

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

RIGI AGRICULTURAL)	
SERVICES, INC.,)	
)	Case Nos. 81-CE-167-SAL
Respondent,)	81-CE-175-SAL
)	82-CE-6-SAL
and)	82-CE-9-SAL
)	82-CE-10-SAL
UNITED FARM WORKERS)	82-CE-22-SAL
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	9 ALRB No. 31
)	

DECISION AND ORDER

On December 31, 1982, Administrative Law Judge (ALJ)^{1/} James Wolpman issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions to the ALJ's Decision and a supporting brief, and General Counsel filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,^{2/} 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 ALJ's Decision in light of the exceptions and briefs of the parties

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^{1/}At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

^{2/}All section references herein refer to the California Labor Code unless otherwise indicated.

and has decided to affirm the ALJ's rulings, findings^{3/} and conclusions and to adopt his recommended Order.^{4/}

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Rigi Agricultural Services, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, demoting, depriving of seniority, refusing to rehire, or otherwise discriminating against any agricultural employee in regard to hire or tenure 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.

^{3/} Respondent excepts to certain credibility resolutions made by the ALJ. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24.) Our review of the record herein indicates that the ALJ's credibility resolutions are supported by the record as a whole.

^{4/} Subsequent to the issuance of the ALJ's Decision, Respondent moved this Board to defer ruling on the issue of reinstatement of undocumented workers, as an appropriate remedy under the Agricultural Labor Relations Act (Act), until the United States Supreme Court decides Sure-Tan, Inc. v. NLRB (7th Cir. 1982) 672 F.2d 592 [109 LRRM 2995]; cert. granted, S.Ct. Case No. 82-945, 51 U.S.L.W. 3646 (March 8, 1983). We are not persuaded that the Sure-Tan case is sufficiently related to the instant case to justify deviation from our usual practice of treating all agricultural employees alike, regardless of their immigration status. (See Mini Ranch Farms (1981) 7 ALRB No. 48.) Moreover, we note that the issues raised in the Sure-Tan case may soon be made moot by proposed legislative revisions of the federal immigration and naturalization laws. (See, e.g., the "Simpson-Mazzoli" Bill, H.R. 6514, 97th Cong. 2nd sess. (1982).) We will therefore adhere to our past practice until some new authority in this area has been clearly established.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employees in the exercise of the rights guaranteed them 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 Ponciano Mata, Dario Torres, Pedro Rios, Manuel Torres and Patricio Rios immediate and full reinstatement to their former positions or to substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Ponciano Mata, Dario Torres, Pedro Rios, Manuel Torres and Patricio Rios for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with its Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to the 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 periods and the amounts of backpay and interest 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 its 1980-81 and 1981-82 annual cycles of operation, approximately November 1980 through October 1982.

(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 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 with its terms, and continue to

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

Dated: May 26, 1983

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office by the United Farm Workers of America (AFL-CIO), the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing where each side had a chance to present evidence the Board has found that we have violated the Agricultural Labor Relations Act by discriminating against certain workers because of their union sympathies and activities, and has ordered us to post this Notice. We will do what the Board has ordered, and also 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 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 this is true, we promise you that:

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

WE WILL NOT terminate, demote, deprive of seniority, refuse to rehire or consider for employment or otherwise discriminate against any employee or previous employee because he or she exercised any of these rights.

WE WILL offer Ponciano Mata, Dario Torres, Pedro Rios, Manuel Torres and Patricio Rios their jobs back and pay them all money they lost, plus interest, because they were terminated or demoted.

Dated: RIGI AGRICULTURAL SERVICES, INC.

By: _____
(Representative) (Title)

If you have any questions 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

Rigi Agricultural
Services, Inc. (UFW)

9 ALRB No. 31
Case Nos. 81-CE-167-SAL,
et al.

ALJ DECISION

The ALJ found that the employer unlawfully discriminated against Ponciano Mata, Dario Torres, Manuel Torres, Pedro Rios, and Patricio Rios because of their active support for the UFW during an election campaign in August and September 1981. The ALJ's findings and conclusions were largely based on the discriminatees' credited testimony regarding their campaigning and the employer's past personnel policies. The ALJ dismissed the allegation of discrimination against Javier Paniagua, since there was insufficient causal connection between his union support and the employer's failure to rehire Paniagua on November 30, 1980.

BOARD DECISION

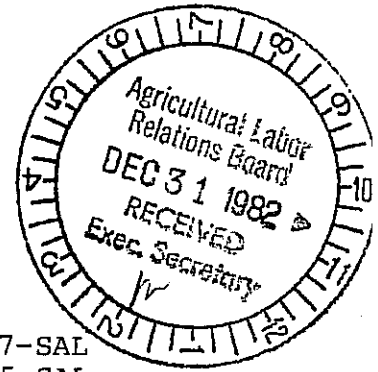
The Board affirmed the ALJ's Decision in its entirety.

* * *

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
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
)
RIGI AGRICULTURAL)
SERVICES, INC.,)
)
Respondent,)
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and)
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UNITED FARM WORKERS)
OF AMERICA, AFL-CIO,)
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Charging Party.)
_____)

Case Nos. 81-CE-167-SAL
81-CE-175-SAL
82-CE-6-SAL
82-CE-9-SAL
82-CE-10-SAL
82-CE-22-SAL

Appearances:

Randolph C. Roeder
and Charlotte Addington, of
Littler, Mendelson, Fastiff & Tichy
for Respondent

Christine C. Bleuler
and Emma A. Castillo
for General Counsel

DECISION OF ADMINISTRATIVE LAW OFFICER

JAMES WOLPMAN, Administrative Law Officer:

This case was heard by me on August 31 and September 1, 2, 3 and 7, 1982, in Napa, California. The complaint is based on charges filed by the United Farm Workers of America ("UFW") and alleges that Respondent Rigi Agricultural Services, Inc. ("Rigi") violated Labor Code sections 1153(c) and (a) of the Agricultural Labor Relations Act ("Act") by: (1) refusing to rehire employee Javier Paniagua, (2) discharging employee Ponciano Mata, (3) discharging employees Dario Torres, Manuel Torres and Pedro Rios, and (4) demoting and reassigning Patricio Rios and removing him from permanent status. The complaint also included an allegation that employees were promised benefits in order to obtain their votes against the UFW in the election which preceded the other alleged violations. At the hearing I granted General Counsel's motion to dismiss this latter allegation (Transcript, Volume IV, page I, hereafter "IV:1"). Respondent denied all of the allegations and asserted two affirmative defenses to the effect that its actions were not discriminatorily motivated. Two additional affirmative defenses -- that there was no legal or factual basis for the filing of the charges and that the Regional Director abused his discretion by failing to conduct an impartial investigation -- I dismissed upon General Counsel's motion as beyond the scope of this proceeding and beyond the power vested in the Agricultural Labor Relations Board (I:8-9).

I. JURISDICTION

Respondent is an agricultural employer; the UFW is a labor organization; and Javier Paniagua, Ponciano Mata, Dario Torres,

Manuel Torres, Pedro Rios and Patricio Rios are all agricultural employees. The instant charges were served on the Respondent in a timely manner.

II. THE WORK ENVIRONMENT

Rigi Agricultural Services, Inc., is a Napa Valley vineyard which grows and harvests seven varieties of wine grapes on 417 acres at three locations: Rigi I (105 acres), Rigi II (100 acres), and Rigi Vin (212 acres).

Until November 1979, Rigi was not actively engaged in the cultivation and management of its properties; this was done by Robert Mondavi Vineyards. In 1979, however, Rigi acquired enough additional acreage to establish its own operation. Its owners, George Roseman and Rudi Schneewis, hired the two Mondavi supervisors who had previously been responsible for Rigi's properties -- Ray Dedini and Meliton Tavizon. Dedini became vice president and general manager and Tavizon became his vineyard foreman. Primary operating responsibility was vested in Dedini; Roseman -- the more active of the two owners -- visited the fields only occasionally. Rigi continued to market its entire output to Mondavi.

Initially, in October 1979, Dedini arranged for six of Mondavi's seniority employees to transfer over to Rigi. But not all of them did, and so, in November, two additional Mondavi seniority employees moved over to Rigi, and in December they were joined by a third. By August 1981 when the union election campaign began, there were seven permanent workers: Ramon Real, Manuel Torres, and Francisco Guillen from the original group of transferees; Dario Torres and Pedro Rios who had come over from Mondavi in November

1979; Ponciano Mata who had come in December; and Patricio Rios who had had some temporary experience with Mondavi and who had been hired as a permanent in August, 1980.

In addition to the permanent employees, Rigi utilized -- in accordance with its seasonal needs -- anywhere from 5 to 25 or more temporary workers. Five to seven of these temporaries would return and work in each consecutive operation in the annual cycle of production. The rest were confined to the most labor-intensive operations: pruning (15-25 workers) and harvesting (up to 40 workers).^{1/}

The first operation of the annual cycle is the pruning of the vines. It begins in late November and continues into mid-January or February. Two weeks after pruning starts, workers begin winter tying, which involves tying the stalks of older vines to stakes for support; it continues until the end of February.

From March 15 into July, spring cultivation is under way; this entails discing the soil and shredding the brush using tractors. Around the same time, frost protection begins. This is accomplished by activating sprinkler systems when the temperature drops below a certain level; the water coats the foliage and thereby insulates the vines from frost damage. The same system is also used for such irrigation as the weather requires. At two-week intervals throughout most of the spring cultivation tractors are used to spray the grapes with sulfur to prevent mildew.

1. A temporary could become permanent by working 90 consecutive days; during the period involved here, none appear to have so qualified.

The next major operation, summer training and tying runs from April to July. It involves deleafing and suckering (or cutting away) the unwanted growth on the lower portions of the vine with shears and then positioning or training the vines onto stakes and wires and tying them in place with rope. Summer training and tying is performed on younger vines and takes more time and trouble than the winter tying of older vines.

The beginning of the harvest is determined by testing the sugar content of the grapes. The first harvest -- which usually begins in August -- is for champagne. It lasts only four days and is accomplished with mechanical harvesters, tractors, and trailers. Next comes the hand harvest. Its beginning as well as how quickly it proceeds (i.e., the number of 12-man crews utilized) depends on the rising sugar level of the grapes and on the weather. In 1980 it began in the last week of August and ended October 20; in 1981 it lasted from the beginning of September to October 24. While a majority of the work is done by hand, there is also some additional machine harvesting. The 1981 hand harvest, for example, ended with a three-day machine harvest at Rigi I.

At the end of each operation in the cycle, temporaries are laid off while permanents continue on performing miscellaneous tasks such as planting new vines and replanting old or damaged ones. At the end of the harvest, however, there is a complete lull before the annual cycle begins anew with pruning; temporaries are laid off and permanents normally use the time for their vacations.

The amount and method of pay varies with the operation involved. During pruning, each worker receives a piece rate based

on the number of vines pruned. During harvest, rates are based on the total amount picked by the crew to which the worker belongs. Other operations are paid at fixed hourly rates. Medical insurance, vacation pay, and pension benefits are provided through Rigi's membership in the California Grower Foundation. The Foundation has its own field staff who visit the vineyards to advise workers and process their claims.

II. WORKER DISSATISFACTION AND THE UNION ORGANIZING CAMPAIGN

In March or April 1981, the permanent workers asked Emilio Ybarra, a field representative for the California Grower Foundation, about getting an employee handbook similar to the one they had had at Mondavi. Ybarra told them that he would talk with supervisors Dedini and Tavizon. Later, according to Ponciano Mata, Ybarra told him and the other permanents that it would take 2 or 3 years to get one. They raised the issue again in late July or early August when Mondavi updated its handbook. Mata testified that their request was again turned down. Dedini, however, testified that he told the workers that, while he lacked authority to take action himself, he would discuss the matter with the owners. On September 1, 1981, the Board of Directors met and approved its issuance; on September 7 it was distributed to the permanents in loose-leaf form. Meanwhile, both picking crews had engaged in a brief work stoppage to protest the tonnage rate for the hand harvest. The rate was renegotiated and work resumed. Later during the election campaign, it became evident that for some time workers had felt that Dedini and Tavizon were unresponsive to their problems and concerns. The locus of this feeling was with the permanents who -- based on their experience at

Mondavi -- had come to expect consistent and well-defined employment policies and supervisory practices.

It is not surprising, therefore, that in mid- or late August 1981, 5 of the 7 permanent employees and one temporary employee visited the UFW field office in nearby St. Helena seeking union representation. This and the later involvement of the six in the union campaign is significant because, within five months of the union election, all were, under a variety of circumstances, laid off or terminated, and their treatment is the focus of the instant complaint. The five permanents -- Ponciano Mata, Dario Torres, Manuel Torres, Pedro Rios, and Patricio Rios -- were all members of Crew No. 1, as was the one temporary, Javier Paniagua. Neither of the remaining two permanents worked in that crew: one, Ramon Real, was in charge of Crew No. 2, and the other, Modesto Guillen, worked as a company mechanic -- a position which appears to have insulated him from the concerns which led to the petition and election.

Rafael Morales, the UFW representative with whom they spoke, explained the certification procedure and talked with them about the problems they were having. Later he gave out blank organization cards and union leaflets and explained how they were to be utilized. He also arranged for several meetings of the workers to be held at a local gathering place -- the Soda Canyon Store. It was left to the six workers to obtain the necessary signatures. Once they had, Morales filed, on September 16, 1981, a Petition for Certification and, at the same time, a Notice of Intent to Take Access. After doing so, he visited the premises on four occasions to answer questions and talk with workers.

Except for Pedro Rios (who testified only briefly), each alleged discriminatee described his activities in obtaining cards, talking with fellow workers and passing out leaflets; and each identified others of the six, including Pedro Rios, who likewise engaged in organizational activity. While it is difficult to believe that the level of union activity approached the sum total testified to by the five, I am convinced that there was an active campaign and that all six participated in it.

Worker testimony about union activity in the presence of supervisory personnel is more specific and to the point. There were three occasions upon which leaflets or cards were circulated in the presence of Dedini and/or Tavizon: once, at Rigi I when the two supervisors were close by; another time, when the two were driving by in a truck; and a third time, near the office, when Tavizon (and perhaps also Dedini) asked the workers to move so that a tractor loaded with bins could get through.

While both Tavizon and Dedini deny ever seeing employees with leaflets or cards, I cannot accept their denials. The workers' testimony, especially that dealing with the incident at the office, has about it the detail and substance which give it the ring of truth (I:64-65, II:82-83, IV:18).

More significant still is the evidence indicating awareness on the part of management that the principle impetus for unionization was the discontent of the permanent workers in Crew No. 1. They had the most at stake; they had asked for the employee handbook; and they had spoken up during the company meetings and gatherings preceding the election about the unresponsiveness of

management and the need for a union. At one meeting, Dario Torres made an outright appeal for the temporaries to support "us" -- i.e., the permanents (III:21). Even Ramon Real, who kept himself "pretty well separate from all the others" (V:93 and See IV:27) and could recall little of what transpired, characterized the organizational campaign by saying, "Well, the permanent ones were urging us to help them get the union going" (V:94). This was not lost on management: At least two company meetings were limited to permanents and three others were confined to Crew No. 1.

There is detailed testimony about six company meetings or gatherings held between the filing of the petition (September 16) and the holding of the election (September 23), at which one or more of the alleged discriminatees spoke up, indicating negative feelings about the company and a predilection for the UFW. Below is a brief description of the time, place, audience and content of each; later, when each individual is discussed separately, what he said or did at these meetings is described:

-- Meeting #1. Two days after the petition was filed owners Roseman and Schneewis met with Crew No. 1 at Rigi I at 10 a.m. Roseman told the workers he did not want and they did not need a union.

-- Meeting #2. At noon the same day at Rigi I Dedini and Tavizon spoke^{2/} to the permanents of Crew No. 1 (and possibly some temporaries as well) tell them that they could do better dealing

2. Frequently in the transcript it is impossible to tell whether something was said by Dedini or by Tavizon. The reason is that Dedini does not speak Spanish and used Tavizon as a translator. Since most of the workers who testified were primarily Spanish

(Footnote continued----)

directly with management on a one-to-one basis without the intervention of a union.

-- Meeting #3. In the afternoon of the same day, two representatives of the California Grower Foundation, Emilio Ybarra and Francisco Vasquez, spoke to the permanents alone, saying they had talked with Roseman and he wanted the workers to forget the union and give him another chance.^{3/}

-- Meeting #4. The day before the election Roseman, Agipito (another Grower Foundation representative), Vasquez, and the company's attorney met with Crew No. 1 at Rigi II at 10 a.m. Roseman told the crew he was in poor health, asked why they were doing this to him, and wanted to find another way to settle their problems.

-- Meeting #5. Immediately after work the same day, Roseman (accompanied by the same persons who had been at the earlier meeting) spoke to all of the crews near the bridge at Rigi II. He read from a paper, talked about the benefits the company offered, mentioned the fact that workers would have to pay 2% of their earnings for union dues, and asked for a no-union vote.

-- Meeting #6. Sometime during this period, there was a gathering at Manual Torres' home in Fairfield attended by a number

(Footnote 2 continued----)

speaking, it is difficult to determine what Tavizon said himself and what he simply translated. The problem is not serious because both were acknowledged to be supervisors and their involvement was such that Rigi is responsible for their comments and actions under the traditional doctrine of respondeat superior.

3. The role of the foundation in administering employment benefits and its involvement in the election campaign are sufficient to deem its agents to be agents of Rigi. See Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.3d 307, 320.

of permanents and by Emilio Ybarra of the Grower Foundation. Ybarra asked that they give Roseman a chance and invited them to a roast at the local park.

There were other meetings with other crews, but they are less important because they do not disclose employer knowledge of union sympathies.

All of the alleged discriminatees attended the pre-election conference, and Dario Torres and Patricio Rios acted as election observers for the UFW. At the election on September 23, 1981, 19 votes were cast for the UFW and 22 votes for no-union. There were five challenged ballots. After resolution of three challenges, it was determined that the union had lost, 24 to 20.

The events which led to the instant complaint all occurred during the next five months. Since they concern the company's treatment of individual workers, they are best described and analyzed by taking each worker separately, bearing in mind, however, that Rigi's motives in those instances where a violation is found constitute evidence of anti-union animus which carries over to other instances involving other workers.

IV. JAVIER PANIAGUA

Javier Paniagua is the only temporary among the alleged discriminatees. He began working for Rigi during pruning in December 1980; he returned in May 1981 for summer training and tying; and he worked the 1981 harvest when the election was held. This pattern of reemployment makes him one of the five to seven "regular" temporaries who were utilized for those operations which could not be accomplished by permanents alone.

A. Union Activity and Employer Knowledge

Although not involved in the demand for an employee handbook, Paniagua was a member of Crew No. 1 and accompanied the permanents to meet with the UFW. He testified that he passed out cards and leaflets and talked to workers both in and out of his crew. Other workers corroborated this.

He was among those passing out leaflets near the office when Tavizon came over and asked them to move; and he appears to have been among those passing out leaflets two or three days before the election when Tavizon and Dedini were nearby.

At company meeting #4, the day before the election (supra, p. 10), he spoke up, saying, "Let's go, because we're losing out on making money," and "Let's go . . . we are already committed [to vote for the union]" (II:86). He may also have spoken up later that day at meeting #5 (I:86, supra, p. 10).

B. The Layoff and Refusal to Rehire

Paniagua was laid off by Tavizon at the conclusion of the 1981 harvest in late October. He and Tavizon disagree over what was said. He testified that Tavizon complimented him on his work and, when he indicated that he wished to return for pruning, told him that he would be called if there was work (II:88). Tavizon denied talking with Paniagua about returning to work as a pruner (V:65).

Based on the testimony of the permanents who were present, what most likely happened was that Tavizon said nothing to Paniagua at the end of the harvest about contacting him personally, but did say something to the group about utilizing a mail recall procedure.

As it turned out, Tavizon did not use a mail recall;

instead, after being told by Dedini that pruning would commence November 30, 1981, he called Pedro Rios three or four days before work was to begin and told him "to let all the workers know because we had to get back on the pruning." (III:94). I do not credit Tavizon's testimony that he told Rios exactly whom to call. The notification system was looser and more informal than that.

Rios then proceeded to call permanent employees Ponciano Mata and Manuel Torres, and he asked Torres to notify Paniagua. Torres left word at his home a day or two before work began.

Since this was the way he had been rehired for summer training and tying in 1981 and for the 1981 harvest, Paniagua was satisfied that, even though he had not received any written notification, he would have a job so long as he appeared on November 30. However, when he showed up, Tavizon told him that there was no work because he had failed to make contact beforehand. A few minutes later when the two again spoke, Tavizon repeated his explanation, and Paniagua said, "Well, my understanding was that they were going to let us know through some cards or flyers when work was going to begin" (II:91).^{4/} The conversation ended with Tavizon saying that additional workers might be needed and Paniagua leaving his telephone number. Tavizon testified that Paniagua failed to ask for work in winter tying (which was to begin a week later). Tavizon was being unduly technical; for, in almost the same breath, he went on to say that workers hired for tying "came to see

4. Note that he said nothing about any promise by Tavizon to call him personally (see also G.C. Ex. 8), thus casting doubt on his earlier testimony to that effect (II:88).

me . . . looking for work and I would decide to put them in tying" (II:69) (emphasis supplied).^{5/}

Paniagua heard nothing more from Rigi and so, two weeks later, he returned. Dedini told him that there was no work and asked him to leave.

The company's position is that only seniority employees are called back to work; temporaries must contact Tavizon beforehand and secure a commitment from him (V:19). According to Tavizon:

For two or three weeks people come up to me, come up to my house to see if there are jobs available. And then as soon as they give me the order to start working, then those people who come to see me first, I'll tell them, go and work here. (V:62).

He testified that this procedure was followed for all the temporaries among the 15 pruners who began work on November 30 and the 13-14 who started on the following day. Even the three who started later in the month had contacted him before work actually began and secured his permission (V:70). When questioned about the re-employment of Francisco Hernandez, a former permanent employee, Tavizon likewise described his earlier contact with the man (V:74).

As for winter tying, Mata named several temporaries who worked either in that operation or in pruning (see also G.C. Ex. 9 & 10). Tavizon testified generally that all had contacted him beforehand (V:69). He was specifically questioned only about Francisco Guillen and Miguel Real; and in both cases he explained that their employment had been arranged before pruning began

5. Nor could there be any question of experience: Permanents and "regular" temporaries were expected to work in a variety of operations and Paniagua himself had previously done summer tying, an admittedly more difficult task (I:20).

(V:75-76). Ramon Real corroborated this with respect to his nephew, Miguel (V:96).

C. Analysis and Conclusions

To establish that an adverse action taken against an employee violates section 1153(c), the General Counsel has the initial burden of proving by a preponderance of the evidence that the employee engaged in protected activity, that the Respondent knew about it, and that a causal connection, or nexus, exists between the employee's involvement and the adverse action taken against him. Lawrence Scarrone (1981) 7 ALRB No. 13; Jackson and Perkins Rose Company (1979) 5 ALRB No. 20.

Here the General Counsel has established Paniagua's involvement in protected activity and Rigi's awareness of his involvement. Not only did he hand out cards and leaflets and talk with workers (supra, p. 12), but on two occasions he did so with company representatives present (supra, p. 12). In addition, he spoke up in favor of the union at two of the six meetings or gatherings held by Rigi management (supra, p. 12). Then, too, he was a member of Crew No. 1, the crew which management had identified as the locus of pro-union sentiment (supra, p. 8-9). Although he was a temporary worker, he aligned himself with the permanents in that crew who sought out and spoke up for the UFW (supra, p. 12).

The difficulty with General Counsel's prima facie case lies in establishing a nexus between union activity and adverse action. In cases involving the failure to rehire this means proving: (1) that he applied for work; (2) that work was available, and (3) that the employer's policy was to rehire former employees. Anton Caratan

and Sons (1982) 8 ALRB No. 83; Prohoroff Poultry Farms (1979) 5 ALRB No. 9.

While the latter two requirements are easily met, the first -- proper application for work -- is questionable. Rigi's position is that while permanents may rely on being contacted to return to work; temporaries may not. Each must contact Tavizon before work begins and secure a commitment from him. Paniagua did not do so and was therefore not rehired.

General Counsel concedes that it is the policy for most temporaries, but asserts that there is a favored group of temporary employees -- the 5 to 7 "regulars" -- who are rehired in the same fashion as permanents, and that Paniagua was one of them. In support of this contention General Counsel did succeed in proving that Tavizon had utilized the informal network which existed among permanents in hiring Paniagua for the 1981 summer training and tying and for the 1981 harvest, and that the same network had been used prior to the 1981 pruning in rehiring Ismael Arcienaga, Carlos Romero and Rosendo Angulo^{6/} (III:97).

On the other hand, it was established through Ramon Real that his nephew Miguel -- an experienced temporary who lived with him -- does not rely on the company to contact him or his uncle, but "keeps a lookout for the job" by checking with Tavizon (V:96). Nor is there any evidence that prior to the 1981 pruning the other "regular" temporaries -- Ciciglio Rios, Francisco (nee Joaquin) Hernandez, and Francisco Guillen -- were hired any differently than

6. Angulo worked in 1980, but not in 1981.

other temporaries. And, when it comes to the 1981 pruning and tying, General Counsel was unable to prove that any experienced temporaries were rehired without first contacting Tavizon and securing his commitment.^{7/} Tavizon was specifically questioned about two -- Miguel Real and Francisco Guillen, and in both instances he testified that the workers had previously contacted him (V:76-77).

In the face of this evidence, it is difficult to say that Rigi has an established or consistent policy of rehiring experienced temporaries by simple recall.

There still remains the possibility that -- as Paniagua testified -- at the conclusion of the 1981 harvest, Tavizon personally told him that he would be called if there was work. The repudiation of such a commitment would be strong evidence of a link between the failure to rehire and his union activity.

I cannot, however, credit Paniagua's testimony that he was promised a job. Not only did Tavizon deny it, but it does not comport with the explanation Paniagua gave to Tavizon on November 30 for not contacting him earlier. Had he received such a commitment, it would have been natural for him to challenge Tavizon with it. But he did not. Instead, he explained, "My understanding was that they were going to let us know through cards or flyers when work was going to begin" (II:91, see also G.C. Ex. 8). This, taken together with the testimony of the other permanents (III:92), makes it more

7. For pruning and tying, nine temporaries were hired who had previously worked for Rigi (G.C. Exs. 9 & 10); three of them -- Francisco Hernandez, Carlos Romero and Francisco Guillen -- were identified by witnesses as "regular" temporaries.

likely that Tavizon spoke generally about utilizing a mail recall and said nothing about personally contacting him.^{8/}

All that remains, then, is the fact that on two prior occasions Paniagua got work without the necessity of obtaining a prior commitment; while, on this occasion, he did not. This circumstance, without more, is not enough. No promise was made. No established policy was violated. It might well have been that the reason he was hired on the previous occasions was that a full work complement had not yet been secured. The most that can be said is that the failure to rehire Paniagua was suspicious, but a suspicion does not suffice to establish a violation of the Act. Rod McLellan Company (1977) 3 ALRB No. 71.

The same is true of the failure to hire him a week later for winter tying. General Counsel was unable to find any worker who had not already obtained a commitment from Tavizon before Paniagua asked for work on November 30.

General Counsel has thus failed to make a prima facie case that Respondent violated section 1153(c) or (a) in its treatment of Javier Paniagua; and I therefore recommend dismissal of that allegation of the complaint.

V. PONCIANO MATA

Ponciano Mata transferred from Mondavi to Rigi in December 1979, two months after the initial complement of transferees. He

8. There is also considerable doubt that Tavizon intended to utilize the mail recall procedure for any but the permanents. Dario Torres believed it to be so restricted, and Pedro Rios' testimony was unclear. Paniagua himself testified at one point that he believed -- at least before the election -- that only permanents would be recalled by mail (II:101-102).

was a seniority employee and a member of Crew No. 1.

A. Union Activity and Employer Knowledge

Mata was the most active of all those engaged in the Union campaign. He met with the UFW representative; he gathered authorization cards and passed out leaflets; and he spoke with workers in his and other crews about the benefits of unionization. He was present, handing out leaflets, on each of the three occasions when Dedini and/or Tavizon were standing or passing by (I:62-65).

He testified that he spoke up at every one of the six meetings held by the company (supra, pp. 9-11), and his testimony is corroborated by one or more other employees for five of the six meetings. His comments concerned not only his individual problems, but the loss of overall benefits and the unresponsiveness of management. He also indicated his reluctance to give the company "another chance." On one occasion, Rossman thanked him "for opening his big mouth" (I:69, II:85, III:86).

Earlier he had been involved in the request for an employee handbook and in the brief work stoppage (supra, p. 6). He attended the pre-election conference.

B. The Written Warning and Its Aftermath

On the first day of pruning in 1981 (the same day Paniagua was refused rehire), Tavizon announced that workers could now be terminated upon receipt of two written warnings. Before that, three had been required.

Two weeks later, on December 15, while Mata was pruning vines at Rigi I along with other members of his crew, Dedini instructed Tavizon to "ticket" him because, instead of cutting close

and clean, he was leaving stubs about a half inch out (V:22; G.C. Ex. 7). Tavizon agreed with Dedini's assessment.

Mata objected and afterwards examined the work of his fellow crew members. He testified that it was the same as his. Dario Torres and Pedro Rios likewise checked his work and stated that it was comparable to theirs. All three claimed it was better than that being done by the other crews. Mata is an experienced pruner; however, pruning is paid at piece rate and so hasty work is always a possibility.

Two or three days later, Mata was working at Rigi I when Paniagua returned (supra, p. 14). He was speaking with Mata when Dedini and Tavizon arrived. After telling Paniagua to leave, Dedini took Mata to task for having invited Paniagua to the field and told him that this made his already blotted record worse. Mata replied that he had nothing to do with Paniagua's visit.

C. The Layoff and Discharge

At the end of the 1981 pruning season Dedini decided that because of the rains he would lay off all the temporaries and two of the permanents as well. Based on the November 30, 1981 Seniority List (GC Ex. 3), he selected Patricio Rios (#7 on the List) and Mata (#6) for layoff. This was the first layoff of permanents at Rigi.

On the day of the layoff, January 15, 1982, Dedini and Tavizon arrived at the field at 3:30 p.m. Because Patricio Rios had previously asked and received permission to leave early, they spoke with him first, giving him his check and informing him of the layoff. When he asked why he was being laid off, Tavizon told him there was no more work and Dedini said he had no business asking.

(IV:37.)

The two supervisors then walked over to the field to which Mata had moved. On the way they distributed checks and informed those who were being laid off that they were to continue working until 4:30 because that was the quitting time used in computing their pay. Mata was the last person with whom they spoke. He was unhappy about the layoff. Initially, he asked why he was being laid off rather than Dario Torres or Pedro Rios, both of whom had less seniority. Tavizon told him that his seniority at Mondavi did not carry over to Rigi and that, based on the records, he had less seniority than Dario or Pedro.

At this point there is a significant disagreement over what was said. Mata testified that he was told that he could go to the office "right now" and check his record. Dedini and Tavizon, on the other hand, testified that Mata was told that he could only do so "after work." Pedro Rios was standing a few feet away. His version differs from Dedini's and Mata's in that no time -- either "right away" or "after work" -- was specified. According to him, Tavizon told Mata, "[I]f he didn't believe that, he should go to the office and look over the records that were there" (III:105).

Mata walked over to Pedro to ask about the company's interpretation of seniority, and Pedro told him that if only Rigi seniority counted, Ramon Real (#1 on the list) had less seniority than any of them because he had not actually begun working at Rigi until late December 1979. Mata then went to check his records at the office. When he arrived -- somewhere between 4:00 and 4:20 p.m -- Dedini asked what he was doing there. He replied that he wanted

to see his records. Dedini responded that he had been told to wait until after work. Mata disagreed saying he had been told to come at once. Dedini thereupon fired him for leaving work without permission, lying about being told to come at once, and having had a prior written warning within 30 days (V:31-32; cf. G.C. Ex. 8). He was ordered to leave the premises or the sheriff would be summoned. There was uncontradicted testimony from Mata that, although the office was open from 8:00 a.m. to 5:00 p.m., workers had been told on previous occasions not to come after 4:30 because Dedini and Tavizon needed the final half hour for their own business (II:71).

D. Analysis and Conclusions

As the most active -- and vocal -- union adherent, there is little doubt that management was aware of Mata's union sympathies and activity. Indeed, Roseman's comment about his "big mouth" (supra, p. 19) would, standing alone, be enough to satisfy this element of General Counsel's prima facie case.

As for the requirement of a causal connection or nexus between his union activity and his discharge, a number of factors come into play. First of all, there is the issue of timing. Had Mata been the only union activist disciplined, then his discharge, coming as it did four months after the election, would have little significance. But there is more than that. Not only Mata, but every one of the permanent employees -- five in all -- who actively participated in the campaign was discharged -- or, in one case, demoted -- within five months of the election. Since these permanents were the core group whose dissatisfaction had led to the attempt at organization (see supra, p. 9), the timing of the

discipline takes on a much more ominous cast, one which may properly be taken into account in determining the existence of a nexus between union activity and employee discipline.

Second, and even more important here, is management's perception of Mata. He is one of those workers who -- union or no union -- is likely to complain, to speak up and to challenge supervision -- sometimes justifiably, sometimes not -- about perceived wrongs either to himself or to the group to which he belongs. Moreover, in expressing dissatisfaction, Mata adopted a more strident tone than most. This stridency and sense of being wronged was evident, not only in his demeanor while testifying but in his work history as well. A good example is his long-standing and oft repeated complaint about the \$600 he lost because he was not allowed to drive the tractor until he obtained a doctor's release for his previous medical condition.

With workers like Mata there is always the risk that a quick-tempered supervisor, anxious over his authority, will act precipitously in meting out discipline, and will do so, not simply because of the problem at hand, but because of his attitude toward the worker's previous behavior. When that behavior includes -- as a substantial component -- union and protected activity, then it is legitimate to ask whether the disciplinary action would have been taken but for the employee's previous exercise of statutorily protected rights.

Dedini is just such a quick-tempered supervisor. Both in his demeanor while testifying -- especially his tone during cross-examination -- and in his description of encounters with

workers -- and theirs with him -- there is the unmistakable flavor of a man whose temper is close to the surface and likely to come to the fore when his authority is challenged. One example is telling Rios that he had no business asking why he was being laid off (supra, p. 20). In his dealings with Mata, this is especially evident. When Paniagua returned to Rigi in mid-December looking for work, Dedini ordered him to leave and then accused Mata of being responsible for the visit, all without evidence and without first giving him an opportunity to explain.

This same attitude was manifest in the events surrounding Mata's discharge. For the first time permanent employees were being laid off; and in view of the discrepancy in the order of seniority between the May 9 Seniority list (G.C. Ex. 2) and that of November 30 (G.C. Ex. 3), Mata's desire to check the record was legitimate and reasonable. His job was at stake. Yet, when he went directly to the office, 10 to 30 minutes before quitting time, Dedini made no attempt to find out whether his direction to wait until after work had been misunderstood or possibly mistranslated; instead, he accused Mata of lying, fired him on the spot and threatened to call the sheriff unless he left at once.

Thus, even assuming that Dedini did tell Mata to wait until 4:30 before visiting the office, his anger and haste in the face of what was, after all, an understandable and minor breach of discipline, indicate that his overall perception of Mata as a "troublemaker" affected his judgment. A good portion of the "trouble" Mata made -- and of which Dedini was well aware -- had to do with his involvement in union and protected activity.

What we have, then, is a mixed motive discharge. In such cases, once the General Counsel succeeds in proving its prima facie case, then -- under the Board's present formulation of the "Wright Line" test -- the burden shifts to the Respondent to prove by a preponderance of the evidence that the discharge would have occurred even absent the employee's protected activity. Royal Packing Company (1982) 8 ALRB No. 74; Zurn Industries v. N.L.R.B. (9th Cir. 1982) 680 F.2d 683.

Here, the timing, Dedini's perception of Mata, and the severity of the penalty imposed when weighed against the seriousness of the infraction^{9/} are enough to supply the required nexus and complete the prima facie case.

The burden therefore shifts to the Respondent to prove that the discharge would have occurred regardless of Mata's protected activity; i.e., that there was good and sufficient cause or, at least, that there was some cause other than that proscribed by the Act.

One way to do this would be to show that Mata disobeyed Dedini's instructions and left work early. But there are two problems with such a contention: first, the penalty remains disproportionate to the offense; and second, it is difficult to

9. In weighing the seriousness of the offense against the penalty imposed, I have assumed that the prior warning notice (given December 15) was proper, making this a "second offense" for which "corrective action" would be permissible. I find, nevertheless, that Rigi violated its own policy that "corrective action . . . be in line with the severity of the infraction" (see Resp. Ex. 1: Disciplinary Procedure). See also, American Thread Company v. N.L.R.B. (4th Cir. 1980) 631 F.2d 316, 322; Neptune Water Meter Company v. N.L.R.B. (4th Cir. 1977) 551 F.2d 568, 570.

prove that the instruction was actually given. Dedini and Tavizon claim it was. Mata and Rios say it was not, and their claim has the support of Mata's uncontradicted testimony that the office was closed to workers after 4:30.

Another tact would be to concede the inappropriateness of the discipline, but argue that it's imposition had little or nothing to do with union or protected activity. That it was due, for example, to Dedini's gratuitous and uncontrollable anger. But Respondent has not carried this burden. Dedini's anger, while disproportionate to the offense committed, was not random. On this record, it was confined to union adherents.

I therefore conclude that Respondent violated section 1153(c) and derivatively section 1153(a), in discharging Ponciano Mata.

In her brief, counsel for the General Counsel suggests that the Warning Notice given to Mata on December 15 was motivated, not by poor work, but by his union activity.

I find that that claim, while not charged or alleged in the complaint, was fully litigated. I cannot conclude, however, that a violation was committed. The element of timing, described above, is present; but that alone is not enough. Unlike the discharge, a warning notice was appropriate to the offense; and it was not given in anger as a result of a challenge to Dedini's authority. To make out a prima facie case, General Counsel had therefore to prove that there was no basis for the warning notice; but, in view of the conflicting testimony on the issue, that burden was not met.

VI. DARIO TORRES, PEDRO RIOS AND MANUEL TORRES

Manuel Torres was one of the original transferees from Mondavi. Dario Torres and Pedro Rios were hired a month later in November 1979. All three were permanents and worked in Crew No. 1. All were illegal aliens.

A. Union Activity and Employer Knowledge

All three were involved in the demand for an employee handbook and in the work stoppage in August 1981. They were also among those who went to the UFW seeking representation.

Dario Torres testified that he passed out cards and leaflets and talked to workers both in his and in other crews, and other workers corroborated his testimony. The same was true of Manuel Torres. Pedro Rios was less active: Although he spoke with workers in the other two crews about the need for unionization, he passed out cards and leaflets on only one occasion.

All three were identified as being present at one or another of the three occasions where leafletting occurred in the presence of Tavizon and/or Dedini (supra, p. 8).

In the company meetings, Dario Torres appears to have been almost as vocal as Mata. There is testimony that he spoke up in five of the six, indicating that it was too late, that management had left the workers no alternative, and that the temporaries should join with the permanents in supporting the Union.

Pedro Rios spoke up at three of the meetings (#2, #4 and #5) also indicating that it was too late, the workers were already committed to the Union.

Both Mata and Dario Torres identified Manuel Torres as

-- In March 1980, Mata, Pedro Rios, Dario Torres, Manuel Torres, Ramon Real and Robertro Mendoza were checking sprinklers at Rigi II. Dedini and Tavizon were above them at the reservoir next to the field. Dedini (with Tavizon translating) told the workers to move to the other side of the field so that an INS patrol passing by across the river could not see them (I:124, III:50-51, III:116).

-- Another time in 1980, Mata was removing leaves from bins at Rigi with Pedro Rios and Manuel Torres when Tavizon, who was atop a tractor, said, "Men, everyone down, keep down. The Immigration is coming If they come in I'll tell you. I'll warn you" (I:123).

-- One day during Summer 1981, Dedini and Tavizon came out to Rigi I where Patricio Rios, Pedro Rios, Dario Torres and Mata were working and told Dario that Patricio's wife had called to say he should not go home because the INS had been there (III:52, I:125-126, III:116). Mata then told Tavizon that he was going to telephone his wife and tell her not to open the door for the INS (I:127).

Dedini and Tavizon denied each of these incidents and claimed they had no knowledge that any of their workers were illegal aliens. Dedini said that Rigi had the same policy as Mondavi: No worker would be hired if his application revealed him to be an illegal and any employee who was discovered to be illegal would be terminated.

In the face of the workers' detailed descriptions of specific instances revealing management awareness of their status, I cannot credit these denials. There is just too much mutually

corroborated evidence to the contrary. Tavizon's overall demeanor was defensive and lacking in candor, both here and also with respect to his awareness of the Union activities of the permanents in Crew No. 1; and the same is true of Dedini. Management was not only aware but actually participated in the concealment of its illegal employees.

C. The Discharge of Dario Torres, Pedro Rios and Manuel Torres

On the morning of February 5, 1982, all three were taking a break from putting staples on vines at Rigi II near the Silverado Trail when an INS patrol car drove slowly by, spotted them, and turned into the field. They ran toward the river to avoid being caught, and at least one INS officer pursued them on foot. Dario and Manuel crossed the river and proceeded separately back to the office to ask permission to go home and change clothing. Pedro remained hiding in the bushes beside the river.

When Dario arrived at the office, soaking wet, he met Dedini who asked what had happened. Upon being told, Dedini asked that he wait while Tavizon was summoned (probably by radio).

Manuel arrived and after him, Tavizon. Dedini came out of the office, and the supervisors asked Pedro's whereabouts. The two workers were uncertain. Dedini was worried that he might have drowned and so both supervisors went looking for him. They found him hiding by the river bank and told him to take another car back to the office.

Dedini and Tavizon returned and went inside. At this point, or shortly thereafter, Dedini called the company attorney. He then sent Tavizon out, once or twice, to ask exactly what had

happened and to get the workers to say why they had run. Tavizon did so, characterizing the question as a foolish one. Upon getting their replies, he told the workers, "It isn't worth a shit anymore." When Dario asked if that meant they were fired, he nodded his head (III:41).^{10/}

Tavizon then went back inside and, a short while later, both supervisors came out. Dedini, with Tavizon translating, told the three that there was no question in his mind that they were illegal aliens and had to be terminated. He said he was sorry; if the INS had not come they could have continued working "for the next 20 years" (III:43), but since they had been seen on the property, the INS would return and the company would be in trouble. Dario has him going on to say, "and we [the company] could receive a bond, bail bond, up to \$20,000" (III:43) (presumably he meant a fine).

The checks were made out, and the employees were given some coffee and presented with termination slips (GC Ex. 6 and 7). When Dario said that the real reason for their firing was that they had tried to organize, both supervisors denied it. Tavizon then drove the workers to Dario's apartment in Napa. On the way he told them, "God is everywhere, he will help you."

Neither Tavizon nor Manuel Torres testified about the discharges; and Dedini's testimony, while much sketchier, is for the most part consistent with that of Dario and Pedro.

10. Dario has this exchange occurring earlier, before Pedro arrived. Its occurrence at this point is consistent with Pedro's testimony and with the unfolding situation.

This was the first instance in which an INS patrol actually entered Rigi properties to pursue workers. In the instances described earlier, patrols had only passed by along the road (supra, p. 28-29).

D. Analysis and Conclusions

All three workers were active in the campaign and their sympathies were well known to management (supra, pp. 27-28).

With them, as with Mata, the timing of the adverse action helps establish a nexus between their union activity and the later discharges (see discussion, supra, p. 22). Standing alone, however, it is not enough for a prima facie case. Additional proof is needed.

General Counsel was able to find that additional proof in the consistent and detailed descriptions given by workers of incidents where management not only acknowledged their illegal status, but participated in their concealment (supra, pp. 28-29). Had Dario and Manuel not been led to expect such treatment, it is unlikely that they would have so freely admitted to Dedini and Tavizon the reason they arrived at the office, soaking wet.

This reversal of previous policy, taken together with the timing of the discharge, is enough under Royal Packing Company, supra, to call into question the stated reason for the discharges and supply the nexus which shifts the burden of proof to Respondent.

For its part, Respondent was able to show that this was the first time the INS had actually entered Rigi property. That meant that the INS knew -- or at least strongly suspected -- that Rigi had illegal workers. Dedini, after speaking with Rigi's lawyer, told

the workers that the INS would return and the Company would be in trouble.

Were it true that the company would be in trouble or even were it shown that Dedini in good faith believed that was the case, then there would be some substance to the defense. But it was not true. Hiring undocumented workers is not a violation of federal law; and California employers are -- and have been for some time -- immune from prosecution under Labor Code section 2805 (which makes it a misdemeanor to knowingly hire undocumented workers if such employment has an adverse effect on lawful resident workers). In Dolores Canning Co. v. Howard (1974) 40 C.A.3d 673, that section was ruled unconstitutional and its enforcement enjoined.^{11/}

As for any good faith, albeit erroneous, belief that Rigi would be in trouble with the INS, there is nothing to indicate that Dedini received incorrect information from his attorney,^{12/} or that he had any other legitimate bases for believing that he or his company would be prosecuted. See Nishi Greenhouse (1981) 7 ALRB No. 18.

His statement to that effect must therefore be viewed as pretextual. All of which lead to the conclusion that Respondent violated section 1153(c), and derivatively section 1153(a), by

11. A similar result was reached in De Canas v. Bica (1974) 40 Cal.App.3d 976, 115 Cal.Rptr. 444. On review, the U.S. Supreme Court held that section 2805 was not per se in conflict with the Federal Immigration and Nationalization Act and remanded (De Canas v. Bica (1976) 424 U.S. 351), but no further proceedings have been taken, and the section is not being enforced. Cf., N.L.R.B. v. Apollo Tire Company (9th Cir. 1979) 102 LRRM 2043, 2045.

12. Nor is it clear that erroneous advice of counsel would be a complete defense; but I do not reach that issue.

discharging Dario Torres, Manuel Torres, and Pedro Rios on the pretext of a company policy against employing illegal aliens, when the actual reason, as established by a preponderance of the evidence, was their union sympathy and activity.

VII. PATRICIO RIOS

Patricio Rios was the least senior of the permanents. Tavizon hired him in August 1980, because he needed a forklift driver. Before that Patricio had driven a tractor and disced in other crops. His only experience with grapes had been in 1977 when he picked at the Rigi properties. After coming to work, he performed all of the tasks done by other permanents.

A. Union Activity and Employer Knowledge

Patricio testified that he was actively involved, passing out cards and leaflets and talking to workers both in his and other crews; his involvement was corroborated by other workers.

He was one of those who passed out leaflets at the office when Tavizon, and perhaps also Dedini, was present. He spoke up at company meeting #4 (and #6 as well) saying to Roseman that the workers had no alternative but to organize because they had not received the benefits due them. (I:83, IV:22, 25-26). And Mata identified him as speaking up in company meetings #1 and #2 (I:69-71, 76; III:13). He attended the pre-election conference and served as an observer for the UFW during the election.

B. His Work History at Rigi

1. August 1980 to March 1981

In August 1980, Patricio began working as a forklift driver for the champagne harvest and continued doing so throughout the hand

harvest. During pruning, he performed the same tasks as other permanents (pruning, tying and so on). After pruning, he worked on into spring cultivation where he was assigned, among other tasks, to sulfuring -- driving a tractor which has a device to spread a film of sulfur over the developing grapes. Sulfuring takes two or three days and is done bi-weekly to prevent mildew. It is not difficult and there is no indication that he failed to do well at it or at any of the other normal pruning and cultivation tasks.

2. Frost Protection

About this time (March 15 to April 15) he was also assigned to frost protection. This requires that workers go out to the fields at night during cold weather. When the temperature drops to freezing, they must turn on the sprinkler systems thereby coating the foliage with water, and insulating it from the frost. Patricio was called out two or three times, and Dedini considered him a "trainee." Although he denied being so classified, he did admit on cross-examination that Tavizon was always with him and was the one who actually operated the equipment.

Dedini testified that Tavizon had reported to him that, on one occasion, Patricio failed to turn on the sprinklers before the temperature fell below the critical level. At the time nothing was said to Patricio; and, at the hearing, he explained that other workers had already completed the job before he arrived. Dedini's testimony was hearsay; and since Tavizon did not cover the point, I accept Patricio's explanation.

3. Discing

Between mid-March and the end of May, the fields are

disced. This involves using a tractor to pull a discing machine back and forth between the rows of vines. Care and skill are required to avoid cutting vines and breaking stakes and trellises. Most discing was done by Ramon Real and Ponciano Mata; however in May, Patricio was assigned to disc first at Rigi I for three days and later at Rigi II for two or three days. He had disced other crops but never grapes.

Rigi owned three discing machines: two large ones and a small one. One of the large machines did not work properly. Its rods were bent, causing it to trail unevenly, thereby increasing the risk of injury to vines, stakes and trellises. In addition, it had a cracked bearing. Mata had told Tavizon that the disc was no good; and, according to Patricio, neither Mata nor Ramon Real were willing to use it.

It was this discing machine which he was given to use at Rigi I in mid-May. Both Tavizon and Dedini were present when he began. Initially, the discs were too far apart and the machine got stuck in a vine. After adjusting it for him, the two supervisors left and he began work. A little later Dedini returned and asked how many plants had been cut. He said just one. Later on he told Tavizon that the bent rods were damaging some of the vines, but Tavizon told him to take it easy and continue. The two supervisors returned at intervals throughout the day, but did not speak further with him.

He continued to disc the next day and complained on several occasions about the cracked, squeaking bearing, but was told to keep working. He testified to breaking some stakes and cutting some

plants and wires. Since Tavizon had been inspecting his work all along, he did not feel it necessary to again mention the damage. On the third day the bearing went out completely, and he left off discing.

Later that month he used a small disc at Rigi II. There is no indication that he had any problems there.

Patricio estimated that he cut a total of 15 plants during the three days he disced at Rigi I, an amount which he did not believe to be excessive. In June, Mata was assigned to clean up the dead plants in the field Patricio had disced. He testified to finding 10-12 plants torn up. Dedini testified that he did not discover the damage until July when Crop Care, an independent monitoring service hired by Rigi, found 25 vines cut off at the base and destroyed.^{13/} Tavizon did not testify about Patricio's work, and Dedini did not challenge his description of what occurred at Rigi I or deny that the disc was in poor condition. Nor did he claim to have said anything about the damage to Patricio until October when a dispute arose over Patricio's right to return to work on the forklift (infra, p. 31). Patricio says he heard nothing about the problem until his demotion on February 9, 1982 (infra, p. 32).

I therefore accept Patricio's description of the problems with the machine, his notification of his superior, and his being told to continue discing with the defective machine. As for the seriousness of the damage, while it was greater than would be

13. Rigi plants 454 vines per acre.

expected of an experienced operator using good equipment, it was not so serious that Dedini -- when he learned of it in July -- was impelled to take immediate action (V:37-38). When he eventually did not, he only issued an oral reprimand, not a written warning.

4. The 1981 Harvest

Patricio began the 1981 harvest season (the period in which the campaign and election occurred) driving the forklift, as he had the previous year. However, at the conclusion of the champagne harvest he left off driving to join Crew No. 1 as a picker. Since forklift operators are paid by the hour and pickers by crew tonnage, he increased his earnings by making the change. Tavizon then hired Bill Walten for the forklift.

At the end of the 1981 hand harvest, there was a three-day machine harvest at Rigi I,^{14/} and Patricio asked Tavizon if he could return to the forklift; Dedini came over and told him that he could not because it would mean laying off Walten. Patricio claimed his seniority entitled him to the position. Dedini denied this; though he later testified that when a machine harvest follows a hand harvest, a senior employee has the option of returning to work on his machine (V:53).

C. His Removal From Machine Work and Demotion to Temporary Status

Patricio returned to work for pruning in November and was laid off along with Mata on January 15, 1982 (supra, p. 20). On February 8 Tavizon called him back to work and asked him to come early the next day to meet with Dedini. According to Patricio,

14. This would have been after the Union election.

Dedini began the meeting by telling him that he and Roseman had concluded that he could no longer operate any of the machines because of the damage he had done to the vines. Dedini told him, "Not counting wire and poles, Roseman could take you to court for up to \$3,000 for the plants you cut" (IV:38), and, according to Patricio, he went on to say:

You're going to be like a temporary worker . . . because three new tractor drivers are coming in. They will do your work and they will have more seniority than you I think it would be happier for you if you just got out of here and looked for work elsewhere . . . because here you will never get any seniority. (IV:39).

Patricio described Dedini saying all of this in a rapid fire, angry fashion.

Dedini says he told Patricio that, he was being recalled only for specific work, he would not be allowed to operate any equipment or perform frost protection because of the damage he had done the previous year (V:36,40).

While both versions of the meeting agree in important respects -- elimination of machine work, loss of seniority rights, and the reason given for these changes -- they differ significantly in tone and detail. Patricio described Dedini as speaking rapidly and angrily in a manner which left little doubt about Patricio's future at Rigi.

Having observed Dedini at the hearing, I accept Patricio's description. Dedini's demeanor has already been commented upon (supra, p. 23-24); it struck me as taciturn and irritable, and there

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was unmistakable sense of controlled anger in his manner.^{15/}

Patricio returned to work February 9 putting in wire, stapling, suckering and planting. He received no tractor work and was laid off about a month later. He was later recalled for suckering and worked two weeks before again being laid off. He received no frost protection work.

D. Analysis and Conclusions

The complaint contains two distinct allegations of discrimination against Patricio: (1) that he was demoted as a tractor driver and removed from the permanent seniority list on February 9, 1982, and (2) that he was removed from operating diesel machinery on March 15, 1982 (G.C. Ex. 1-G, paragraphs 10 & 11). The facts do not support the distinction. Whatever happened to Patricio took place on February 9; later events were the consequences of that action.

Before turning to the adverse action itself, the other elements of General Counsel's prima facie case deserve mention. Patricio's involvement in the union campaign and management's awareness of his involvement was just as pronounced as with other of the permanents (supra, p. 27); so those two elements are satisfied. Lawrence Scarrone, supra; Jackson and Perkins Rose Company, supra. The element of timing, already described, is likewise present

15. Patricio himself was not a good witness. His testimony was less than forthright in a number of particulars and his manner on cross-examination was evasive and hostile. I have therefore avoided crediting his uncorroborated testimony where it was disputed by company witnesses. There is, however, ample evidence of Dedini's manner, and my observation of his demeanor confirms it.

(supra, p. 22).

With Patricio there is, in addition, another element of "timing". The ostensible reason for stripping him of seniority and demoting him was the damage he had done while discing 10 months earlier, a failing which -- even by Dedini's testimony -- was not brought to his attention until 3 months after its discovery. This delay is suspicious, and is made more suspicious still because the union campaign and election occurred in the interim.

The clearest indication of a nexus between Patricio's union activity and the treatment he received is, however, Dedini's exaggerated response. First of all, there is good reason to doubt Patricio's culpability. The discing machine was defective, and he so advised Tavizon. Nevertheless, he was told to continue using it. Second, discing was only a secondary assignment (supra, p. 36), yet his alleged inability to do it was used to justify the elimination of other, regularly assigned functions for which he had never been criticized or censured -- sulfuring, operating the fork-lift, and the like. Indeed, Dedini went so far as to use it as a reason for depriving him of seniority protection. Third, in treating Patricio as he did, Dedini ignored the company's written Disciplinary Procedure providing that corrective action for carelessness or negligence would only come after a written warning and, even then, would be in keeping with the severity of the infraction (Resp. Ex. 1). American Thread Company v. N.L.R.B., supra; Neptune Water Meter Company v. N.L.R.B., supra. Finally, the punishment was administered in the same angry, almost threatening tone ("Roseman could take you to court for up to \$3,000) which marked Dedini's

treatment of Mata, and it is subject to much the same interpretation (supra, p. 23-25).

These factors forge a strong link between Patricio's union activity and his demotion and deprivation of seniority -- certainly a strong enough link to shift the burden of proof, under Royal Packing Company, to Respondent.

The problems with establishing poor work as a sufficient cause for corrective discipline have already been described. Neither the damage from discing nor the hearsay testimony about frost protection suffice. Respondent has not carried its burden of proof, and I therefore conclude that it has violated section 1153(c), and derivatively section 1153(a), by demoting Patricio as an equipment operator and depriving him of seniority. This is not to say that management could not have reassigned him to other work besides discing, only that -- under the circumstances here presented -- that reassignment and the other action taken against him would not have occurred but for his union sympathy and activity.

Although not charged, it could be argued that another violation was committed when Patricio was prevented from returning to the forklift during the final machine harvest of 1981. While this incident was fully litigated and while there is evidence that he was treated differently than Ramon Real in this regard, I cannot conclude that a violation was committed because it is unclear that Real's reassignment entailed laying off another worker (as Patricio's would), and because it is not certain that the machine harvests which occur sporadically during the hand pick are sufficiently discreet operations to allow for "bumping". In such

cases management is entitled to some leeway. This being so, the most that can be said is that the circumstances were suspicious; and that is not enough for a violation. Rod McLellan Company, supra.

REMEDY

Having concluded that Respondent violated sections 1153(c) and (a) by discharging Ponciano Mata, Dario Torres, Pedro Rios and Manuel Torres and by demoting and depriving Patricio Rios of seniority rights, each of them is entitled to immediate reinstatement to the same or similar job with full back pay.

The date from which back pay is to be computed is -- with the exception of Ponciano Mata -- the date the action was taken. With Mata, it is to commence February 9, 1982. The reason being that he was properly laid off just prior to his termination and would not have returned to work until February 9, the date Patricio was recalled. Back pay from January 15 would only be justified if the layoff itself (as distinguished from the discharge shortly thereafter) were a violation. General Counsel did not, however, succeed in proving that the November 30 seniority list, which furnished the basis for the layoff, was discriminatorily motivated. Respondent's Exhibit No. 3 -- the initial letter of transfer -- provides an adequate rationale for granting the employees named therein credit for their Mondavi service, while denying it to the others (of which Mata was one). The discrepancy between the May 9 seniority list and that of November 30 is insufficient to overcome this. It can properly be seen as an attempt to clarify a previously ill-defined situation.

The other items of remedial relief I recommend as necessary

in view of the nature of the violations, Respondents' business, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management Inc. (1977) 3 ALRB No. 14.

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

ORDER

Pursuant to Labor Code section 1160.3, Respondent Rigi Agricultural Services, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, demoting, depriving of seniority, refusing to rehire, or otherwise discriminating against any agricultural employee in regard to hire or tenure 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.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed them 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 Ponciano Mata, Dario Torres, Pedro Rios, Manuel Torres and Patricio Rios immediate and full reinstatement to their former positions or to substantially equivalent positions, without prejudice to their seniority or other employment rights or

privileges.

(b) Make whole Ponciano Mata, Dario Torres, Pedro Rios, Manuel Torres and Patricio Rios for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with its Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to the 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 periods and the amounts of backpay and interest 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 its 1980-81 and 1981-82 annual cycles of operation, approximately November 1980 through October 1982.

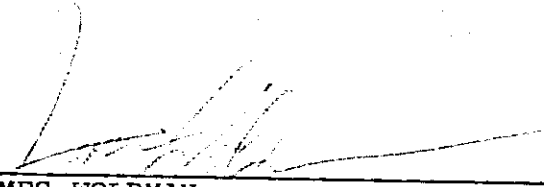
(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the

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 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 with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: December 31, 1982



JAMES WOLPMAN
Administrative Law Officer

DO NOT REMOVE OR MUTILATE

NOTICE TO EMPLOYEES

After a hearing where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by discriminating against certain workers because of their union sympathies and activities, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

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

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

Because this is true, we promise you that:

WE WILL NOT terminate, demote, deprive of seniority, refuse to rehire or consider for employment or otherwise discriminate against any employee or previous employee because he or she exercised any of these rights.

WE WILL offer Ponciano Mata, Dario Torres, Pedro Rios, Manuel Torres and Patricio Rios their jobs back and pay them any money they lost because they were terminated.

DATED:

RIGI AGRICULTURAL SERVICES, INC.

By: _____
Representative Title

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