STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARMSTRONG NURSERIES, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 81-CE-44-D 81-CE-243-D 82-CE-43-D 9 ALRB No. 53

DECISION AND ORDER

On October 5, 1982, Administrative Law Judge (ALJ)[1/] Robert LeProhn issued the attached Decision in this proceeding. Thereafter General Counsel and the Charging Party each timely filed exceptions with a supporting brief and Respondent filed a brief in response.

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

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[1/] At the time of 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 are to the California Labor Code unless otherwise stated.

Decision in light of the exceptions[3/] and briefs and has decided to affirm the rulings, findings and conclusions of the ALJ only to the extent consistent herewith.

Although we adopt the ALJ's findings and conclusions relating to the allegation that Respondent discriminatorily refused to pay a bonus to the June budding crew, we reject his analysis of the April 30 order changing the suckering operation from rows to spaces and the related discharges of the employees who refused to comply with that order.

The evidence overwhelmingly establishes that the suckering operation at Respondent's nursery had traditionally been accomplished by assigning each crew member to sucker all the trees in one row. When working in "rows" the crew members would progress across the field side-by-side, the workers with the lighter rows helping the ones with the bigger trees. Working by "spaces" involves dividing the field into sections, with each crew member assigned to a section or "space" with no sharing allowed. Each section consists of contiguous segments of rows. As articulated by the ALJ "[b]y analogy, working by rows may be thought of as working with the grain and working by spaces as working cross grain."

The ALJ found that the General Counsel failed to present

[3/] We deny Respondent's request to strike the exceptions of both the General Counsel and the UFW for failure to state the grounds for each exception and cite to the record as required by Board Regulation section 20282(a)(1). Both General Counsel and the UFW substantially complied with the regulations and no material prejudice has been demonstrated by Respondent. (George Arakelian (1979) 5 ALRB No. 10; Foster Poultry Farms (1980) 6 ALRB No. 15.)

a prima facie case that Respondent's discharge of nine employees on April 30, 1981 was based on the employees' engagement in protected concerted activity. He found that the discharges were a legitimate response to the employees' refusal to comply with Respondent's order to sucker in spaces, an order which he in turn found to have been justified by legitimate business considerations and therefore not violative of section 1153(a).[4/]

Initially, we find that the ALJ failed to take into proper account the substantial amount of protected activity which immediately preceded the spaces order and the related discharges.

In January 1981, the United Farm Workers of America, AFL-CIO (UFW or Union) filed a Notice of Intent to Take Access at Respondent's nursery. UFW organizer Juan Cervantes took access during one or two lunch breaks in February and March 1981 in the deciduous department and addressed the employees.

During February, March, and April, numerous discussions were held among the workers regarding the Union, led by "steady" deciduous employee Rafael Gonzalez, a known union activist,[5/] and other union supporters. In addition, Gonzalez addressed the workers in groups and represented "union members" at a meeting with supervisors in early April regarding the June budding rate. In mid-April, supervisor Pedro Torres called a meeting to announce

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[4/] General Counsel, without explanation, amended the complaint at hearing to eliminate the allegation that Respondent's order to sucker in spaces violated section 1153(c) and elected to proceed solely on an independent section 1153(a) theory.

[5/] The company stipulated that it knew of Gonzalez' support of and organizing activities in favor of the Union.

the rate for the stripping operation. The workers, including the nine discriminatees, gathered shortly before the meeting and agreed not to strip for less than $5.00 per hour. At the meeting, attended by the same group of approximately 50 workers and four supervisors, Gonzalez demanded the raise. At a second meeting that afternoon two of the discriminatees, Rafael Del Toro and Abed Flores, spoke up in support of the employees' demand. When Torres announced Respondent's rejection of the employees' requested increase, Gonzalez demanded to speak to the production manager and announced that the employees would not work until they were paid $5.00 per hour. When the employees threatened to go to the Union, Production Manager Ahumada capitulated and the employees returned to work.

We reject the ALJ's finding that the protected activity preceding Respondent's order to sucker in spaces was insubstantial, given the concurrence of union organizing with the above-described concerted activities. We also find evidence of antiunion animus in Respondent's attempt to thwart the union organizing beginning in January 1981. Ahumada testified that Respondent's President DeMayo met with him after the Notice of Intent to Take Access was filed and urged him to do "everything within your power" or "something to that effect," to prevent the Union from coming in. Ahumada then relayed the instructions to the other supervisors. Ahumada also equivocated as to whether the supervisors reported to him in January of 1981 that the employees were talking about the Union while working.

Within days of the work stoppage, crews which had

traditionally suckered in rows were ordered to change to spaces.[6/] Of the 13 members of the crew that was ordered to sucker in spaces on April 30, nine had participated in the work stoppage less than two weeks earlier, and two of those nine had spoken up at the stripping meeting in support of Gonzalez' wage demand.

The order to sucker in spaces, coming so proximally in time to the work stoppage and union organizing, is particularly suspect in view of the company's long history of suckering in rows. Although spaces were retained for certain planting and harvest operations, suckering and the other cultural operations had traditionally been accomplished in rows.[7/]

Respondent's witnesses contradicted each other in their

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[6/] Evidence was adduced that Respondent ordered at least two crews to sucker in spaces starting in late April. Mary Rodriguez' crew began suckering in rows in March and switched to spaces in late April. Several known union activists belonged to her crew and Respondent's supervisor Cipriano Torres told Rafael Del Toro that they were put into spaces because "a lady was working there who talked alot." The crew to which the discriminatees belonged was also directed to work in spaces several days before the 30th, on the first day that they were assigned to sucker, allegedly in order to facilitate irrigation.

[7/] Respondent's deciduous production manager testified that the operation in the rose department had been worked in spaces for 20 years. Planting and harvesting in the deciduous department had always been by spaces whereas limbing, stripping, June budding, and stubbing were performed by rows. One of Respondent's supervisors stated that the last time suckering was performed in spaces was "in the 60's." According to Ahumada, spaces were disadvantageous for both young and mature trees because crossing over the rows could damage the young trees and the excessive growth of the older trees obstructed passage across rows.

explanations of the business rationale for the change.[8/] Ahumada's testimony that the April 30 order was issued solely to facilitate irrigation conflicts with his later claim that he made the decision as a result of having observed workers talking and suckering inefficiently in rows; that testimony in turn conflicts with operation supervisor Pedro Torres' assertion that suckering by spaces had never been ordered to prevent workers from talking. The irrigation rationale was further discredited by suckering supervisor Calistro Torres' testimony that irrigation was not a reason for suckering in spaces. Although we agree with the ALJ that a Respondent may have more than one legitimate reason for changing the suckering system, when Respondent's witnesses give shifting and conflicting reasons, the Board is permitted to infer an improper motive. (Cf. JP Stevens Co. (1968) 171 NLRB 1202, 1220 [69 LRRM 1088] enforced (5th Cir. 1969) 417 F.2d 533 [72 LRRM 2433]; Sunnyside Nurseries (1977) 3 ALRB No. 42, ALOD, p. 21.) We are not persuaded, as was the ALJ, that suckering in spaces would interfere less with irrigation than suckering in rows; incomplete spaces would prevent irrigation

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[8/] The ALJ's resolution of the credibility of Respondent's witnesses was not based on their demeanor, at least insofar as they testified to the alleged business justification for the spaces order. We do not disturb his finding that the decision to impose the April 30 order preexisted Del Toro's prounion comments on the day of the discharges.

just as effectively as incomplete rows.[9/] In addition, the record is devoid of evidence of any concurrent change in irrigation practices which would necessitate a change in suckering systems after so many years.

In addition to the claimed facilitation of irrigation, Respondent's other business justification for the change to spaces was that workers tended to fraternize while working in rows, causing the faster workers to hang back with the slower workers. However, despite an active discipline system,[10/] no evidence was adduced that any worker had been disciplined for talking excessively or working slowly. Moreover, in the context of the union campaign, this explanation on its face underscores the fact that Respondent's purpose was to discourage organizing.[11/]

Finally, Respondent's business justification for its decision to change to suckering in spaces is further undercut by the uncontroverted testimony of Rafael Gonzalez, ignored by

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[9/] Since workers suckering in rows tended to move across the field together assisting each other, any left over piece rows would all be approximately the same length. Ahumada's testimony on the irrigation consequences of suckering in rows versus spaces, relied on by the ALJ, was confused and self-contradictory. We note that he initially responded affirmatively to Respondent's counsel's question of whether working in spaces could result in incomplete rows being left between complete rows.

[10/] The Armstrong employee handbook provides that "loafing and other abuses of time" can subject an employee to disciplinary action or discharge.

[11/] The ALJ questioned whether engaging in union or other concerted activities on paid company time was protected activity. Absent evidence of disruption or some other legitimate rationale, however, we have found that isolation of employees during a union organizing drive interferes with their section 1152 rights, Nishi Greenhouse (1981) 7 ALRB No. 18, and violates section 1153(a). (Cf. Karahadian Ranches, Inc. (1979) 5 ALRB No. 37.)

the ALJ, that supervisor Ed Rodriguez admitted to him in 1982 that the company did not like suckering in spaces but kept the 1981 order in effect to avoid the appearance that the April 30, 1981 discharges had been in retaliation for protected activity.

That Respondent's April 30 order to sucker in spaces was based at least in part on its desire to prevent the workers from discussing the union and organizing work stoppages for higher wages is easily inferred from the timing and effect of the order, and the admissions and the shifting, illogical and inconsistent business justifications presented by Respondent's management, all considered against the backdrop of Respondent's president's January instructions to Ahumada to do everything in his power to keep the Union out. The same factors cause us to conclude that Respondent's business justifications are a mere pretext. However, even if suckering by spaces were a more efficient system, Respondent must prove that it would have changed to spaces even absent the protected activities of its employees. (National Transportation Co. v. NLRB (June 15, 1983) __ U.S. __ 103 S.Ct. 2469 [113 LRRM 2857].) Proof that Respondent might eventually have assigned its employees to sucker in spaces for legitimate business reasons does not satisfy this burden.[12/] The gravamen of the instant complaint is the timing of the change. Respondent's only explanation for the timing was

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[12/] Respondent was unable, however, to make even this showing, due to Ed Rodriguez' uncontroverted admission that the company only continued the 1981 spaces order into the 1982 suckering season to avoid the inference that the April 30 discharges were discriminatory.

Ahumada's testimony that he had observed workers suckering apples in rows for 1/2 hour in late March and had noticed that "it didn't seem conducive to the effectiveness of how we were employing our employees." Although he claimed to have recommended changing to spaces to Production Manager Bud Norris the next day, the change was not actually implemented until late April, after the protected wage demands and work stoppage. Bud Norris had worked as deciduous production manager since 1966; Mike Ahumada was hired as assistant production manager in August of 1979 and became production manager in April of 1981. Both men were responsible for the efficiency of the various deciduous operations and had had ample opportunity to observe the suckering system. However, it was not until the UFW filed a Notice of Intent to Take Access and President Demayo instructed him to do everything in his power to keep the Union out that Ahumada suddenly noticed the inefficiency of row suckering. We find that both the timing of the alleged "observation" and the delay in implementation of the change render Respondent's defense unpersuasive.

We will defer to the ALJ only when his findings are founded on demeanor-based credibility resolutions. (Foster Poultry Farms (1982) 8 ALRB No. 51.) Absent credibility resolutions by the ALJ, we are free to make our own, based on the logical consistency and the probability of the testimony taken as a whole. (Tony Lomanto (1982) 8 ALRB No. 44.) The ALJ's findings are not grounded in demeanor-based credibility resolutions. Accordingly, we find that Respondent violated section 1153(a) by ordering the suckering crew to work in spaces

on April 30, 1981.

Our finding with respect to Respondent's motive for assigning workers to sucker in spaces necessarily determines our resolution of the discharge issue.[13/] Respondent relies on the workers' violation of the spaces order to justify their discharges. However, if, as we have found, the spaces order was motivated by the workers' protected activity, and the discharges were in response to the employees' refusal to comply with the order, Respondent can hardly persuade us that it would have discharged the workers even absent their protected activity. But for the employees' union organizing, wage demands and work stoppage, the "insubordination," whether itself protected or not, would not have occurred because the spaces order would not have been issued.

Analogous federal cases also support our result herein. The U.S. Supreme Court in Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 upheld a National Labor Relations Board (NLRB) finding that an employer had violated section 8(a)(3) of the National Labor Relations Act (NLRA) by discharging an employee for violating a company no-solicitation rule which, although adopted before the advent of the union and applied non-discriminatorily, in turn violated section 8(a)(1) by

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[13/] The ALJ erroneously concluded that the motive for the spaces order was irrelevant to the legality of the discharges, and consequently, he improperly narrowed his analysis to the question of whether the employees' refusal to follow the order was "protected activity." See infra. However, his perception of the "novelty" of the issue prompted him to make certain factual findings on Respondent's motivation, findings which we are overruling herein as explained above.

prohibiting solicitation during non-working hours. Although no antiunion animus was established, the Supreme Court found that the congruence of the employer's two decisions, i.e., to enforce the rule and to discharge employees for violating the rule, obviated the need for any additional finding of discriminatory motive for the discharge.[14/]

Accordingly, we conclude that Respondent violated section 1153(a) by its April 30 order to sucker in spaces, and section 1153(c) and (a) by discharging the nine workers who refused to comply with the aforesaid order. In addition, to effectuate the purposes of the Act, we order Respondent to make the nine discharged workers whole and reinstate them to their former or substantially equivalent positions.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Armstrong Nurseries, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Ordering its employees to sucker in spaces

[14/] See also Florida Steel Corp. v. NLRB (5th Cir. 1976) 529 F.2d 1225, 1230-1231 [92 LRRM 2040], and Liberty House Nursing Homes (1979) 245 NLRB 1190 [102 LRRM 1517] (where antiunion animus and discriminatory motivation for a rule change are established, discharges for a violation of the new rule are a fortiori violative of the Act). See also, Anderson Plumbing and Heating (1973) 203 NLRB 18 [83 LRRM 1026], where the NLRB adopted the ALJ's finding that an employer's discharge of an employee for violation of a new truck loading rule, implemented within one week of certification of the union but nondiscriminatory on its face, violated section 8(a)(3) of the NLRA because it tended to discourage membership in the union.

in order to prevent them from talking about union matters or otherwise engaging in union or other protected activity.

(b) Discharging employees for engaging in union activity or any other protected concerted activity.

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

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

(a) Offer to the following named agricultural employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges:

Rogelio Avila	Angel Castillo
Antonio Castro	Rafael Del Toro
Abed Flores	Jose Oropeza Garcia
Merced Longoria	Manuel Lopez
Benigio Martinez	

(b) Reimburse all of the above-named employees for all losses of pay and other economic losses they have suffered as a result of our discriminatory discharge of them, such backpay amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying,

and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay 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 between April 30, 1981 and April 30, 1982.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, 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 agricultural employees on company time and property at time(s) and places(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: September 19, 1983

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, Armstrong Nurseries, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by ordering a crew to sucker in spaces instead of rows on April 30, 1981 in order to prevent them from organizing and then discharging the employees who refused to work in the assigned spaces. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

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

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

WE WILL NOT order employees to work in spaces or otherwise isolate them to prevent them from discussing the union or working conditions unless the discussions are disrupting or slowing the operations.

WE WILL NOT discharge employees for union organizing or demanding higher wages or better working conditions or for refusing to be unlawfully isolated.

WE WILL pay Rogelio Avila, Antonio Castro, Abed Flores, Merced Longoria, Benigio Martinez, Angel Castillo, Rafael Del Toro, Jose Oropeza Garcia and Manuel Lopez any money they may have lost, plus interest, as a result of being discharged by us on April 30, 1981 and we will reinstate them to their old jobs.

Dated:

ARMSTRONG NURSERIES, INC.

By: _____
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

ARMSTRONG NURSERIES, INC.

9 ALRB No. 53
Case No. 81-CE-44-D
81-CE-243-D
82-CE-43-D

ALJ DECISION

The ALJ dismissed all three allegations of the complaint. He found that Respondent's April 1981 discharge of nine employees was not in retaliation for any protected activity but was a justified response to their insubordinate refusal to comply with a legitimate rule change from suckering in rows to suckering in spaces. He also found that the General Counsel failed to prove that Respondent's failure to pay employees a bonus was motivated by their protected concerted activity, finding rather that the employees were not entitled to the bonus because of low bud production caused by extraordinarily hot weather. Finally, he found that the change from suckering in rows to suckering in "spaces" was implemented in 1981, rather than in March 1982 as alleged in the complaint. However, because the 1981 change to spaces had been fully litigated, he considered whether it violated section 1153(a). Because the employer had cited "valid business justifications," the ALJ found the change did not violate the Act.

BOARD DECISION

The Board adopted the ALJ's findings regarding the bonuses but found violations in the change to spaces and the discharge of the nine employees who refused to comply with the change to spaces. The Board found that the ALJ had not properly taken into account the context in which the change from rows to spaces was ordered, i.e., union organizing and other protected concerted activity including work stoppages during the three months prior to the order. Given that, plus Respondent's president's instruction to supervisors to do everything within their power to prevent the Union from coming in, Respondent's long history of suckering in rows, the paucity of evidence that employee fraternizing had interfered with the suckering, Respondent's shifting and contradictory business justifications for the change, and Respondent's agent's admission that the spaces order had been retained into 1982 to avoid the appearance of discrimination in the 1981 discharges, the Board concluded that the change was made in response to employee organizing, in violation of 1153(a). The April 1981 discharges of nine employees who refused to comply with the change, then, would not have occurred absent the antecedent employee union and other protected concerted activity and therefore violated sections 1153(a) and (c).

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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

Agricultural Labor Relations Board
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Exec. Secretary

In the Matter of: ARMSTRONG NURSERIES, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-44-D 81-CE-243-D 82-CE-43-D

APPEARANCES:

For the Respondent
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Los Angeles, California 90067

On Behalf of the General Counsel
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627 Main Street
Delano, California 93215

DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: This case was heard before me in Delano, California, on April 19, 20, 21, 22, 23, 26, 27, 28 and 29, 1982.

The charges were filed against Respondent in Case No. 81-CE-44-D on May 1, 1981; in Case No. 81-CE-243-D on October 15, 1981; and in Case No. 82-CE-43-D on April 5, 1982. All charges were duly served upon Respondent. Complaint in Case Nos. 81-CE-44-D and 81-CE-243-D issued on December 28, 1981, Respondent filed and duly served its Answer on January 11, 1982. On April 9, 1982, the First Amended Complaint was filed incorporating charge number 82-CE-43-D. Respondent filed and duly served its Answer to the First Amended Complaint on April 16, 1982. It is the First Amended Complaint on which the case was tried.[1/]

Charging Party, United Farm Workers of America, AFL-CIO, filed a Motion to Intervene on January 4, 1982. Its motion was granted at the prehearing conference. Charging Party did not participate in the trial of the matter.

At the outset of the hearing, counsel for the General Counsel moved to delete a portion of Paragraph 8 of the First Amended Complaint alleging a violation of section 1153(c) of the Act. The motion was granted. As tried, Paragraph 8 alleges only a violation of section 1153(a) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I

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1. Hereinafter referred to as complaint.

make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, Armstrong Nurseries, is a California corporation principally engaged in the growing and harvesting of nursery stock, including rose plants, fruit and shade trees and deciduous shrubs for wholesale distribution. Its agricultural operations are located in the Wasco/Shafter area of Kern County. Its administrative headquarters are in Ontario, California. Respondent admits, and I so find, it is an agricultural employer within the meaning of Labor Code section 1140.4(c).

The United Farm Workers of America (UFW) is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and the conditions of work for agricultural employees. The UFW is a labor organization within the meaning of Labor Code section 1140.4(b).

II. RESPONDENT'S OPERATIONS

The instant litigation involves events occurring during 1981 and 1982 in Respondent's deciduous operations. The deciduous department work force ranges from 45 to 170 employees: it averages 90 employees of which 45 are year-round steady employees.

The deciduous growing cycle begins with planting in February and March. Planting customarily lasts three to four weeks

and is usually done by spaces on an hourly basis.[2/] Suckering begins around March 1 and continues for three to four weeks; it is done both by rows and by spaces. Stripping occurs for two or three weeks in April; is done by rows on a piece work basis. June budding begins between May 5 and 10 and customarily lasts four to five weeks, ending on or about June 15. Limbing is done mainly during June, July and August; some limbing and suckering is still being performed until harvest time in November. Limbing must be done by rows because the trees are too tall for the stakes establishing space boundaries to be visible and because there are strings along the rows holding the trees straight, thus inhibiting movement from one row to another. Budding and tying of the yearlings begins in late July and lasts four to five weeks. Thereafter liners are budded and tied for about two weeks. Liner work is by rows and compensated for by piece rate. During October and early November employees other than steadies are laid off and not recalled until harvest time which occurs from late November until early January. Harvesting is performed by spaces at an hourly rate.

III. SUPERVISORS

Either by stipulation or by admissions in its Answer, Respondent concedes that the following named individuals are supervisors within the meaning of Labor Code section 1140.4(j):

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2. Deciduous field operations are performed either by rows or by spaces. When done by rows, each worker is assigned a row and works the length of that row, and then proceeds to his next assigned row. Thus, the pattern is one worker per row. When work is performed by spaces, the entire crew works an assigned segment of a row and then moves on to the same segment of the next row. By analogy, working by rows may be thought of as working with the grain and working by segments as working cross-grain.

Mike Ahumada, Glen (Bud) Norris, Pedro (Pete) Torres, Cipriano Torres, and Steven Esquibel. The parties also stipulated that Henry Gonzales and Ed "Penny" Rodriguez were agents of Respondent in 1982. Respondent also stipulated that Mary Rodriguez was a forewoman commencing in October 1981 and during 1982. Thus, all individuals alleged to have engaged in conduct violative of the Act are conceded to be supervisors within the meaning of Labor Code section 1140.4(j). Rodriguez' testimony, discussed below, supports the conclusion that she was also a statutory supervisor during February 1981.

IV. UNION OR PROTECTED ACTIVITY

In January 1981, the United Farm Workers of America (UFW) filed a Notice to Take Access.[3/] Pursuant to that Notice UFW organizer Cervantes met with workers during their lunch break on one or two occasions in February and March.[4/] There is no evidence of further organizational efforts by UFW representatives until December 1981 when some effort was made to solicit authorization cards. A Notice of Intent to Organize was filed December 9, 1981; the Union failed to make the showing requisite to require Respondent to provide the names and addresses of its employees.[5/]

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3. 81-NA-1-D

4. It is unclear whether Cervantes met with Respondent's employees more than once in February and once in March 1981. At most, there appear to have been three occasions when a UFW representative met with Respondent's workers during their noon break.

5. 81-NO-12-D

Certain of General Counsel's witnesses testified they were observed by foremen as among workers present at one of the February-March meetings with UFW organizer Cervantes. Additionally, some workers testified that during February and March, they were overheard by foremen advocating the advent of the UFW.[6/]

General Counsel witness Merced Longoria testified he talked with Juan Cervantes, a UFW representative, for about fifteen minutes one lunch hour in the presence of other workers as well as Mary Rodriguez, a foreman. After Cervantes departed, Longoria asserts he made pro union comments to Maria Esther, again in the presence of Mary Rodriguez.

Rodriguez testified a UFW organizer visited her crew on one occasion in 1981. She was about to have lunch in the shed together with her crew. When the organizer arrived, he approached Rodriguez, identified himself as an organizer, and gave her his name. Rodriguez got into her pick-up and departed because it was her understanding that foremen were not to be present when an organizer wanted to speak to the people. This testimony is consistent with a finding that Rodriguez was a statutory supervisor at the time. Rodriguez was a believable witness; her testimony was straight forward and without vacilation.

Rodriguez' testimony regarding her behavior in the organizer's presence is credible. It is unlikely the UFW organizer

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6. Raphael Del Toro testified he told Cipriano Torres while listening to a UFW broadcast regarding its success at another grower that it was a good idea to have union representation. Torres did not respond. According to Del Toro, he made similar remarks in Torres's presence on two other occasions in February 1981. This testimony was not controverted.

would have gone ahead with his meeting had Rodriguez remained; Rodriguez' understanding that she should depart was generally consistent with the requirements of Board case law and regulations; her testimony she did so is credited. Longoria's testimony regarding remarks to Cervantes in Rodriguez' presence is not credited.

According to Rodriguez, after lunch Longoria was working at the other end of the shed from her, a distance of approximately 10 yards. Rodriguez specifically denied hearing Longoria make pro-union remarks. Her denial is credited.[7/]

Rodriguez has worked with Longoria in the liners in the Shafter Shed and during the harvest in liners. She denied observing his participation in Union activities or having heard him make any pro-Union statement. She denied he ever protested to her for himself or on behalf of employees generally about working conditions or how the work was assigned.

In view of her admitted knowledge of that other employees (Mary Maddox and Hortencia Gonzales) were Union activists, there would be no reason for falsely denying the events surrounding the February visit of the UFW organizer or the fact that Longoria had spoken to her regarding the UFW or about working conditions. Longoria's testimony is not credited and is not relied upon as showing employer knowledge of union activity.

While suckering in early March 1981, in a crew with Rafael

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7. Even if Rodriguez had been close enough to hear Longoria's statement to Maria Ester, it was not the sort of statement to burn itself on ones brain and would likely have been forgotton.

Gonzales, Abed Flores heard Gonzales make pro-Union remarks in the presence of Calistro Torres. In view of Respondent's admitted awareness that Rafael Gonzales was a long time union activist, there is no necessity to deal extensively with this testimony nor with the question of whether Calistro Torres was a supervisor within the meaning of the Act.[8/]

In early March Flores was listening to a UFW radio broadcast as he was suckering. Cipriano Torres was present checking the work. Flores commented to Jose Garcia that the Union had caused the ranchers to pay a fair wage and to provide other benefits such as pensions, job security and insurance. Cipriano made no comment.

Cipriano specifically denies having ever heard Flores make pro-union comments to Jose Garcia. In the face of Cipriano's denial he heard Flores make pro-union statements to Garcia, Flores' testimony limited as it was to establishing Cipriano's presence does not suffice to establish employer knowledge Flores was a union activist.

While there may be some question regarding Armstrong's awareness of the protected concerted activity of specific workers, there is no question but that such activity occurred in the presence of admitted supervisors.

Ahumada testified that meetings with employees regarding dissatisfaction with piece rates are fairly common. He recalled four such meetings in 1981, two with respect to deciduous fruit and two with respect to roses. He also recalled similar meetings in

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8. The leadership of Raphael Gonzales in incidents of protected concerted activity is clear on the record.

1980 with his predecessor production manager.

At the outset of 1981 stripping, there was such a meeting.[9/] Raphael Gonzales was spokesman for the crew.[10/] He had obtained agreement from the workers not to work for less than $5.00 per row. Initially, Bud Norris was the management spokesman. When no satisfactory agreement could be reached with Norris, Gonzales demanded to meet with Ahumada. Ahumada arrived about 15 minutes later. There was an exchange of proposals and counter-proposals between Ahumada and Gonzales. Gonzales asserted the proposed piece rate was too low; Ahumada responded the company felt it had raised the rate too much in 1980; that the stripping rate was one of its highest piece rates; and that if they weren't prepared to work for $4.55 per hour, they would be discharged. Gonzales announced this to the group and told them to go to the Union and file a complaint.[11/] When it appeared an impasse was reached, Ahumada again asked Gonzales what the workers wanted. Gonzales said $5.00 per row. After further interchange between them, Ahumada agreed to the $5.00 per row rate proposed by Gonzales, whereupon the crew went to work.[12/]

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9. On or about April 17th.

10. Del Toro testified that he and Abed Flores spoke in favor of Gonzales' position.

11. Ahumada denied threatening to fire anyone.

12. Ahumada denied threatening to fire anyone for refusing to work at the rate proposed by the company. He said he told Gonzales that Pedro Torres had misinformed him by relating that they didn't want to work piece rate; this was the reason he had made an hourly proposal. Gonzales said that wasn't the case; they merely wanted a higher piece rate.

V. THE UNFAIR LABOR PRACTICES

A. The April 30, 1981, Terminations

The Complaint at Paragraph 6 alleges that Respondent on April 30, 1981, discharged nine employees "in retaliation for participating in concerted activity and for supporting the UFW."[13/]

B. Events of April 30

Nine of twelve employees working in a suckering crew under Steve Esquibel were discharged on April 30.

The crew began working by rows. At approximately 8:20 a.m. the initially assigned rows were completed at which time Esquibel directed them to work the spaces he had previously staked out.[14/] Except for the steadies in the crew, the workers disregarded Esquibel's order and resumed working by rows. Esquibel contacted his immediate supervisor, Cipriano Torres, who came to the field and reiterated the order to work by spaces. When asked the reason for

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13. Nowhere in the Complaint does the General Counsel allege that individuals discharged or otherwise discriminated against were engaged in "protected" concerted activity. This omission is regarded as inadvertent. Respondent failed to question the sufficiency of the allegation, and the case was tried as if Respondent's actions were directed at protected-concerted activity. It is clear that engaging in concerted activity which is not protected does not constitute a violation of the statute. While support for the UFW is also alleged as a basis for the discharges on April 30, 1981, the thrust of the General Counsel's case goes to what is characterized as "concerted" activity.

14. Whether the rows initially assigned were completely unsuckered or were pieces of rows left from the previous day is controverted. General Counsel's witnesses testifying to the events of April 30 uniformly stated that the row on which he worked was a complete row. Respondent's witnesses testified the crew was initially assigned to complete rows left unsuckered by a female suckering crew the previous day. The latter testimony is more consistent with the totality of events. However, resolution of this conflict is not crucial.

w rking in spaces, Cipriano responded that it was a company order and if they failed to obey, they would be fired. Again, the nine employees disregarded the order and continued to work by rows. Cipriano departed and returned fifteen minutes later with warning notices which he said must be signed by the workers, adding that failure to sign would result in discharge. The notices were not shown to the workers and none were signed. Cipriano again left the area. The nine continued to work by rows.

Approximately fifteen minutes later Pete Torres arrived, he told the nine employees they would be discharged if they were not in spaces by 10:30 a.m. They were not; discharge resulted.

Divergent testimony was offered regarding what triggered Respondent's direction to work by spaces. General Counsel's witnesses testified that Esquibel made no move to establish spaces until he overheard a worker (Del Toro) verbalize the desirability of a union. Thereupon say these witnesses Esquibel obtained stakes from his pickup, staked out spaces and ordered the crew to work by spaces.[15/]

Esquibel testified that the afternoon of the 29th Cipriano Torres said the next day he would get a crew of men to finish the suckering; Torres told him to have them work in spaces and to get the stakes ready for the crew when they arrived in the morning. Esquibel gathered the stakes that afternoon. When the crew arrived, Esquibel testified he told the crew they were going to finish the

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15. Esquibel denied hearing Del Toro's remarks; however, from having worked with him previously, he was aware of Del Toro's pro-union position.

rows left from the previous day and then go into spaces. At that time, according to Esquibel no one complained about spaces. He went to his pickup to obtain stakes and began staking out spaces. Esquibel denied hearing Del Toro's remarks.[16/]

The group had worked in spaces the first day of 1981 suckering without protest.[17/] The uniform explanation by General Counsel witnesses for their lack of protest is that the work was done as a favor to Pete Torres and Respondent because it was an emergency. Torres denied having requested a favor or having stated there was an emergency.[18/]

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16. It is uncontroverted that Esquibel had stakes in his truck the morning of April 30. Their presence is consistent with Esquibel's testimony regarding the instructions he received from Cipriano. thus, I find Respondent had planned to have Esquibel's crew move to spaces as soon as possible on the morning of the 30th. Having so found, it is unnecessary to resolve the conflict regarding whether Esquibel overheard Del Toro's pro-union comment.

17. General Counsel witness Merced Longoria places this on the second day of suckering.

18. There is no evidence to suggest why Pete Torres would have felt the need to seek a favor from the crew when he directed they work by spaces. There appears to have been no reason he would have expected opposition to spaces. Moreover, seeking favors of the work force is not consistent with other behavior of Pete Torres or of Respondent's supervisors. Such behavior is inherently unlikely. On the other hand, the purported solicitation of a favor provides General Counsel's witnesses with an explanation for the conduct of April 30 as well as the other occasions on which they refused to work by spaces. I credit Pete Torres testimony that his assignment of the crew to spaces was unaccompanied by a request the work be done as a favor. It is not ascertainable whether the steady employees working in the crew on April 30th were in the crew the first day of suckering. None were called to testify regarding the events of April 30 or the events of day one of suckering. Had the General Counsel established their presence when Torres is alleged to have curried favor, Respondent's failure to produce them might warrant the inference General Counsel's witnesses were credible.

Del Toro testified that two days later Cipriano Torres told the crew to work in spaces; when Del Toro asked why, Cipriano said he didn't know and reiterated the order. The crew did not comply.[19/] They continued to work by rows on that day and upon two subsequent days without further mention of spaces.[20/] When Cipriano gave no explanation for the order to sucker by spaces, Del Toro asserted the company sought to prevent workers from talking to each other about the Union and about the possibility of a representation election. Del Toro reiterated this assertion on April 30 when he sought an explanation for the work in spaces order from both Esquibel and from Cipriano.[21/]

On the 30th, shortly before Pedro Torres terminated the nine, Del Toro characterzed their action as a protest against working in isolation aimed at preventing organization and obtaining a representation election. As verbalized by several General Counsel

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19. Cipriano testified the crew worked three successive days by spaces and then returned to rows when the block was finished.

20. Seven of those terminated were in the crew the day of the initial refusal to work by spaces. Suckering by spaces in 1981 was not limited to the crew in which Del Toro worked. On April 29, he was assigned to drive tractor; while so engaged, he saw another crew suckering by spaces. Fidenca Rodriguez, a current employee, testified her crew began suckering in March 1981 by rows and worked in this fashion for about three weeks. At the end of April the crew was shifted to suckering by spaces. Fidencia has been an Armstrong employee since 1975; she had not previously suckered by spaces. Abigail Moran, a current employee, corroborates Rodriguez's testimony regarding 1981 suckering. Moran has worked for Armstrong since March 1980. Bud Norris, Deciduous department production manager testified the suckering was done by spaces during March 1981.

21. Cipriano denied that Del Toro told him the company was assigning workers to spaces to separate them and prevent conversations about the Union.

witnesses, the crews' objection to working by spaces was that this method precluded them from talking to each other while working.[22/] Del Toro and other members of the crew testified they were unable to speak with each other during break times or during the lunch period.[23/] It would appear that this condition existed only when suckering work was performed. Testimony was adduced regarding meetings during the lunch break conducted by UFW representatives earlier in the year.

When Production Manager Ahumada arrived at his office some time between 9:30 and 10:00, he learned from Bud Norris of the events which precipitated the discharges.[24/] He was told nine people refused to work by spaces when ordered to do so and had continued to work by rows. Norris said they had been told two or three times to work in spaces. He asked Ahumada what was to be done. Ahumada stated it seemed as if the workers were insubordinate and would have to be discharged.[25/] At this point, Pedro Torres

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22. It is apparently interference with discussions during work time which is regarded as Respondent's interference with section 1152 rights.

23. Workers objection to spaces was stated in terms of being "incommunicado"; as being "against human dignity"; as an attempt to isolate the workers to discourage their efforts to obtain a union and as an absurd order. It is easier for crew members to converse while working in rows because they work side-by-side in adjacent rows and at the same pace.

24. Norris is Deciduous Production Manager. Ahumada is Production Manager and the ranking management person in the Shafter/Wasco area.

25. Ahumada denied awareness of the identity of any worker involved until after the discharge was effected. He had personal dealings with one of those discharged regarding a disciplinary notice a week or two previously.

came into the office. Ahumada told him to tell the workers they had one more chance to go into spaces before they were terminated. Torres departed and returned sometime after 10:30 a.m., having terminated the nine employees for insubordination. Up to the moment of termination the nine workers refused to obey direct orders to work by spaces issued by successive levels of supervision, Esquibel, Cipriano Torres and Pedro Torres. The nine did not respond to the order by engaging in a work stoppage, but rather by continuing to work in the manner of their choice. They were apparently paid for all time worked on the 30th up to their time of discharge.

The 1981 suckering operation began in March and was intially done by rows. Ahumada was unsure when the work was done by spaces. Nor did he recall whether suckering had been done by spaces in 1980.[26/] In late March 1981 Ahumada and Norris spoke regarding suckering by spaces, and they concluded that working a large number in rows was not efficient; that the quality and quantity of work would be increased by working in spaces.

In Ahumda's opinion, working by spaces facilitates quality because people pay more attention to what they are doing. When working by rows, crew members engage in excess talking thereby reducing concertration.[27/] Suckering is a critical operation

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26. The foregoing was elicited on cross-examination. On direct examination Ahumada testified suckering had been done by spaces in 1980.

27. In 1981 Ahumada spent approximately one-half hour in the fields observing from close proximity a suckering crew work by rows. They were talking to one another and playing a radio.

because the bud is just starting to push out and can easily be mistaken for a sucker. If one is not paying attention a sucker can be left in place of a bud or a bud can be suckered. Ahumada also opined that when workers work by rows an individual with a light row tends to stay behind with the group rather than proceed at his normal pace.[28/]

An additional reason put forth by Respondent for suckering in spaces is that it facilitates irrigation and cultivation operations. There are no unfinished rows at the end of a day, a situation which does occur when suckering is done by rows. It is this explanation which worker witnesses testified was given them.

VI. PAYMENT OF BUDDING BONUS

Paragraph 7 of the Complaint alleges that on or about October 14, 1981, Respondent refused to pay a bonus to the persons engaged in June budding because said persons engaged in "concerted activity and supported the UFW."

Historically, Respondent has paid a productivity bonus to the budders and tiers working in June budding who produce a 90 or more live stand, i.e., 90% of the trees budded and tied by the team are live trees. While the reasons are disputed, it is uncontroverted that of those involved in 1981 June budding only five employees had a 90% or more live stand and that they alone received

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28. Ahumada has never undertaken any time studies to verify conclusions based upon visual observations made as the work was being performed. However, support for his conclusions can be inferred from work unhappiness at being unable to socialize while working.

a bonus in 1981. In prior years, excluding 1974, substantially all budders achieved the requisite live stand percentage and received the bonus.

A. June Budding

June budding usually starts between May 10 and May 12. The process consists of grafting budwood onto understock to produce a live tree of the budwood variety. Armstrong provides the understock, i.e. the base tree onto which the budwood is grafted. The understock does not vary with respect to tree varieties budded. In 1981 approximately 70 tree varieties were budded in the June operation. For its open-market varieties Armstrong supplied the budwood.[29/] Dave Wilson Nurseries supplied budwood for the trees which Armstrong grew for them.

In 1981 Armstrong budded 1,464,000 trees; 1,100,000 were budded for Wilson. Respondent contracts to grow a certain number of trees for Wilson and is paid upon delivery of live trees. It must replace any trees sold by Wilson which subsequently die.

Fifty-eight employees working as teams of one budder and one tier, were used in the 1981 June budding. Compensation is by piece rate per thousand trees budded or tied. In 1981 the budder's rate was $25.94 per thousand and the tier's rate $22.50 per thousand. The piece rates were posted throughout the period of June budding on the side of the trailer used to supply budwood to the workers. The bonus rates were also posted.

At the beginning of May, Pedro Torres held a meeting with

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29. Armstrong budwood was used for approximately the first week of June budding.

employees assigned to June budding to inform them of the rate to be paid; the rate was announced both in English and in Spanish. Torres read the base rates and the bonus rates from a schedule, a copy of which was later posted on the bud box for the duration of the budding operation.[30/] During the meeting there was also some discussion regarding who was to tie for whom, i.e. how the workers were to be paired. Thirty to forty-five days after budding is completed a live count is taken. It is this count upon which the bonus is based. The field employees making the count are unaware of the identity of the employees who worked in a particular row. The live trees are physically counted; the results recorded; and office records establish which team budded each row.[31/]

In 1980 Armstrong had a 93%+ live stand; in 1981 the live stand was 85.2%. Ahumada attributes the decreased live stand to high temperatures. Credible evidence comparing maximum termperatures from May 20 to August 31 for 1978 through 1981, shows the 1981 temperatures for the period following completion of budding (June 14 or 15) through July 8th to be uniformly higher in 1981 than in the other years compared.[32/] Temperatures during the period

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30. Bud box refers to a four wheel tractor holding a desk for Maria Rodriguez to do the paper work connected with the operation as well as actual bud boxes placed on either end of the trailer. There is a bulletin board on the trailer on which the wage schedule was posted.

31. The live count was completed by the end of July.

32. In some instances, temperatures were as much as 12° higher in 1981 than on comparable days in 1978, 1979 or 1980. Respondent Ex. D. The data used to prepare the graph was obtained from the USDA Research Station at Shafter, California.

the trees were budded were within the range of temperatures for a comparable period in 1978, 1979 and 1980.

When Ahumada viewed the damage during the third week of June, budding was completed. Sunburned root stock and dehydration of trees stubbed beyond the bud were visually apparent to him. The roots of some trees had turned brown and died. In other cases the stem portion of the rootstock was totally brown from sunburn.

The open market trees were budded and stubbed earlier than Wilson's trees and were, therefore, less affected by the heat. There was a minor heat wave in May when Armstrong was budding its own trees, but it was not a "major heat wave" like that which occurred in the middle of June.[33/]

An effort was made to save those trees not yet stubbed by not stubbing as close to the bud as is customary, using the foliage as protection from the sun, hoping the bud would start to push out. Once the bud took hold, the tree could be cut back further. The bud won't push out unless the understock is stubbed. After observing the heat damage, Respondent irrigated as frequently as water was available to protect the buds from the heat. Heat causes dehydration and burns the understock on the side toward the sun. It affects the bud by prohibiting "callusing" or "joint of both cambium layers" and inhibits the root growth of the understock. When temperatures rise above 90 degrees Fahrenheit, the buds are affected

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33. Ahumada notified DeMayo, Armstrong's sales manager, and Dave Wilson Nursery regarding the heat damage. By letter of August 19, 1981, Ahumada notified Wilson Nursery of low live count percentages and attributed it to extreme hot weather during the month of June. He received no response to his letter.

in some way. In previous years although there had been temperatures above 90 degrees, the degree of difference experienced in 1981 did not occur.

Pete Torres testified that if a particular variety of bud wood were bad, it would not affect the live count for all employees because each budder does not bud each variety and because each budder buds between forty and seventy thousand trees.[34/] Torres testified he was familar with bud wood used both in 1980 and in 1981. It was his opinion the 1981 bud wood was about the same as that used in 1980.

General Counsel presented testimony from several budding crew members to the effect that each complained about the bud wood. Antonio Gonzales, a current employee, testified he complained some time during mid-June about bad bud wood, and Torres told him to use it because there was nothing else. While Torres specifically denied another conversation with Antonio, it does not appear testimony regarding this conversation was disputed. Even crediting Gonzales, the testimony does little to support a contention Respondent undermined budders ability to make a 90% stand. Gonzales places the conversation in mid-June, a point when June budding was nearly completed and bad bud wood was likely to have little impact upon his

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34. This testimony was uncontroverted. It is logical and is credited. In 1981 between firty and sixty rows were the most budded of any variety. There are approximately 1500 trees per row. It would appear that approximately 90,000 trees would be the maximum of a single variety, something less than 10% of the total trees budded.

production.[35/]

Balthazar Camacho, a current employee, testified he complained to Pedro Torres on one occasion during June budding that the bud wood was burnt and Torres told him to use it that he was guaranteed 90%. Torres specifically denied this conversation.[36/] Edwardo Villegas testified he overheard Pete Torres tell Camacho he was scattering too much wood. Camacho responded the wood was burnt. Torres told him to use it anyway because 90% was guaranteed anyway.

Raphael Gonzales testified that, on one occasion in mid-May, he told Pete Torres he couldn't guarantee the budwood he was using would produce a live tree. Gonzales asserts that Torres told him to use it anyway; it was bud wood supplied by the other company and that his 90% was guaranteed anyway.[37/]

Carlos Gonzales also lodged a complaint regarding budwood; Torres told him it was buddable even though the buds were small; he denies any mention of the bonus during this conversation.

B. September 28, 1981

On September 28, Ahumada met with the workers to discuss

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35. Antonio testified he had a second conversation with Torres about bud wood in early August. This testimony is not credible; June budding ended June 20th. It casts some doubt on Antonio's veracity with respect to the earlier conversation.

36. Camacho's testimony was inconsistent. He testified he began June budding about May 10 and worked continuously in June budding until September. He later testified that June budding ended in June. On direct examination he testified he told Torres the wood was "burnt" after having been reprimanded for spilling wood. On cross he placed the reprimand earlier in time than his complaint about burnt wood. He is consistent with respect to having lodged a single complaint regarding the wood.

37. From mid-May thereafter all budwood came from Wilson.

demands for a wage increase in the liner budding operation.[38/] The workers had agreed among themselves that they would not start work until they met with Ahumada. It apparently took about two hours from their initial refusal to work before they were able to meet with Ahumada at his office. Ahumada rejected their request for a wage increase, saying there were only two days of the liner operation remaining. He promised a raise in 1982. When some question was raised regarding whether they would be paid for their lost time that morning, Ahumada told them to return to work, do a good job and said they would be paid by the hour that day if they failed to make the minimum by working piece work.

As the meeting was breaking up, Raphael Gonzales and Ahumada had a conversation in English regarding when the June budding bonus would arrive. Ahumada responded two weeks. Gonzales asked whether Ahumada was sure. Ahumada said he was. No mention was made of the fact that whether more than five employees would receive the bonus depended upon DeMayo's acceptance of one of the proposals presented him regarding its payment though a 90% live stand was not achieved.

Around September 23 Ahumada had proposed to DeMayo, Armstrong's president, that the bonus be based on the following formula: Average the live count percentages for the previous five years (93%); place that against the 1981 percentage of approximately 85%; take the 8% differential; split it 50-50; and add 4 percentage

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38. Testimony from General Counsel witnesses that the meeting was held on September 27 is not credited. Armstrong does not work on Sunday, and everyone agreed the meeting was a work day.

points to the actual 1981 live count percentage of each budder and tier. If the result reached 90% or more, pay the bonus. An alternative proposal tacking the entire 8% onto each team's actual live count percentage was submitted. As of September 28, DeMayo had not decided which, if either proposal he would accept. Approximately four days later DeMayo notified Ahumada neither alternative was acceptable. DeMayo said he had considered both proposals and decided to reject both. DeMayo told Ahumada that by paying a bonus when a low live count isn't our fault, the definition of bonus would be lost and Armstrong would have to pay it every year regardless of what happened. DeMayo felt the Company should not pay for something it wasn't going to be able to sell. When the up-front agreement with the workers is that no bonus is paid if a worker doesn't get a 90% live stand, the reason for failure to do so is irrelevant.

De Mayo contrasted this position with what occurred in the budding of roses in 1981. In the August budding of roses, a 30% live stand was the best workers were going to do. Nobody wanted to bud in August; so DeMayo made an agreement before budding began that the rate would be higher than normal, and that it included a bonus, because the Company knew that due to the absence of budwood no bonus could be earned under standard conditions.[39/]

C. October 9, 1981

Ahumada met on October 9 with the employees involved in June budding to explain the bonus situation. He told the workers

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39. This testimony was not disputed.

bonuses were not being paid because the failure to make a 90% live stand was attributable to heat damage; something out of the control of the Company; an act of God that the budwood dried up.[40/]

Following his explanation an unidentified employee said Pete Torres had guaranteed them the bonus; Ahumada responded that Pete would have to pay it out of his own pocket because he was not authorized to make such a promise. Ahumada denied that anyone accused him of guaranteeing the bonus. He admits that Raphael Gonzales asserted Pedro Torres guaranteed the bonus.[41/]

Juan Sanchez stated the Company had killed the trees in one row with chemicals and complained that the Company had stubbed the rows too early. Ahumada denied the charge regarding chemicals; as for the stubbing charge, by October there was no way of identifying the rows to which Sanchez referred. Ahumada was unaware that any trees were affected by the application of chemicals during June budding. Ahumada stated if chemicals had killed trees, the damage would have appeared on more than one row because chemicals are applied to two and sometimes four rows at a time, and the damage would have appeared on all rows.[42/] Ahumada was also unaware of the stubbing situation to which Sanchez referred.

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40. Ahumada denied he was accused of having promised a bonus. He asserts he did not promise on September 28 to pay anyone a bonus.

41. As noted alone several General Counsel witnesses testified that Torres, during the course of the budding operation, stated to them the bonus was guaranteed. The inference which the General Counsel wishes drawn is that a bonus would be paid although a 90% live stand was not produced by the worker in question.

42. This testimony is uncontroverted and credited.

Rosario Gonzales mentioned bad budwood. Ahumada could not respond because she couldn't remember or identify the variety.

At some point during the meeting the workers said Pedro Torres explained that the way the bonus works is that the Company takes $2.00 away from the $25.94; holds it in reserve and later pays it in the form of a bonus.[43/] Ahumada was confused because the $2.00 didn't match any of the bonus rates. Despite his explanation that what he was being told was not a Company policy and could not happen, the workers insisted that's what Torres was doing. Maria Maddock and Rosario Gonzales told Ahumada to pay the $2.00 Torres has been taking out of our piece rate and the dispute would be resolved. Ahumada said he was confused and asked "do you really believe that's what Pete did, they said, yes." Thereupon Ahumada had Norris go to the office and obtain the piece rate book. When Norris returned, Ahumada put the book on the hood of a car, everyone saw the piece rate and acknowledged it was the rate he had received.[44/]

VII. 1982 Change in Operations

Paragraph 8 of the complaint alleges that commencing on or about March 8, 1982, Respondent changed terms and conditions of

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43. Ahumada's recollection is that this position was put forth by Hortencia Gonzalez and Maria Maddock.

44. Enrique Gonzales produced check stubs verifying what Ahumada had said. Whereupon Maria Maddock ran to a car and said, I don't know about the rest of you but I'm going to the ALRB. Rosario Gonzales said see what you can do for us. Ahumada responded the final decision has been made -- I can't change it, if I did, I'd be fired. However, Ahumada said he would give it one more try although he thought it would do no good. He said he would let them know in about a week.

employment to discourage workers from engaging in union organizing. The change alleged is assigning work by spaces. Thus, in 1981 suckering by spaces was not limited to the crew terminated on April 30th.

Hortencia Gonzales was the principal witness for the General Counsel regarding the events of 1982. She reported for work after layoff in late February[45/] and was initially assigned to a crew in which the majority had signed UFW authorization cards. They were also people with whom she had worked in 1981. Commencing about mid-March the crew was assigned to sucker by spaces. Gonzales and Hortencia Sanchez worked adjoining spaces jointly. No objection was raised to this practice until March 22nd when Enrique Gonzales told them that each had to work her own space.[46/] Hortencia Gonzales asked who had issued the order. Enrique responded Maria Rodriguez.

Gonzales and Sanchez asked to speak to Maria. Rodriguez met with them and said each had to work her individual space because those were the orders from the office. Hortencia Gonzales told Rodriguez to have the one who gave the order to come and meet with us. Following this request there was a meeting with the crew at which Rodan Ayala and Bud Norris were the principal management spokesmen.

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45. Hortencia is a steady worker. She is the wife of Raphael Gonzales. Respondent admits knowledge she is an active union supporter.

46. Gonzales and Sanchez each testified the two wanted to work jointly in order to be able to talk about the union. Sanchez admitted conferring with Gonzales prior to testifying.

Crew member Juan Sanchez stated the company was pressuring the workers by having them work in spaces, thereby preventing them from talking about organizing.

Rodan told Norris he had no objections to two people working jointly in spaces as Gonzales and Sanchez were doing. Norris' response was each one to a space.

Hortencia Sanchez stated: "Rodan, this which you are doing regarding spaces is to put pressure on us because we are for the Union." Rodan said he would talk to Ahumada to see what could be done and let us know the following day. He told us to get into spaces for the remainder of the day. Juan Sanchez said O.K., and tomorrow we are going to get rows. Rodan said he would meet with them the next morning before work. The crew returned to work in spaces.

The next day Bud and Ken arrived before work started. Ken spoke in English and said he did not want to hear anymore questions about spaces. The final decision is that we are working by spaces. Bud and I are going to leave. We will be back in a couple of minutes and those who do not go by spaces will be terminated.[47/] No one responded to Bud's Statement. The people worked in spaces that day.

Near the end of March, Hortencia worked in a limbing operation for about two days. The work was done by rows. Hortencia was in a crew made up of the daughters and purported friends of

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47. The witness' testimony with respect to what Bud said in English was given in English; thus indicating her comprehension of what he said.

Maria Rodriguez.[48] Thereafter she worked in suckering by spaces and was again with the crew which sympathized with the Union. Hortencia Gonzales testified that working spaces puts more pressure on one because sometimes you can't even go to the bathroom because the co-workers will leave you behind. However, she admits no one ever told her she could not go to the bathroom nor was she ever disciplined for doing so.[49]

Hortencia testified the only reason workers didn't want to work in spaces was because they couldn't talk to each other about organizing or having a union. She then testified spaces are harder because some have more trees than others, and also because the foremen divide the rows unequally.

On cross-examination Hortencia conceded that an inability to talk to fellow workers did not make the work harder. The job is identical whether done by spaces or rows. Gonzales concedes that no one from the company told the workers that they had to work harder when working by spaces. However she contends she did have to work harder because there are some people who work faster and this forces the others to go faster. When working by rows, the crew goes along evenly.

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48. On cross-examination Rodriguez denied that those in the crew other than her daughters were her friends. She considers them not friends but workers. She rode to and from work with some of the workers. She has no social relationship with any of those working in her crew at the time. This testimony is uncontroverted and is credited.

49. Sanchez' testimony on this point is essentially identical.

DISCUSSION AND ANALYSIS

1. The April 30, 1981 Terminations

Conventional analysis of Labor Code Section 1153(c) or Section 1153(a) discharges must follow Wright Line and Martori Brothers.[50/]

> In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, inter alia, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. Wright Line at 1083.
>
> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (Emphasis added.) (Ibid. at 1089.)

The ALRB in Nishi Greenhouse stated its reading of Wright Line as follows:

> [I]f the General Counsel establishes that protected activity was a motivating factor in the employer's decision, the burden then shifts to the employer to prove that it would have reached the some decision absent the prtected activity. 51/

The unfair labor practice with which we are concerned in paragraph 6 of the complaint is not whether the persons discharged

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50. Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721; Wright Line (1980) 251 NLRB 1083; Nishi Greenhouse

DISCUSSION AND ANALYSIS

1. The April 30, 1981 Terminations

Conventional analysis of Labor Code Section 1153(c) or Section 1153(a) discharges must follow Wright Line and Martori Brothers.[50]

> In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, inter alia, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. Wright Line at 1083.
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50. Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721; Wright Line (1980) 251 NLRB 1083; Nishi Greenhouse (1981) 7 ALRB No. 18.

51. Supra, slip. op. 3.

were wrongfully ordered to work by spaces, but whether they were inproperly discharged for continuing to work by rows in the face of repeated orders to work by spaces. Unquestionably, the nine employees were engaged in concerted activity when they protested Respondent's directive to work by spaces, but not all concerted activity is protected.[52] "Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protections of the Act."[53] The objection of the employees protest on April 30 was to retain a condition of employment, i.e., suckering by rows. Respondent concedes the appropriateness of such an objective. However, there is some question whether the method used to obtain that objective, i.e. continuing to work by rows, was improper. The National Labor Relations Act has generally been interpreted to prohibit employees from drawing wages and attempting to put economic pressure on the employer at the same time.[54]

Elk Lumber Company, supra, is instructive: Five individuals employed as carloaders by Elk were discharged. Prior to discharge they were paid on a piece work basis and earned, on an average $2.71 per hour. They loaded an average of one-and-a-half cars per day. Respondent changed its loading method and

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52. UAW, Local 232 v. Wisconsin Employment Relations Board (1949) 336 U.S. 245; Elk Lumber Company (1950) 91 NLRB 333, 336.

53. Elk Lumber Company, supra, 336, 337.

54. N.L.R.B. v. Robertson Industries (9th Cir. 1976) ____ F.2d ____; 93 LRRM 2529 citing Shelly & Anderson Furniture Co. v. N.L.R.B. (9th Cir. 1974) 497 F.2d 1200 (employee meetings lasting 15 minutes into work time for which employees not paid held protected).

unilaterally changed the rate of pay to $1.52½ per hour. The carloaders responded by reducing their output to one car per day, admitting they could have done more and knowing the employer was dissatisfied with their production. The employer met witht he carloaders seeking suggestions for improving output. The spokesman for the group suggested a return to piece rates or an increased hourly rate, making clear the crew did not intend to increase their production without an increase in pay. Seven days later the carloaders, who had not struck but had continued to work at their chosen pace, were terminated.

The NLRB viewing the issue to be whether the carloaders' conduct was a form of concerted activity protected by the Act held it was not.

> Section 7 of the Act guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. However, both the Board and the courts have recognized that not every form of activity that falls within the letter of this provision is protected. . . . Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act.
>
> Her, the objective of the carloaders' concerted activity--to induce the Respondent to increase their hourly rate of pay or to return to the piecework rate--was a lawful one. To achieve this objective, however, they adopted the plan of decreasing their production to the amount they considered adequate for the pay they were then receiving. In effect, this constituted a refusal on their part to accept the terms of employment set by their employer without engaging in a stoppage, but to continue rather to work on their own terms. 55/

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55. C.f. Harshberger Corporation (1938) 9 NLRB 676, 686, in which the Board treated a concerted refusal to work overtime as a partial work stoppage and protected concerted activity.

The similarity between the conduct of the Esquival crew on April 30 and that of the Elk carloaders is apparent. Elk is an applicable NLRB precedent supporting the conclusion the nine workers discharged on April 30 were not engaged in conduct protected by Labor Code Section 1152; thus, their discharges did not violate the Act.

In C.G. Conn, Ltd. v. N.L.R.B.,[56] the Seventh Circuit declined to enforce a Board order directing reinstatement of union activists for refusing to work overtime. The Board argued the workers were engaging in a partial strike when they decline to work overtime although being otherwise prepared to perform their duties.

The Court stated the employees could continue work and seek to negotiate further with the employer or they could strike in protest.

> They did neither, or perhaps it would be more accurate to say they attempted to do both at the same time.
>
> We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment. (5 LRRM at 813.)

Elk and the other cases cited deal only with the impact of the method upon concerted activity in determining whether such activity is protected. Having found the nethod of protest removed

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56. (7th Cir. 1939) 108 F.2d 390, 5 LRRM 806; see also, N.L.R.B. v. Montgomery Ward & Co. (8th Cir. 1946) 157 F.2d 486.

it from the protection of the NLRA's G 7 (Section 1152), the cases do not deal with the question of the employer's motivation for doing what it did to precipitate the concerted though unprotected activity. However, it seems clear the NLRB and the courts considered the employer's conduct discriminatorily motivated or the underlying charges would have been dismissed.

It is questionable whether the employers motivation for an arguably illicit work order has relevancy when the employees' response is concerted unprotected conduct which leads to their discharge. In the instant case, there is no question that had the Esquibel crew responded to the order to work in spaces by striking, the response would have been protected concerted activity and insulated the employees from discharge. Moreover, if proved that Respondent's order was discriminatorily motivated, their posture would have been that of unfair labor practice strikers immune even from permanent replacement. Alternatively, had they sought to negotiate with Ahumada upon receipt of the order, their response would have been protected. Thus, logically it would appear that the reason for Respondent's direction to work by spaces is irrelevant. Even if aimed at punishing the Esquibel crew for past "union" or "concerted" activities, the workers were not free to continue to work in the manner of their choosing rather than the manner dictated by Respondent.[57/] When they did so, they went beyond the pale of Section 1152 and were unprotected.

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57. I find the employees discharged on April 30 were terminated because of their repeated refusals to work by spaces

(Footnote 57 continued----)

Notwithstanding the conclusion that Elk Lumber and the cases cited above seem to render irrelevant the employer's motivation for the order precipitating the concerted action, the preceived novelness of the issue so far as the ALRB is concerned suggests that the motivation of the Respondent in issuing the spaces order be discussed.

From the perspective of Respondent's overall operation spaces work is not unusual, granting that 1981 appears to be the first year suckering was done by spaces.[58/] Except so far as it prevents employees from socializing during work time, the work is not different from suckering by rows. No contention is made to the contrary. The consensus of workers objections to spaces work in suckering was that it prevented socializing and talking about the union during actual work time. Work time is for work; not for engaging in union or other concerted activity. General Counsel has cited no cases supporting the proposition that employees have a right to engage in non-work activities during these periods of the day when they are expected to be physically performing their

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(Footnote 57 continued----)

coupled with continuing to work by rows. Their conduct amounted to insubordination and warranted discharge. The record does not support the conclusion the nine employees would have been retained "but for" union activities or other protected activities. This is not a case in which there is substantial independent Section 1153(a) conduct nor a case in which there has been significant amounts of union or protected activity; either of which factors might support an inference that Respondent's explanation for the termination is pretextual. Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 730.

58. There is some testimony there was spaces suckering in 1980; however, I am not convinced such was the case.

duties.[59]

Ahumada testfied that suckering is a critical operation in the growing cycle, requiring care and concentration. Following his observation of a suckering crew working by rows, he concluded, after consultation with Norris, the work could be performed more efficiently by spaces. All three suckering crews were assigned to work in this manner. There is not evidence the other crews objected.

As conceded by worker witnesses, spaces suckering results in greater worker productivity. The method also maximizes the employer's ability to cultivate or irrigate following the suckering process, since there are likely to be fewer "piece" rows at the end of a day or a week.

Thus, even if the motivation for the work direction precipitating the workers unprotected response be germain, there were valid business considerations for the order that all crews sucker by spaces. But even if this were not the case, the Esquibel crew was not free to respond to the order in the manner in which it opted to do so.

2. The June Budding Bonus

Paragraph 7 of the complaint alleges that Respondent violated Section 1153(a) by failing in 1981 to pay the June budding

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59. One General Counsel witness testified he and his co-workers spent an estimated one-half hour per day during work time talking about the UFW. Not surprisingly, he testified his work was unaffected. This testimony must be evaluated in the face of worker and management testimony to the effect that when working by rows, the crew tends to remain together as they proceed along the rows as well as Ahumada's testimony regarding his observation of workers suckering by rows.

crew a bonus.

General Counsel offers two theories to support the allegation: Respondent engaged in cultural practices which made impossible for crew members to achieve the 90% live count required to be eligible for a bonus; alternatively the failure to pay the bonus, despite failure to achieve a 90% live stand, departed from Respondent's past practice. In either case it is contended Respondent's motivation was interference with workers section 1152 rights.

Turning first to the argument that the failure to pay the bonus was a change in conditions of employment. The following facts are undisputed: only five persons in the June budding crew achieved a 90% or greater live stand, these persons received the bonus; with the exception of 1974 persons failing to make a 90% live stand have not received a bonus; historically, 1974 excepted, most budding crew members have achieved a 90% stand.

Respondent's president made the decision to adhere to the practice of paying a bonus only to those achieving a 90% live stand. He testified he felt the purpose of the bonus was to permit workers to share in gains enjoyed by Armstrong as the result of high production; that if it were paid despite the failure to achieve high production, its purpose would be lost and Armstrong would have to pay it every year to every employee.

This position is one which can be expected of a reasonable corporate executive of ordinary prudence irrespective of whether his company is being subject to protected or union activity. An exception to De Mayo's position occurred in 1974 when all budders

and tiers received a bonus despite faiures to achieve 90% stands. Respondent argues such is not the case. In 1974 the company knew prior to commencement of budding that the only available budwood was of a quality which would not permit workers to achieve 90% stands; in order to get the budding done, Armstrong agreed in advance to guarantee the bonus because it rather than an external cause was responsible for the law production.[60/] Thus, Respondent's position may be stated in the following way: when it has advance knowledge the budders will not achieve the requisite percentage live stand, it guarantees the bonus. The effect of such a practice is to pay a higher wage when productivity is anticipated to be lower; an effect De Mayo testified would subvert the purpose of the bonus.

Conceptually, there is no difference between failure to achieve a 90% stand as the result of a naturally external cause and an external cause resulting from business exegencies. If the logic of 1974 were followed, bonuses would have been paid to everyone in 1981. The fact that the 1974 external cause was known prior to rather than during the budding season is on its own a distinction without a difference. In 1974 and with roses in 1981, a bonus guarantee was necessary to secure the required number of workers.

There is, however, uncontroverted testimony from De Mayo which does distinguish the failure to pay all workers the 1981 budding bonus from bonus payments made in 1974 and in 1981 roses. De Mayo testified regarding the latter two situations that agreement

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60. A situation similar to that of the 1974 deciduous budding operation occurred in 1981 with roses; again the bonus was guaranteed up front.

was reached with the workers "up front", i.e. before the season began, regarding the fact their rate would include the customary bonus. The failure of General Counsel to rebut this testimony warrants the inference it is credible. There is no evidence such an agreement was reached at the pre-budding meeting between management and workers at which the wage rates and bonus system was explained to workers.[61] It follows that Respondent's failure to pay all 1981 June budders a bonus did not constitute a unilateral change in wages or a condition of employment with an object proscribed by Sections 1153(a) or (c).[62]

We turn now to General Counsel's argument that if the low live count was attributable to factors within Respondent's control, the workers should have received their bonus. In short, bonuses are automatic unless God or the budwood supplier intervenes. Management errors in cultural protests provide no reason for failing to pay bonuses; the failure of a reasonable grower of ordinary prudence to

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61. There is disputed testimony from General Counsel witnesses that Pete Torres during the course of June budding stated to some individual workers that the bonus was guarangeed to everyone. Torres denied having done so. It is undisputed that Torres lacked authority to set or increase wages and that workers were aware he lacked such authority. Since there was no implied contract at the outset of budding, it is unnecessary to resolve this conflict in the testimony. Such a resolution would be difficult. While General Counsel produced several witnesses who testified Torres told them their bonus was guaranteed, their testimony was not totally convincing. Balanced against some obvious inconsistencies in their testimony, e.g. steadfastly contending they attended a meeting on September 27, a Sunday, while agreeing they never worked on Sunday, is the fact these witnesses were currently employed by Respondent and testifying against his interest, albeit in their own.

62. Since no certified collective bargaining representative is involved, this is not a situation in which a unilateral change per se might violate the Act.

make decisions producing a 90% live stand nonetheless requires the bonus be paid.

This analysis overlooks the need for a discriminatory motive in finding a statutory violation. It would not enough for General Counsel to establish that Respondent engaged in cultural practices with respect to budding which resulted in the production of approximately 190,000 fewer trees than anticipated; he must also establish a discriminatory motive for such a course of conduct. Contrary to General Counsel, I do not find that the facts overwhelmingly support this view.

The record is somewhat muddled with respect to when high temperatures would impact on production of live trees, and other factors must be considered in assessing heat impact, e.g., how close the trees were stubbed above the bud or the failure to paint the understock white. However, the pervasiveness of the damage as well as the type of damage leads one to conclude that high temperatures were the prime cause for tree loss.

While poor cultural practices may have been a contributing cause in producing the low count, it doesn't follow automatically that Respondent engaged in those practices to deprive workers of a bonus. To accept this line of reasoning requires acceptance of the idea that Respondent subjected itself to substantial losses in revenue with the object of interfering with the Section 1152 rights of its employees. There is no evidence of the degree of animus one would expect from a grower who would engage to this degree of cutting off his nose to spite his face. General Counsel has failed to establish a causal connection between Respondent's failure to pay

the 1981 June bonus and the union and/or protected concerted activities engaged in by some members of budding crews.

3. 1982 Changes in Conditions of Employment

Paragraph 8 of the Compalint alleges that in March 1982 Respondent changed the conditions of employment to discourage workers from union organizing. The substance of the allegation is that Respondent implemented the space method in "nearly all its operations in 1982. Planting and suckering are the operations occurring during February and March. Credible evidence established that planting has been done by spaces the majority of the time during the three years preceding 1982 and the shift over to suckering by spaces occurred in 1981. Indeed, it was a refusal to accept the shift from rows to spaces which triggered the April 30, 1981, discharges.

General Counsel seeks a finding that the 1981 change from suckering by rows to suckering by spaces violated section 1153(a) despite the absence of an allegation the shift violated section 1153(a), stating the matter was fully litigated at the hearing.[63/] I agree that Respondent's shift from row suckering to space suckering in 1981 was fully litigated. Evidence was presented regarding when the shift occurred, i.e. during 1981 or in an earlier year, which supports the conclusion that the space method had not been used at Armstrong prior to 1981. The record also establishes that the change over occurred in all suckering crews and was not limited to the crew in which the April 30 discharges occurred.

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63. McFarland Rose Production (1980) 6 ALRB No. 18; Anderson Farms (1977) 3 ALRB No. 67.

However, Respondent's unilateral change of a condition of employment, standing alone, does not establish a violation of the Act. An illicit motivation for the change must be established before a violation of section 1153(a) or section 1153(c) can be found.[64/] For reasons previously set forth I find General Counsel has not proved that a motive for Respondent's change in suckering methods was interference with workers' union activities or with the right guaranteed by section 1152 to engage in protected concerted activity.

CONCLUSIONS OF LAW

1. Respondent, at all times material herein, was an agricultural employer within the meaning of Labor Code Section 1140.4(c).

2. The UFW, at all times material herein, was a labor organization within the meaning of Labor Code Section 1140.4(f).

3. Respondent was duly served with the charges, complaint and first amended complaint as set forth in the findings of fact.

4. Respondent did not for the reasons set forth above violate sections 1153(a) or 1153(c) of the Act by terminating nine employees on April 30, 1981.

5. Respondent did not for the reasons set forth above violated sections 1153(a) or (c) of the Act by failing to pay a June budding bonus to persons not achieving a 90% live stand in the 1981

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64. While discriminatory motive is ordinarily not a requisite element in proving violations of section 1153(a), it is an element of proof when the conduct alleged to violate section 1153(a) is of the type which would constitute a violation of section 1153(c) in an appropriate case.

June budding.

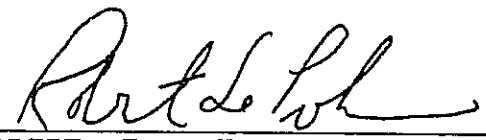
6. Respondent did not violate section 1153(a) of the Act in March 1982 in that it did not change conditions of employment with the object of interfering with employee rights guaranteed by Labor Code Section 1152.

7. Respondent did not violate section 1153(a) of the Act by changing its method of suckering in 1981 from rows to spaces.

RECOMMENDED ORDER

Having concluded Respondent did not violate the Act as alleged, I recommend that the complaint be dismissed in its entirety.

DATED: October 5, 1982



ROBERT LE PROHN
Administrative Law Officer