separately allege Vargas' protected concerted activities. However, the elements of both types of discrimination are the same (Lawrence Scarrone, supra, 7 ALRB No. 13 at 4), the evidence of Vargas' concerted conduct was connected with that of his Union activities, and the same persons were involved in all of the conduct. There was, therefore, a close relation to the subject matter of the complaint. Further, the concerted activities were fully litigated. Respondent's counsel did not object to the General Counsel's evidence on this -- [continued]

B. Antonio And Ruben Perez

The Perez discharges present a much harder question, whose resolution depends entirely on witness credibility. From my observation of the witnesses who were the principal actors in the matter, I did not wholly credit either side. For example, I believe the Perez brothers' testimony that foreman Daniel Hernandez heard Gregorio's announcement that they had signed Union cards and that Hernandez later asked Ruben whether he had signed. But I did not believe the Perezes' testimony that their work was never criticized by their foremen since I found convincing the testimony of Respondent's worker witnesses that they observed poor work on the part of the Perezes and heard the foremen chastising their performance.

On Respondent's part, I credit the two foremen's testimony that the Perez brothers' work was defective, but I disbelieve Hernandez' statements that he did not hear Gregorio's announcement and that he did not ask Ruben if he had signed a card. Once he learned that the Perezes had signed authorization cards, I do not believe Hernandez would have kept that information to himself at the very time that he and David Cortez were : discussing their problems with the work performance of the Perez brothers. The ultimate question, of course, is whether the foremen acted on that knowledge when they knowledge when they decided to discharge Antonio and Ruben. Wright Line, Inc., Supra, 251 NLRB No. 150.

4/[continued]-point and presented his own witnesses, David Cortez and Jose Chavez, on this issue. In these circumstances, a finding of a violation is proper. Giannini & Del Chiaro Co., supra, 6 ALRB No. 38, p. 8; Prohoroff Poultry Farms (Nov. 23, 1977) 3 ALRB No. 87, enf'd (1980) 107 Cal.App.3d 622, 628-30.

The General Counsel's prima facie case rested primarily on the timing of the Perezes' discharges, the day after the foremen learned that they had signed UFW cards. There was little evidence that the Perez brothers stood out as Union activists aside from having been identified as card-signers. Neither Vargas nor Arreguin mentioned the Perezes in their testimony about contacts with the Union organizer, and Antonio himself did not remember whether he had talked to the organizer more than other workers did. Furthermore, for the reasons stated above, do not find that the General Counsel made an impressive case for Respondent's general anti-union animus. The General Counsel's case, then, was largely based on the timing of the discharges, factor which--if not refuted--may provide strong circumstantial evidence of wrongful motivation. (Compare Foster Poultry Farms (March 19, 1980) 6 ALRB No. 15, pp. 8-9, and Lawrence Scarrone, supra, 7 ALRB No. 13, p. 6, with Mel-Pak Vineyards, Inc. (Feb. 20, 1979) 5 ALRB No. 13, ALO Decision, pp. 16-21.)

The burden then shifted to Respondent to show that the discharges would have occurred even if the Perezes had not signed UFW cards. I conclude that Respondent met that burden. I am convinced that the Company was concerned with improving the quality of their celery pack, and I credit the testimony of Mark Simis, whom I found a truthful witness, that Royal Packing supervisors were instructed to discharge poor workers before they completed their 30-day probationary period.^{5/} According to the

^{5/}I also believe Simis' testimony that Respondent had not instructed supervisors to report Union-related conduct. Therefore, I view Daniel Hernandez' question as to whether Ruben had signed a Union card not as evidence of a Company interrogation policy but rather as an indication that -- [continued]

parties' stipulation, three other celery workers were fired in July, 1980, for poor work. Antonio and Ruben Perez were fired about two-thirds of the way through their probationary period.

The above evidence establishes the good faith of Respondent's general claim that it was actively seeking to weed out poor workers. In the final analysis, what convinces me that Respondent was motivated by business considerations in discharging Antonio and Ruben Perez was the testimony of the employee witnesses who had worked near the Perezes during July, 1980, but were no longer employed by Royal Packing at the time of the hearing. Miguel Hernandez Morales, who packed celery cut by Ruben and Antonio, and Andres Flores, who cut celery in the next burrow, were excellently situated to observe the Perezes' work and the response of the two foremen. Both testified persuasively^{5/} that there were serious problems with the Perezes¹ performance and that the foremen criticized their work far more than that of the other cutters. That criticism seems to have spanned the whole month of July, long before the Union organizer appeared on the scene in late July. On the day of the discharges, Andres Flores testified, both brothers had been severely criticized and told that their poor work had gone on for days and could not continue.^{6/}

5/[continued]--Hernandez heard Gregorio's announcement and interpreted "little squirrels" as referring to the Perezes.

6/Counsel for the General Counsel made much of the fact that neither Perez received a written warning for poor work. Several of Respondent's witnesses testified that the warning system applied only to seniority employees, although the employee handbook did not mention that fact. The three workers (two loaders and one cutter) who, according to General Counsel witnesses, received tickets during July, 1980, appeared to be seniority employees although there was some -- [continued]

These two workers were the most "neutral" witnesses in the hearing. Although still working under the supervision of David Cortez at another company, they did not appear to have been coached as to the "correct" answers. Miguel Hernandez persuasively testified that he had not talked with David Cortez before testifying and had no assurances that he would be paid for the work lost during his attendance at the hearing. Although Andres Flores was not asked those questions, enough of his testimony was unfavorable to Respondent to convince me that he had not been told what to say. The demeanor of both these witnesses indicated a sincere desire to recount what they saw and heard, without any ax to grind.

Relying particularly on their testimony, I conclude that Respondent met its burden to demonstrate that the Perez brothers would have been discharged for poor work even if they had not engaged in Union activity. To put it another way, the General Counsel did not sustain his "ultimate burden" of establishing the unfair labor practice by a preponderance of the evidence. Wright Line, Inc., supra, 251 NLRB No. 150, n. 11.

REMEDY

Having found that the discharges of Antonio and Ruben Perez did not violate the Act, I recommend that the allegations in the complaint referring to their discharges be dismissed.

With respect to Armando Vargas, whom I found was

6/ [continued] --uncertainty about one of them, who did not testify. I conclude that the General Counsel failed to establish that any non-seniority worker received a written warning, and that no inference of satisfactory work can be drawn from the fact that the Perezes, both probationary employees, did not receive tickets.

illegally discharged, the usual remedies, including reinstatement with back pay and the customary notice requirements, are appropriate here. Accordingly, pursuant to §1160.3 of the Act, I recommend the following:

ORDER

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 §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 §1152.

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

(a) Immediately offer to Amando Vargas full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other rights or privileges.

(b) Make whole Amando Vargas for any loss of pay and other economic losses he has suffered as a result of his 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 7% 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 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 July, 1980.

(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

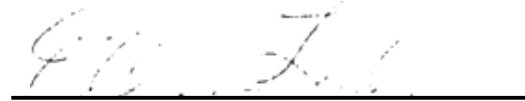
paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(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: December 15, 1981

AGRICULTURAL LABOR RELATIONS BOARD

By



Ellen Lake

Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence the Board found that we did violate the law by discharging Armando Vargas on or about July 31, 1980, because he protested against our pay and 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 farm workers these rights:

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

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

SPECIFICALLY, the Board found that it was unlawful for us to discharge Armando Vargas because he acted as a spokesman for the celery loaders in complaining about pay and working conditions in July, 1980. WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate Armando Vargas to his former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse him for any pay or other money he has lost because of his 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, CONTACT THE BOARD AT 112 BORONDA ROAD, SALINAS, (408) 443-3160. DO NOT REMOVE OR MUTILATE.