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LADB Staff

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## **Afflicted Nicaraguan Banana Workers Choose Death Over Injustice**

*by LADB Staff*

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In Nicaragua, former banana workers, sickened over the years by the pesticide Nemagon, threatened in March to bury themselves alive or set themselves on fire to get the Asamblea Nacional (AN) to act on a US\$6 million request for assistance for their plight. The threat was more than stunned officials were willing to risk and on March 18 the government agreed to several of the workers' specific demands.

The government agreed to supply medicines and food aid to the stricken workers, to help 80 of them get visas to the US, and to discuss lifetime pensions for them. The purpose of the visas is to enable victims to press lawsuits against their former employers and Nemagon's manufacturers.

The effects of Nemagon exposure are many and varied, according to reports, because the chemical targets the endocrine system. Male victims suffer reduced, impaired, or decimated sperm counts, leaving 67% of Nicaraguan banana workers permanently sterile. Females suffer menstrual disruptions, skin discoloration, repeated miscarriages, uterine and breast cancer. Both genders suffer migraines, permanent headaches, bone pain, blindness, fever, hot flashes, loss of fingernails and hair, weight loss, anxiety and nervous disorders, depression, hematomas of the skin, liver damage, kidney, stomach, and other cancers. The cancer deaths of 466 Nicaraguans have been attributed to Nemagon.

The government was also encouraged to act by the arrival in Managua of somewhere between 5,000 and 8,000 banana workers who walked 140 km from Chinandega department to demand that the government live up to commitments it made to them in March 2004. This time, they arrived on March 2 and stayed until the burial and immolation threats punctuated their resolve.

The virulent pesticide Nemagon has been used in Central America, and extensively in Chinandega, since the 1970s. More than 30,000 workers were exposed to it, even after it was banned in the US in 1979. Dow Chemical and Shell Chemical are reported to have exported 24 million pounds of the poison per year during this period (see NotiCen, 1991-08-09). The chemical kills a microscopic worm that reduces production and damages the appearance of bananas.

Nemagon was first used by the Standard Fruit Company in 1969 in Central America. In 1975, the US Environmental Protection Agency (EPA) determined that the poison, chemically DBCP, was a possible carcinogen. In 1977, of 114 employees of a plant that made the stuff, 35 had become sterile. In 1979, DBCP was prohibited for nearly any use, and Dow announced a temporary withdrawal of the product. But Standard Fruit threatened to sue for breach of contract. Dow resumed production with the understanding that Standard Fruit would assume the costs of lawsuits arising from continued use of DBCP. Standard Fruit continued using it in Nicaragua.

In 1979, Costa Rica banned it, and Standard moved its entire stock to Honduras for continued use. Doctrine for denial The first lawsuits brought by victims of the chemical began in the 1980s. Complainants around the world had to bring their suits in the US because their home countries had not provided the necessary legislation. Their hopes of US justice ended, however, when the doctrine of forum non conveniens was asserted. Under the doctrine, a case can be rejected on the grounds that it would be more convenient to hear it elsewhere, in this case, in Nicaragua. It was not the concern of the US courts that Nicaragua had no law under which to try the cases.

Erika Rosenthal, counsel to the banana workers in the early 1990s and now legal advisor to Pesticide Action Network, said forum non conveniens has been used since the 1980s to close the door of US courts to foreign plaintiffs injured by US corporations. "Forum non conveniens especially in the globalized economy where products are sent around the world, and industrial processes, especially the most dirty and dangerous ones, are often exported to the developing South has been used to create this horrible double standard," said Rosenthal. "And it has been used as a shield or a way for US corporations to evade liability."

Most of the world's victims of the chemical were silenced in 1997 when the companies settled with them with a payment of as little as US\$100 per individual. The complainants were induced to accept the paltry amount by their own lawyers and corrupt politicians (see NotiCen, 1997-04-10). In Nicaragua, however, few fell for the scam, and, in 2000, the country passed Ley 364, legislation for which the workers fought with massive mobilizations. This law put an end to the paradox of forum non conveniens. With the legislation, suits were filed in Nicaragua against Dow Agro Sciences, Del Monte Fruits, Del Monte Tropical Fruit Company, Occidental Chemical Corporation, Standard Fruit Company, Dole Food Corporation Inc., Chiquita Brands International, and Del Monte Foods.

In December 2002, Nicaraguan justice found against some of the companies, ordering them to pay US\$490 million. The companies have not paid. In October 2003, the Central District Court of California disallowed the judgment on a technicality having to do with the formal registered name of Dole. On the strength of that misstep, the companies countersued the plaintiffs, alleging presentation of false evidence.

The Nicaraguans are pressing on. They have formed several groups, the largest being the Asociacion de Trabajadores y Ex Trabajadores Afectados por Nemagon-Fumazone (ASOTRAEXDAN). This is the organization at the forefront of the current action. ASOTRAEXDAN has convened assemblies, has conducted medical examinations of past and current banana workers, operates a radio program, organized protests, and filed suits on behalf of plaintiffs.

In the last two months, more than 100 of the Nemagon claimants have died, putting some perspective on the willingness of others to bury or burn themselves to obtain justice. The latest to die was Medardo Rios, who died of neck and lung cancer, which, say ASOTRAEXDAN leaders, was the result of his exposure to the chemical. Rios was one of those who came to Managua from Chinandega to protest. He was honored in front of the AN. ASOTRAEXDAN founder and leader Victorino Espinales said Rios was the 903rd person to die of Nemagon exposure.

For US Trade Representative (USTR), justice is a trade barrier Ley 364 has been labeled by the USTR as a trade barrier. Its report on trade barriers says, "US multinational firms and the US Chamber of Commerce have expressed concern regarding Nicaraguan Law 364, enacted in October 2000 and published in January 2001. Law 364, which some US multinationals believe targets them, retroactively imposes liabilities on foreign companies that manufactured or used in Nicaragua the chemical pesticide DBCP, which was banned in the United States in 1979, when the Environmental Protection Agency cancelled its certificate for use (with exceptions).

US multinationals express concern that the law and its application under Nicaragua's judicial system lacks due process, transparency and fundamental fairness, and that the Nicaraguan Government has not taken sufficient ameliorative action to date. "Concerns with Law 364 include onerous procedures and requirements such as: retroactive application of no-fault liability related to a specific product; waiver of the statute of limitations; irrefutable presumption of causality; truncated judicial proceedings; imposition of a \$100,000 non-refundable bond per defendant as a condition for firms to put up a defense in court; escrow requirements of approximately \$20 million earmarked for payment of awards; and minimum liabilities as liquidated damages (ranging from \$25,000 to \$100,000.)"

In December 2002, the first judgment under this law was rendered in a consolidated lawsuit in the amount of US\$489 million. A US district court ruled in October 2003 that the judgment could not be enforced against the companies in the United States. Several hundred lawsuits claiming damages of over US\$11 billion are pending." The at-risk companies now have the possibility of excluding Nicaragua from the Central America Free Trade Agreement (CAFTA) as a weapon. If Nicaragua can be brought to heel and made to repeal Ley 364, forum non conveniens reverts to status quo ante.

The New York Times reports that Dow, Dole, and Shell hired lobbyists to press the Bush administration to get Ley 364 annulled. Then Secretary of State Colin Powell was said to have intervened with the Nicaraguan government, as did Otto Reich, then assistant secretary of state for Western Hemisphere affairs. The Nicaraguan media reported that the US suggested that, if the law was not annulled, investment in the country would be reduced. Only the protests of the banana workers prevented the annulment.

El Nuevo Diario reported that Nicaraguan Attorney General Francisco Fallos had petitioned the Corte Suprema de Justicia (CSJ) to find Ley 364 unconstitutional, but withdrew the request following a massive protest in 2002. Dow has acknowledged exerting pressure, citing its right under the First Amendment to the US Constitution to do so. The US does not have to use withholding CAFTA participation to dismantle Ley 364. Ratification of the agreement could accomplish the task.

Stephen Porter, senior attorney of the Center for International Environmental Law (CIEL) in Geneva, said that even though the final version of CAFTA does not contain language specific to the law, CAFTA investment rules are similar to Chapter 11 of the North American Free Trade Agreement (NAFTA), which allows corporations to sue governments if they think domestic policies or laws create obstacles to profit-making. With billions on the line for the fruit and chemical companies, they might think that in this case. Porter said, "If a law such as the law allowing these banana workers to sue foreign companies were challenged by one of the trade tribunals, it wouldn't

make Nicaragua eliminate its law, but it could render it totally ineffective." He said this would even apply to a CSJ decision if it was seen to go against CAFTA's "fair and equitable treatment" provision. "It creates a fuzzy, almost arbitrary legal standard and allows investors to run roughshod over domestic laws," he said.

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