Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LU-ETTE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 82-CE-29-EC[1/] 82-CE-38-EC 82-CE-44-EC 10 ALRB No. 20

DECISION AND ORDER

On April 19, 1983, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision and recommended Order in this matter. Thereafter, General Counsel timely filed exceptions to the ALJ's Decision and an accompanying brief.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

[1/] Charge No. 82-CE-29-EC was severed sua sponte by the ALJ who was reversed on Interim Appeal. We ordered the allegations set for hearing. As of this date, the General Counsel has not sought to bring these allegations to hearing. Given the overlap of any possible remedy for the alleged violations with the remedy we ordered in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, we hereby sever the allegations relating to Charge No. 82-CE-29-EC in order to issue this Decision without further delay. (See Labor Code § 1160.2.) Chairman Song would reverse the Board's earlier ruling in this matter regarding severance. He would find that the Board has the discretion inherent in a fact-finding tribunal to sever, consolidate, continue or otherwise manage cases before it. The efficient and effective administration of justice furthers the Board's ultimate objective, the ascertainment of truth.

[2/] All section references herein are to the California Labor Code unless otherwise specified.

The Board has considered the record and the ALJ's Decision in light of the exceptions and brief of the General Counsel and has decided to affirm his findings, rulings,[3/] and conclusions and to adopt his recommended Order, with modifications in the Notice.

As suggested by the ALJ, any delays in reinstatement experienced by the strikers who unconditionally offered to return to work after issuance of the Superior Court injunction will be remedied in the compliance phase of Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Lu-Ette Farms, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Harassing, intimidating, coercing, or otherwise discriminating against, any agricultural employee for having engaged in union activity or other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the

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[3/] The ALJ's sua sponte severance, as mentioned in footnote 1, was reversed by the Board by order dated January 12, 1983. Unlike the situation in Sam Andrews' Sons (1980) 6 ALRB No. 44, the General Counsel and other parties to the instant case were opposed to the severance at the time of the ALJ's action. The General Counsel has apparently reconsidered and is now in favor of severance, as indicated by the "Order Severing Complaint and Placing it in Abeyance" filed by Regional Director Arizmendi on March 6, 1984.

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) 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.

(b) 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 January 29, 1982 and January 29, 1983.

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

(d) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the notice and 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 to compensate them for work time lost at this reading and the question-and-answer period.

(e) Notify the Regional Director in writing, within 30 days of the 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: April 20, 1984

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by harassing and intimidating employees who had shown support for the United Farm Workers of America, AFL-CIO (UFW), who had gone out on strike, and then were ordered reinstated. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act (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 harass, intimidate or coerce any employee by imposing more onerous working conditions, by photographing employees against their wishes, by making statements threatening, provoking, and denigrating them for exhorting other employees not to assist them, or by otherwise discriminating against any employee because he or she has joined or supported the UFW, or any other labor organization, or has exercised any other rights described above.

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

Dated: LU-ETTE FARMS, 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 319 Waterman Avenue, El Centro, California 92243. The telephone number is (714) 353-2130.

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

LU-ETTE FARMS, INC.

10 ALRB No. 20
Case Nos. 82-CE-29-EC
82-CE-38-EC
82-CE-44-EC

ALJ DECISION

The ALJ, after severing sua sponte charges alleging Respondent's refusal to rehire unfair labor practice strikers, found strikers who were rehired were subjected to an overall scheme of harassment and intimidation in violation of section 1153(a) and (c). He also found that documentation procedures adopted by Respondent and its agents for identification of returning strikers were reasonable in light of the extended passage of time since inception of the strike and, especially, in light of the limitations of a contemporaneous court injunction ordering reinstatement for only those strikers who had previously submitted written offers to return. (See Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.) He recommended dismissal, for failure of proof, of an allegation that employee David Adams was threatened with discharge. Finally, he suggested that any delays in reinstatement occasioned by Respondent's identification procedures be remedied in the compliance phase of 8 ALRB No. 55.

After the close of the hearing, but before issuance of the ALJ's Decision, the Board, pursuant to interim appeal of all parties, reversed the ALJ's sua sponte severance of the refusal to rehire charges and ordered that the hearing be reopened to litigate those charges.

BOARD DECISION

The Board affirmed all of the ALJ's findings and conclusions regarding the scheme of harassment and intimidation against returning strikers and the alleged threat to discharge David Adams. The Board also adopted the ALJ's suggestion and ordered any delays in reinstatement to be remedied in the compliance phase of 8 ALRB No. 55.

Regarding the severed refusal to rehire charges, the Board noted that General Counsel had not sought to proceed against Respondent on those allegations and was presently on record as seeking their severance. In addition, any remedy for refusing to rehire strikers would be subsumed by the remedy already ordered in 8 ALRB No. 55. Therefore, the Board, with Chairman Al Song concurring, severed the charges in order to issue its Decision without further delay.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: LU-ETTE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 82-CE-29-EC- 82-CE-38-EC 82-CE-44-EC

APPEARANCES:

Nancy Bramberg, Esq., and Christine Brigagliano, Esq., for the General Counsel

Larry Dawson, Esq. Of Dressier, Quesenbery, Laws & Barsamian for the Respondent

David Adams, for the United Farm Workers of America, AFL-CIO, Charging Party

BEFORE: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

1. This charge was severed from the others. The circumstances surrounding the severance are discussed infra.

I. STATEMENT OF THE CASE

On February 3, 1982,[2/] the United Farm Workers of America, AFL-CIO (hereafter referred to as the Union), filed and served on Lu-Ette Farms, Inc. (hereafter referred to as "the company" or "respondent") the first of the three charges with which this case is concerned, alleging violations of sections 1153(a) and (c) of the Act. Subsequent charges, also alleging violations of sections 1153(a) and (c) of the Act, were filed by the Union and served on respondent on February 9 and February 18, respectively.

On May 25 the General Counsel for the Agricultural Labor Relations Board caused to be issued a consolidated complaint based on the aforementioned charges. Respondent, having been duly served with the complaint and notice of hearing, timely filed an answer which essentially denied the commission of any unfair labor practices.

Beginning December 6, a hearing was held before me in El Centro, California, and proceeded until adjourned on December 10. All parties appeared through their respective representatives, and were given full opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to submit oral arguments and briefs in support of their particular positions.

As the hearing opened, I severed, on my own motion, Case Number 82-CE-29-EC from the remaining allegations. All parties were

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2. All dates refer to 1982 unless otherwise noted

opposed to the severance. The matters arising therefrom[3] were thus not treated during the course of the hearing. The General Counsel timely filed an interim appeal from the ALJ's Order for Severance. On January 12, 1983, the Board granted the appeal stating "[t]he Board holds that the Administrative Law Officer[4] is not empowered to sever a charge sua sponte. See 8 Cal. Admin. Code section 20244 and 20262."

Contrary to this determination, in Sam Andrews' Sons, 6 ALRB No. 44 on page 5, fn. 6, the Board explicitly recognized the authority of the ALO to act in this capacity: "... it would have been appropriate for the ALO, on the motion of the General Counsel,

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3. As will be detailed below, the issues alleged in the instant complaint concerned events surrounding the reinstatement of former strikers pursuant to 8 ALRB No. 55. A group of these employees signed actual written offers to return to work; others expressed this intention by applying in person for their jobs and orally, requesting reinstatement. A Superior Court injunction obtained in January 1982 ordered the reinstatement only of those workers who had executed the written offers to return. Certain individuals who applied for work in person were denied reinstatement despite having requested it. These workers were initially alleged as discriminatees herein.

The severance was occasioned by the ALJ's interpretation of the original language of 8 ALRB No. 55, which, it was felt, created no distinction between oral and written offers to return to work in holding that "all strikers" were entitled to "immediate reinstatement." Therefore, it appeared redundant to relitigate the issue of the right to reinstatement for these workers whom the Board had clearly declared were already entitled to their former jobs. Subsequent to the hearing the Board apparently attempted to dispel any ambiguity arising from its original opinion by specifically enunciating in a supplemental decision, 8 ALRB No. 91, that "[i]n ... 8 ALRB No. 55, we concluded that Respondent herein discriminatorily refused to rehire strikers who had made written and/or oral unconditional offers to return to work." (Emphasis supplied.)

4. At the time, all Administrative Law Judges were referred to as Administrative Law Officers. (ALRA Regs, section 20125, amended eff. Jan. 30, 1983.)

sua sponte, to sever the two settled cases and to proceed with the hearing as to the allegations in the complaint based on the charges on the remaining matter. ..." The Board is invited to clarify its position on the authority of Administrative Law Judges to treat matters on their own motion and hopefully provide precedential guidance on this question.[5/]

Returning to the issues presently at bar, based upon the entire record, including my observations of the respective demeanors of each witness who testified, and having read and considered the briefs submitted to me since the close of hearing, I make the following:

II. FINDINGS OF FACT

A. Jurisdiction of the Board

1. Respondent was and is, at all times material, an agricultural employer within the meaning of section 1150.5(c) of the Act;

2. The Union was and is, at all times material, a labor organization within the meaning of section 1150.5(f) of the Act.[6/]

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5. More recently, in Nick J. Canata (1983) 9 ALRB No. 8, the Board on page 5, fn. 6 recognized by implication the power of an Administrative Law Judge to reinstate, sua sponte, without a motion or request for reconsideration from a party, allegations which were dismissed pursuant to the motion of a party.

6. The jurisdictional facts were admitted by respondent in its answer.

B. The Unfair Labor Practices Alleged

1. Introduction

Respondent is principally engaged in the cultivation of lettuce, wheat and alfalfa. Lettuce operations are conducted over some 650 acres.

This case involves allegations of harassment and acts of intimidation directed towards lettuce harvest workers who were deemed unfair labor practice strikers and who were initially denied reinstatement in 8 ALRB No. 55. In the injunctive proceeding in the Imperial County Superior Court alluded to above, respondent was ordered to put the bulk of those workers back to work.

As may be recalled from the decision in the original Board case, during the course of the 1978-79 harvest season, Respondent's workers engaged in what was initially an economic strike, but which was converted, as of February 21, 1979, (per Admiral Packing Company (1981) 7 ALRB No. 43) into an unfair labor practice strike by "virtue of the employer's illegal conduct [bad faith bargaining] as of that date." In 8 ALRB No. 55, the Board determined that the respondent had violated sections 1153(a) and (c) of the Act by failing to reinstate those workers who had gone out on strike and who subsequently offered to resume employment unconditionally. On January 4, 1982, an injunction was obtained by the General Counsel in the Superior Court of Imperial County ordering that certain workers[7/] who had engaged in the strike be reinstated to their

7. As previously noted, the group which was ordered back to work was comprised of those workers who had submitted "written" offers to return. The "offers" actually consisted of workers' signatures on various petitions which the Union had gathered at its office.

former positions with the respondent. Commencing January 29, 1982, workers in this category returned to Respondent's employ.

General Counsel alleged that the respondent engaged in the following acts, among others,[8/] designed to harass and intimidate the returning strikers:

1. Conditioning reinstatement "on presentation of various forms of identification";

2. Photographing of strikers while they were working "in order to create the impression of surveillance and the threat of reprisal";

3. Making "threatening and coercive statements directed at the returning strikers";

4. Threatening employee David Adams with discharge should he return to work under the reinstatement order.

2. Specific Allegations

a. Presentation of Identification

As noted above, on January 29 groups of erstwhile strikers presented themselves at respondent's fields in order to reobtain their jobs. A list had been prepared of those individuals who had previously signed written offers to return to work. Luis Avila, respondent's harvesting superintendent, testified that the list named all of the workers he intended to hire, since the company

8. General Counsel did not intend the listing to be all-inclusive. A discussion of other conduct not specifically denoted in the complaint follows that for the particularized allegations set forth.

had sufficient numbers of workers in already-existing crews.[9/] In addition to being named on the hire list, the respondent required each worker to verify his identity and social security number before being put to work. General Counsel alleged that by insisting on these prerequisites to reinstatement, respondent harassed and coerced its former strikers, and made their return to work unduly onerous.

Bill Daniell, co-owner and one of respondent's chief managers, instructed Yolanda Munoz, respondent's timekeeper,[10/] to ask that returning strikers produce a green card or citizenship papers, and a Social Security card. Daniell, Avila and Munoz all testified that while they might recognize a particular worker's face, in most instances they were unable to match a face with a name, or vice versa. Munoz in particular stated that she needed the written verification in order to fill out W-2 forms, which was part of her duties.

Several workers testified as to various impediments to re-employment they encountered resulting from respondent's documentation requirements and insistence on inclusion on the hire list. The returning strikers initially reported to superintendent Avila, who had a copy of the hiring list. When workers Francisco

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9. Avila acted on his own initiative in imposing this requirement, as he denied that he received any instructions to impliment the policy. As will appear, the reinstatement of several workers was delayed because their names did not appear on the hire list.

10. Munoz was alleged by the General Counsel to be a supervisor, which respondent denied. As the issue has no impact on the ultimate findings in the case, it will not be determined.

and Felipe Moran, for example, presented themselves at the fields, they were apparently recognized by Bill Daniell.[11/] Avila ordered the brothers to begin working. Subsequently, however, these workers were informed by Mike Munoz that they would not be able to work since their names did not appear on the list of returnees. Although both Munoz and Avila testified at the hearing that they were familiar with Francisco and Felipe Moran, recognizing them by their nickname ("los Changes"), the brothers were not allowed to return to work for the respondent until the question of their prior employment and strike participation was rectified by communications between Board Agent Jesus Longeria and respondent's attorneys. The employees lost several days of work as a result.

Arturo Parra had been employed by respondent from 1977 until the strike. When he returned to work in January 1982, he was asked by foreman Munoz whether he had "a card from the ALRB or the 127 State."[12/] When Parra showed Munoz a note that his daughter had made referring to a call from Board Agent Longoria regarding employment, he was told to start working. Earlier that day, when Parra reported to Avila, he was not asked for any identification, but merely was told to "see Mike."[13/]

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11. As the two arrived, they greeted Daniell, Avila and foreman Mike Munoz, who were gathered together. Francisco extended his hand to Daniell, who responded "Fuck you.'" Daniell, at minimum, was aware of Francisco's participation in the strike, since this must have engendered the animosity reflected in his remark.

12. Munoz did not directly deny this. He stated that he merely spoke to Parra about the "type of work."

13. Parra's name was on the company attorney's list.

Similarly, Felisardo Rascon was asked by Munoz whether he had a letter from "the State" regarding his return to work. Rascon first began working for respondent in 1975. Although Munoz denied requesting the letter or that Rascon show him his social security card and MICA,[14/] Rascon lost two days of work while he attempted to obtain written authorization from the Union and/or the ALRB that he be permitted to resume working. When he eventually returned, Munoz informed him that the letter was no longer important. Munoz admitted that he knew Rascon as a company worker of long standing.

Gustavo Villareal was employed by respondent from 1972 until the strike. He had been permitted to commence work on January 29, apparently because his name appeared on the hire list. After he had packed about five boxes of lettuce that day, Luis Avila ordered him to stop working, since the social security number which appeared next to his name on the list differed from that set forth on his actual social security card. Villareal persisted in his attempts to reobtain his job on consecutive days thereafter, but was not actually allowed to resume his employment until approximately one week after he had initially presented himself.

Fernando Trejo had begun working for respondent in December 1978. He joined his coworkers in the strike which, as may be recalled, began on January 15, 1979. He participated in picket duty during the course of the strike. When he returned to respondent's premises on February 3, 1982, he was asked by Luis Avila for some

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14. Rascon testified that Munoz requested that he be shown this documentation. Perhaps Rascon was confusing the foreman with his wife, who did claim that she asked that workers produce these items.

form of identification which had his picture on it. Although his name appeared on the hire list, because he did not have the identification with him that day, he was not put to work. When he came back the following day with identification, he was permitted to resume his duties with the crew.

Neither Jorge Ferrel nor Ramon Salsameda signed written offers to return to work, and hence neither workers' name appeared on the hiring list. A third worker, Pablo Valenzuela, likewise did not sign a written offer. All three applied for jobs several days after the intial group of returning strikers was put to work and was hired by the respondent. Ferrel stated that he previously worked with Avila in Huron, and claimed that the superintendent knew, or should have known, who he was. He had only been employed for a short period in 1979 before going on strike. When he reported to the company's fields, he was not asked to produce identification. Avila just asked Munoz if there was room in his crew. On being told that the Munoz crew was full, Avila asked foreman Viscarra, who happened to need a worker to complete a trio. Ferrel was then put to work. Salsameda, likewise, was hired as a closer, apparently because on the day he was employed the need arose for someone in that job category. Similarly to Ferrell, Salsameda had only worked a short period for repsondent in 1979 before going on strike.

Two other workers whose names appeared on the re-hire list, Jesus Carmona and Crissanto Armenta, were put to work without first verifying their identities. Armenta stated that he knew Avila for about fifteen years, having worked with him over that period. Carmona, who started working for respondent in 1978, testified that

he was on the picket line every day. When asked, Avila stated that he recognized Carmona's name, although he averred that he "would have to see the face." After beginning work, Carmona was asked by Yolanda Munoz to produce his MICA and his social security card, neither of which he had on his person. Carmona, however, was not prevented from working.[15/]

Luis Avila explained the rationale for requesting that the returning strikers adequately identify themselves, as follows:

> We had that list [of returning strikers] already, and we were going by that list because there was no way of remembering who was on strike and who wasn't, unless we went by some kind of list with the names on it and right at the time that they all showed up, we didn't need that many people.... We were supposed to hire strikers and I had no way of knowing for sure, who were the strikers and who weren't, and the policy is that we hire people daily, if we need them, and the only ones that we were obligated to hire, whether we needed them or not, were the stikers but unless I had a list to go by -- ... I had to have a name, I had to have an order from the office that we had to hire that man, whether we needed him or not.

B. Analysis and Conclusions

Three years had passed since the strikers had been employed by Lu-Ette. While it is evident from the testimony of certain witnesses that they were recognized by respondent's supervisors, and hence no inordinate obstacles to their re-obtaining their jobs were

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15. General Counsel attempted, pursuant to the letter of the complaint, to demonstrate that workers were required to produce a social security card, not just merely recite their number, and that this requirement somehow constituted coercion or restraint of the returning strikers. Yolanda Munoz insisted, somewhat incredulously, that she demanded that each worker produce his card every day, despite their providing to her their number throughout the season. No evidence was presented, however, that any of the returning strikers were denied employment for not having a social security card, or that the respondent insisted on the presentation of the card to the point of annoyance or harassment.

imposed once they had presented themselves, other workers experienced problems being put back to work for the simple reason that they either were not well-known to respondent, or that respondent believed it was not under the compulsion of a court order to reinstate these individuals. For example, Fernando Trejo only worked for respondent a very short time before he went out on strike. It would appear unreasonable to expect anyone within respondent's hierarchy to be acquainted with him to the extent that the need for him to identify himself would be totally obviated.

Further, respondent was somewhat justified in expecting that it would have to reinstate only those individuals of whom it had notice of an obligation towards. The specific language of the preliminary injunction ordered respondent to "reinstate those individuals identified in Exhibit A" (Exhibit A consisting of copies of the offers to return to work signed by the strikers). While the argument might be made that all strikers had reinstatement rights, without some compilation or listing of the names of each of these individuals, it would be difficult, if not impossible, to determine among those people who appeared at respondent's fields who should be hired regardless of whether a vacancy existed in respondent's employee complement. As noted by Luis Avila, ordinarily hiring might take place daily, if employees were needed. Thus, employees customarily appeared at respondent's fields seeking work each day, whether or not they had been previously employed by the company.

The injunction mandated that "if necessary to effectuate the reinstatement rights of those workers identified in Exhibit A, respondent shall terminate any replacement worker who occupies or

will occupy the position for which reinstatement is sought." Thus, respondent was not only compelled to reinstate workers, it was also compelled to terminate those employees who occupied the positions they would assume. The dilemma posed by reinstating the strikers was not merely that they be returned to their former jobs, but that in addition, they be hired regardless of whether or not they were needed; i.e, other workers had to be displaced to make room for them. Under these circumstances, it was not unreasonable for respondent to act consistently with the order of the court in reinstating designated individuals, and requiring those individuals to verify their identifies. Accordingly, it is determined that by such acts and conduct respondent did not violate section 1153(a) of the Act, and this allegation be dismissed.[16/]

b. Photographing of Strikers

General Counsel alleged that respondent photographed

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16. The difficulties experienced by certain workers (particularly those not on the hiring list) in obtaining their former jobs might have quite easily been obviated by the compilation of a list of striking employees achieved by reference to respondent's pre-strike and post-strike payroll records, and a simple announcement to those workers that they have with them sufficient identification when they sought re-employment. Whether these problems were attributable to respondent's intransigence or the laxity of the Regional Office is not apparent. However, it is clear that the workers themselves should not be forced to bear the burden of such conduct regardless of from where it emanates. The wronged employees should not suffer the consequences of administrative delays, which act to the benefit of the wrongdoing employer. An analogy might be drawn to a situation where laches is posed as a defense: "administrative delay is not sufficient reason to deprive employees of their statutory rights." (Mission Packing Company (1982) 8 ALRB No. 47; see also Golden Valley Farming (1980) 6 ALRB No. 8.) It is suggested therefore that any delays experienced in returning to work be remedied in the compliance chase of 8 ARLB NO. 55.

several of the strikers after they had been reinstated. The photography took place while the strikers were working, and the photographs were taken, according to the complaint, "in order to create the impression of surveillance and the threat of reprisal."

Testimony revealed that on a certain day after the strikers had been reinstated, owner Bill Daniell arrived at the work site with a camera and began to take photographs of three workers who had been strikers: Felipe Moran, Francisco Moran, and Pablo Valenzuela. The three comprised a trio which at some point was disbanded. The record is unclear, however, whether the three were still working together at the time of the incident.

It is clear that the workers did not consent to, or even desire, to have their pictures taken. Francisco Moran, while the camera was being pointed at him, pulled his cap down over his eyes, as Daniell repositioned himself repeatedly to attempt to capture his face. Felipe refused to look up when he was being photographed. Daniell took Valenzuela's picture hurriedly, and then quickly walked away.

Prior to the return of the strikers, respondent's workers had been photographed. The pictures were taken by a "professional" photographer, not Daniell, and, as inspection of them reveals, were obviously posed and henced obtained by consent. Daniell explained that the pictures were taken after the crew had harvested a plot with a particularly high yield, and that he wished to give the workers copies of the photos "so they could take it and put on the mantle of their home, you know, be proud that they worked for Lu-Ette Farms."

Daniell attempted to explain the photographing of the three workers by asserting that since he had pictures taken of the non-strikers, in order for "everybody to be equal," he also took pictures of the reinstated strikers. The reason for his taking the pictures personally, rather than a professional photographer performing the task, was in order to save some money. Daniell claimed he had "no idea" what happened to the photos he took, whether they were distributed to the workers or not. The photographs themselves, unlike the posed ones of the non-strikers, were not produced for admission in evidence.

Felipe Moran, prior to the strike, had been a crew representative. At the time in question, he was President of the Ranch Committee. He testified about an occasion where he presented to supervisors a grievance-like matter in which he complained of the treatment that the returning strikers were receiving on the job. However, the photographing incident was not linked to the grievance presentation; the record contains no reference as to relation in time between the two. While Daniell testified that he "might have taken a picture of the whole group of the field," no evidence (including the pictures) was preferred in support of his assertions. Thus, it may be assumed that only Pelipe and Francisco Moran, and Pablo Valenzuela, were the subjects of the photos.

b. Analysis and Conclusions

It is unquestionable that the three workers were annoyed at having their pictures taken, and did not give their consent for same. While photographic "surveillance" of protected activities undeniably constitutes a violation of the Act (see, e.g.,

E & J Gallo Winery, Inc. (1981) 7 ALRB No. 10; O. P. Murphy & Sons (1979) 4 ALRB No. 106; Patterson Farms (1982) 8 ALRB No. 57), nowhere does the simple act of taking pictures of workers while working fall within its specific prohibitions.

Section 1153(a) of the Act states: "It shall be an unfair labor practice for an agricultural employer . . . [t]o interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." (Emphasis supplied.) The distinction between the instant case and those involving violations of the Act based on photographic surveillance is that in those cases, unlike here, employees were engaged in the exercise of their section 1152 rights. While a particularized right of privacy is cognizable under the Act, at least in the context of freedom from surveillance while engaging in union activities (see cases cited above), or in the context of the "right to refrain" from participation in protected activities (see United Farm Workers, AFL-CIO (Marcel Jojola) (1980) 6 ALRB No. 58), a generalized right of that nature has not been so determined to exist.

Admittedly, the testimony of several of respondent's supervisors to the effect that they might recognize a particular worker "by face" though not by name gives rise to the inference that Daniell may have sought to "remember" the identities of certain returning strikers by having a photograph of them. This, in and of itself, does not create the "tacit threat of future reprisals for engaging in [protected] activities" (per Patterson Farms, supra) that the cases finding violations resulting from photographic surveillance, and its coercive nature, are grounded upon. The names

of the returning strikers clearly were known to respondent. Any "threat of future reprisals" based on their strike participation might be inherent on their being identified with the striking group, rather than being implied from the taking of the photographs, in and of itself. While the photographing of these workers certainly constituted an annoyance, I am unable to conclude that, when viewed in isolation, it was sufficient in and of itself to constitute a violation of section 1153(a) of the Act.

Nevertheless, when this conduct is regarded in light of the totality of the treatment which the returning strikers were subjected to (see below), it provides additional evidence for overall finding based on the harassment of returning strikers. In other words, when seen in the context of the remaining acts surrounding the strikers return, the act of photographing the three distinct individuals provides evidence of an overall scheme to make the reinstatement process more difficult, and hence harass those who exercised their section 1152 rights by participating in the strike. However, as the recommended order includes remedial language which is sufficiently general to encompass this specific conduct, it is unnecessary to refer to it with particularity and/or provide an additional remedy therefor.

c. Statements to Strikers

Jesus Carmona stated that when he arrived at respondent's premises in January to resume work, Yolanda Munoz greeted him and some other workers by announcing that the workers from the Union arrived, the "ones with the little eagle." He added that she "mocked those with the little eagle." The supervisorial/agency status of Munoz notwithstanding, the testimony regarding her remarks was inconclusive. Carmona's characterization of the statements, in the absence of the specific words themselves, is of insufficient probative value to utilize it as the basis for a particular finding.

Returning striker Arturo Parra testified that on January 29, after he had been put to work by Avila, Avila went to the crew and asked foreman Mike Munoz, referring to Parra, "Isn't this the person that tried to sleep with your wife?" Munoz thereupon challenged Parra to repeat, face-to-face, the words that Parra "used to yell at [him] during the strike." Parra took strong exception to these remarks, stating, in essence, that he should just be left alone. He further mentioned to the foreman that they were trying to provoke him. Avila and Munoz both denied that such remarks were made to Parra. However, as aptly pointed out by General Counsel's representatives in their brief, Parra's account was not so fanciful as to be totally undeserving of credence: the detail which he supplied makes it unlikely that the statements to which he testified were fabricated. Given the obvious biases of respondent's witnesses, I am inclined to credit Parra's version of the facts.

Parra also testified regarding disparaging remarks concerning the strikers that he heard foreman Munoz relate.

according to the workers, Munoz stated on more than one occasion that "those workers that the little State had sent back . . . they weren't working. They didn't know how to work. They were no good workers .... They think that because it was in the paper, that they are going to get back pay for the days that they didn't work . . . I know that the owner of this company ... he is not going to give them back pay." Parra testified further that he heard Munoz comment to foreman Viscarra that the strikers were not good workers, that they were "a bunch of lice" and "not to give them any rights,"[17/] "not to help them." Munoz did not specifically deny making these remarks. Hence, Parra's version is to be credited.

Several witnesses testified regarding statements made by the other foreman, Manuel Viscarra. Jesus Carmona stated that he often heard Viscarra comment that the work of the strikers "wasn't good enough" that "they didn't do good work" and that "they weren't worth a damn." Crissanto Armenta heard this foreman tell the non-strikers that the strikers were "lousy," that they should not help the returning workers. He also overheard Viscarra refer to the strikers as "lice" in remarks to his assistant, Pablo Lunares. Gustavo Villareal stated that Viscarra would exhort the replacement workers not to assist or give "rides" to the strikers, telling the replacements to continue moving forward: "don't give help to

17. The word "rights" appears in the transcript. As will be seen, several workers testified that they heard the foreman tell others not to give the strikers "rides" ("raites" in colloquial Spanish) or help.

[these] lousey . . . damn --- workers." victor Corrales noted that he heard Viscarra state to Lunares that the strikers were a "bunch of lazy ones," that they had "no pride in returning to the company."

Lastly, Felipe Moran testified that on one occasion, as president of the ranch committee, he presented a grievance to Luis Avila and Juan Viscarra on behalf of fellow workers Armenta, Carmona, Zamora, Cabrera and Aguirre. As Moran perceived it, a problem arose as a result of the workers being "harassed," that better work was demanded of them than others, that they were not receiving assistance from other crew members and, hence, were falling behind.[18/] Moran stated that, in response, Avila asked him whether the workers were "big enough to defend themselves," that he (Moran) was "no one there," that his job was cutting lettuce, and that he should go back to work. Avila could not remember the situation having taken place; hence he did not specifically deny Moran's assertions. Given Moran's detailed recollection, the fact that he took notes of the meeting, and the absence of a specific denial, it is determined that Avila did make the remarks in question.

b. Analysis and Conclusions

In Merrill Farms v. A.L.R.B. (1980) 113 Cal.App.3d 176, the First District Court of Appeals analyzed the legal principles applicable to an employer's union-related speech. It noted that, consonant with Act section 1155, "'the expressing of any views,

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18. As will be seen, infra, these "problems constituted the main basis for the unfair labor practice findings herein.

arguments, or opinions, or the dissemination thereof . . . shall not constitute evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force, or promise of benefit.' This section acknowledges the right of employers to express antiunion views, and at the same time acknowledges that threats of reprisal can constitute the basis of an unfair labor practice." (At p. 183.) The court went on to state that the "test is whether the employer engaged in conduct which it may reasonably be said tends to interfere with the freedom of the exercise of employee rights under the Act." The record as a whole is to be examined, "taking into consideration all of the surrounding facts and circumstances"; and that "isolated offhand comments" are to be distinguished from "systematic, repeated or unambiguous threats" if no violation is to be found.

Viewing the statements in their full context, it is determined that such remarks violated section 1153(a). The plain import of these utterances was that the returning strikers were foolhardy to exercise their right to reinstatement, as things would not go easy for them: they would not or should not receive any assistance from their fellow workers, and that both of their foremen considered them to be inferior, both in general and in the manner in which they performed their jobs. The "threat" inherent in the totality of the remarks was that the striking workers were to be singled out and not treated with respect. They foretold that the strikers' jobs would be more burdensome and their work would be critically viewed.

Under National Labor Relations Board precedent, which we are constrained to follow, where applicable (Labor Code section 1148), "it is well settled that statements or questions implying that an employer does not look with favor upon employees engaging in protected activities are coercive because they discourage employees engaging in protected activities guaranteed them in section 7 of the Act [Section 1152 of the ALRA]." The Berry Schools (1979) 239 NLRB 1160, 1162. Deprecatory comments directed to, or name-calling of, employees who are engaged in or have engaged in protected activities, "are an indication to the employees that engaging in such . . . activity has place[d] [those employees who do so] in an unfavorable light with the Employer in contrast to those employees who refrained from exercising their statutory rights. N.L.R.B. v. A. Lasaponara & Sons, Inc., 541 F.2d 992, 997 (3d Cir. 1976)." EDM of Texas (1979) 245 NLRB No. 119. In EDM, not unlike the instant case, a supervisor referred to "anyone who wanted a Union" as "not worth a shit" and a "son-of-a-bitch," and further made remarks to the effect that the union supporters' work was generally unsatisfactory, thus drawing a "work-related distinction between those who did not favor unions and those who supported them . . . thereby 'convey[ing] to the listener that [union supporters] are looked upon with disfavor or hostility by management[1] and may run the risk of discharge." (ALJ's opin., p. 936.) [Citing The Timken Company (1978) 236 NLRB 757, 759, fn. 5. (See also Coca-Cola Bottling Co., Inc. (1977) 232 NLRB No. 125, were vilification of strikers seeking reinstatement was found to be coercive, as it tended to have an inhibitory effect on the future exercise of

statutory rights.)

The last quoted phrase from Merrill Farms further highlights the unlawful aspect of the speech in question: the remarks by the foremen were not "isolated," or "offhand": they were repeated on several occasions and overheard by numerous workers. Additional emphasis on the statements was placed when the words were translated into acts: the actual treatment, analyzed below, which the returning workers received from their foremen, was hypercritical and disparaging.

Accordingly, it is recommended that a violation of section 1153(a) be found based on this allegation.

d. Threat to Discharge Employee David Adams

David Adams began working for respondent in 1979 as a lettuce cutter and packer. He joined the 1979 strike and performed picket duty. Prior to the strike, Adams worked under foremen Tony Lopez and Raul Zamudio. Apparently, while on the picket line, Adams, according to his testimony, waived a Union flag at Zamudio. Adams testified that later, at some unknown point during the course of the strike, he spoke to Lopez, with whom he was well acquainted, about returning to work for the respondent. Lopez, when asked if the worker might go back to work, stated that if he were to go back, he would get fired. Lopez further informed Adams that it was Zamudio who so instructed him. Zamudio and Lopez were not called to refute Adams' assertions.

Neither Zamudio nor Lopez worked for the company when the reinstatement of the strikers was ordered by the Superior Court. In fact, no evidence was adduced from the witness that they were

working for the respondent at the time the statement to him regarding work was purportedly made.

Adams signed one of the petitions offering to return to work, and his name appeared on the list of those eligible to be re-hired. Adams did not exercise his reinstatement rights as per the court order. However, respondent produced evidence that Adams was employed in the Imperial Valley operations of J.R. Norton Company throughout January and February 1982.

It is recommended that this allegation be dismissed for what may be termed as a broad failure of proof. General Counsel appeared to contend that due to the alleged "threat," Adams was deterred from seeking reinstatement with respondent. While it is indisputable that a threat of discharge voiced to an employee active in Union affairs constitutes a violation of section 1153(a) of the Act (see, e.g., Maggio-Tostado, Inc. (1977) 3 ALRB No. 33; C. Mondavi and Sons (1979) 5 ALRB No. 53), in order for a violation of section 1153(a) to be established it must be shown that "the employer engaged in conduct which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." (Nagata Brothers (1979) 5 ALRB No. 39, emphasis supplied; Merrill Farms v. A.L.R.B., supra.) Further, the test to be applied in determining the presence or absence of a violation based on such remarks should not take into account the employee's reaction to the speech. (Jack Brothers and McBurney (1978) 4 ALRB No. 18; D'Arrigo Brothers of California (1983) 9 ALRB No. 3.)

The element of reasonableness was lacking in General Counsel's presentation for the simple reason that no physical or

temporal context was supplied for Lopez' alleged remarks to Adams. It was not affirmatively established that Lopez was still in respondent's employ at the time the remarks were made, thus making respondent liable via agency principles for Lopez' conduct (see e.g., Anderson Farms (1977) 3 ALRB No. 67), or whether Lopez, by way of "friendly" advice as a personal acquaintance, was merely voicing his opinion that Adams would have difficulty in retaining his former job.[19/] it was similarly unclear at what point during the course of the strike Lopez made the purported statement, thus supplying the requisite "surrounding circumstances" to determine whether Admas had a reasonable basis for concluding that the respondent might act 207 consistently with the threat.[20/] The failure of Adams to present himself to be reinstated is as consistent with his contemporaneous employment at J. R. Norton as it is with the General Counsel's theory that he was "deterred" from doing so by Lopez' remarks.

As General Counsel has failed to demonstrate, by a preponderance of the evidence, that respondent in this particular violated the Act, it is recommended that this allegation be dismissed.

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18. No objection on the basis of hearsay was raised to Adams recitation of the statement, which might have been efficacious in the absence of proof that Lopez was still a supervisor for the company and hence capable of making hearsay-exception admissions.

19. Had respondent respondent raised the defense of section 1160.2 that the allegation was time-barred by the Act's Statute of Limitations, it probably would have succeeded in the absence of proof as to the time when the statement was made. However, respondent has the burden of arguing the defense, which is not jurisdictional in nature. George Arakelian Farms (1982) 8 ALRB No. 36; As-H-Ne Farms, Inc. (1980) 6 ALRB No. 9.

3. Other Acts and Conduct

As alluded to above, numerous workers testified that when they resumed working for the respondent, they experienced inordinate and atypical problems related to their performing their jobs. In essence, the testimony established that an attempt was made to make their work more onerous than that of the non-strikers. The problems manifested themselves in a variety of ways, including not receiving assistance or "rides" from their fellow workers if they fell behind in the pass through the field; unwarranted criticism of their work and insistence on stringent standards which forced them to slow down and gave rise to the circumstances which necessitated the assistance previously referred to; inability to take lunch or other breaks due to the slowed pace occasioned by the scrutiny of their work; switching around of workers from trio to trio or crew to crew; hindrances to smooth performance occasioned by the non-striking workers, who placed obstacles (boxes) in the path of the strikers, or who prevented the strikers from obtaining their boxes. In summary, it is concluded that respondent did, either by way of direct instigation or by condonation, violate section 1153(a) by engaging in acts of harassment, intimidation and coercion directed at its former strikers.

Bill Daniell stated that he did not anticipate any problems with the work performance of the returning strikers, but he did aver that he wanted to see whether these workers were "brave" enough to return.[21/] He testified that he told his forman to make sure that

21. Daniell explained this remark to mean that the workers had been brave enough to go out on strike, that they had left as brave people, and that he was curious to see whether they would be as brave upon their return.

the people did the same "good job" that they did when they left, and instructed the foremen to "keep an eye" on the strikers. However, as will be seen, the eye which was kept on them was a jaundiced one.

The testimony of Jesus Carmona provided numerous examples of the difficulties experienced by the returning strikers as they attempted to go about performing their normal responsibilities. Some of the particulars which he supplied were often repeated in the accounts of other strikers. Hence, corroboration was provided for many of his assertions.

Respondent's supervisors, including Daniell, Avila and Munoz, universally testified that the workers arrange themselves into trios, and decide among themselves whom to work with. Avila further stated that once a trio is formed, the general practice is to leave it the way it is. Carmona stated that the first day of work he was employed in a trio comprised of other strikers. However, after the first day, the trio was disassembled by the foreman, Viscarra, even though no one requested that the trio be disbanded. Arturo Parra and Gustavo Villareal similarly testified that members of certain trios were moved to other trios by the foremen.

An explanation for this rearranging was only partially provided by Luis Avila, who stated that individuals within a particular trio might exchange functions if one was more adept than the other at performing the specific work. For example, while optimally a trio consists of workers who can pack as well as cut, often one member of the trio executes one task with greater proficiency. Although it might be argued that as the strikers

returned they needed to be slotted in among existing trios, none of respondent's witnesses stated that this was the case. Accordingly, it is determined that respondent departed from past practice by changing workers from one trio to another without their consent in order to harass certain strikers by disrupting their previous work patterns in preventing them from working with whom they chose.[22/]

Carmona asserted that Viscarra and the second foreman, Pablo Lunares, criticized his work constantly, that Viscarra said that his cutting was bad, that too many leaves were left on the heads, or that the heads were too clean with no leaves. Carmona has cut lettuce since 1947, and maintained that he was never criticized so extensively for his work. Carmona also heard other strikers being criticized by the foreman. However, according to this witness, the work of those that had not gone out on strike was not so criticized. When he went to obtain boxes from the stitcher truck, Carmona would be able to see the type of work that these individuals were doing, and, he maintained, such work was not up to standard.

Workers Parra and Armenta testified in like fashion that the foreman would tell them that their cutting was inadequate. Gustavo Villareal[23/] similarly maintained that foreman Viscarra

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22. It may be additionally inferred that the trios may establish a certain internal pace or rhythm, and that this rhythm is disrupted when one works with another with whom he is not familiar. This state of affairs might have also contributed to the difficulties experienced by the returning strikers in maintaining the pace of the crew.

23. Villareal worked in Armenta's trio.

would tell him "that the work was being done very bad. That the lettuce weren't (sic) clean, and that there were too many leaves...." As Villareal did the packing, he was the object of the remark by Viscarra: "Look at this packing that you're doing. It looks like somebody blasted it with a shotgun." Villareal stated that, as packer, he also was able to observe the worker of the non-strikers. They, by contrast, were working at a very fast pace, and were not trimming the lettuce they cut: "[The company] demanded that we [the strikers] trim the lettuce, and they [the non-strikers] were not."

Armenta, Parra and Salsameda corroborated the testimony of Carmona and Villareal regarding the work of the non-strikers, which, by mutual acknowledgment, was regarded as inferior. As the non-strikers were working at a faster pace, their work was perforce sloppier: the heads had the wrong number of leaves on them, or the butt of the lettuce was left untrimmed, making the lettuce more difficult to pack.[24/] Yet no witness testified that the non-strikers were ever criticized for their work.

Luis Avila stated that a worker should attempt to leave four or five wrapper leaves on the head of lettuce, that the lettuce butt or root from which the ball emanates should be cut straight across. He testified that the number of leaves left on the ball

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24. While a very skilled cutter might be able to harvest a head with one cut, generally two are required: one to take the head from the ground, the other to trim the stump at the butt. Parra stated that many of the non-strikers were making only one cut, which would account for the faster pace as well as the inferior work. Munoz, by contrast, maintained that no workers were making only one cut.

should be no greater than six nor less than three. By contrast, Mike Munoz testifed that the recommended number of wrapper leaves depended on the size of the particular lettuce head. Thus, it appears that the standard for "proper" cutting of lettuce was, to a certain extent, subjective, or at minimum not susceptible to exacting requirements.

Interestingly, Viscarra, the foreman most often accused of criticizing the work, maintained that the quality of the job done by the strikers was "good." This can only reflect adversely on the merits of the criticism. Avila also claimed that the strikers did good work, but they were "out of practice"[25/] and hence began working at a slower pace than usual. Munoz was the only supervisor to claim that the quality of the strikers' work created some difficulties initially, but that "after a while they straightened out."[26/]

In the face of the mutually corroborative testimonies of the returning strikers, I find that their work was the object of much criticism, a lot of which, given the collective experience of these workers, was not altogether warranted. Despite the assertions

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25. Avila could have no competent basis for concluding this, since he could have no direct knowledge as to whether the strikers were employed cutting lettuce for other agricultural concerns during the course of the strike.

26. As an indication of the credence which might be attached to Munoz' testimony, the foreman initially stated that, in reference to the quality of the strikers' work, "we had to call their attention more than once ... to do better work." Moments later, Munoz testified as follows in response to the question, "How long has it been the case ... if the need arose, you would tell people that their quality of work was poor?": "One time only. One time only, and they did what I said."

that the work of the non-strikers was substandard, no evidence of any criticism of their work appeared in the record. This circumstance provides added evidence of the difficulties interposed by the respondent's supervisors which prevented the strikers from resuming their normal duties.

Additional corroboration for the strikers' accounts in regard to the criticism they received was provided by their testimony that because their work was closely scrutinized, they were forced to work at a slower pace. In turn, due to the pace, they were constantly trying to catch up with the rest of the crew, and were not able to avail themselves of break times.[27/] Further, contrary to past practice and indicative of the harassment directed towards them, foremen did not order that they be given assistance or "rides" by their fellow employees.[28/]

Respondent's supervisors[29/] uniformly testified that when a worker has gotten ahead in his work or when a worker has fallen behind, the workers will assist one another in order to bring those who have gotten behind up to the rest of the crew. This would appear logical in light of the shared piece rate. The returning strikers stated that the practice of giving "rides" was a common one prior to the strike, and that often the foreman would order workers

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27. Workers Cormona and Armenta testified as to these facts. Munoz testified to the contrary that "everyone" in the crew took a lunch break.

28. The slower pace did not result in lower earnings for the strikers. The entire crew shared equally in the rate.

29. These included Bill Daniells, Luis Avila, Mike Munoz, and Juan Viscarra.

to help one another. However, workers such as Crissanto Armenta, Gustavo Villareal, Ramon Salsameda, Jorge Ferrel, and Victor Corrales each testified that when they returned after the strike, the slower trios would not receive any rides or help from their fellow crew members. Some of these workers stated that they overheard their foremen Munoz and Viscarra specifically telling the crew members not to help the slower workers. Viscarra in particular added disparaging remarks about the strikers to his suggestions not to assist, calling the strikers "lice" or "lousey".[30/] The company's response, principally presented by Munoz, maintained that while workers could be ordered to help one another, there might be certain "lazy ones" in the crew who would be refused assistance if they fell behind too often. Munoz essentially stated that he could not force anyone to help someone they did not feel like helping.

Munoz' explanation would seem logical in light of the fact of the shared piecerate among all the crew members, and even in light of the strained feelings that must have existed between strikers and replacements, engendering a reluctance on the part of the latter to assist the former. However, the foremen, in permitting this state of affairs to continue, basically condoned and acquiesced in this break with custom in regard to providing mutual assistance with the workload. Surely the foreman, who has authority over the members of his crew, could have ordered them to perform anything in conjunction with their employment duties, and mete out

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30. Jesus Carmona attested to this in describing a conversation he overheard between Viscarra and his second, Lunares. Armenta and Ferrell also testified to similar remarks made by Viscarra.

appropriate discipline if the orders were disobeyed.

Perhaps the most telling testimony in this regard was provided by Victor Coralles, himself a non-striking employee. It was he who stated that he was ordered by Munoz to put pressure on returning strikers and told not to help them. He thus provided evidence of a supervisorial directive for the types of actions which the returning strikers were subjected to when they resumed their employment. Although Munoz denied making such remarks to Corrales, I found Coralles to be a more credible witness, principally because he had no discernable bias and would derive no perceivable personal benefit from providing testimony which would bolster the assertions of the returning strikers, people who, if sufficient in number, would have deprived him of his employment with the company. I therefore credit his testimony in this regard and find that Munoz did in fact tell him to put pressure on the returning strikers.[31/]

Contributing also to some degree for the slower pace were other tactics employed by the non-strikers for which there is no evidence that they were reprimanded: making it difficult to obtain boxes from the stitcher, and the placing of obstacles (boxes) in the path of the cutter. Carmona testified that when he went to retrieve the boxes from the stitcher truck, replacement workers would take all the available boxes, then call over their companions to take more boxes before Carmona could receive his. Customarily, the first thing that is accomplished during the day is that one member of the

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31. Further corroboration is also provided by the fact that this "pressure" manifested itself in several ways, as attested to by General Counsel's witnesses.

trio spreads the boxes in the line that they will be working that day. On occasion, Carmona stated that after he had accomplished this task, the line in which he would be working would be changed.

Other strikers similarly testified regarding their problems in obtaining boxes from the stitcher truck. Typically the trio members rotate the responsibility of retrieving the boxes. Like Carmona, Arturo Parra stated that on occasion after he returned, he was forced to wait at the stitcher truck while other cutters obtained more than their quota and stacked the boxes to take to their particular trio. Felipe Moran testified that boxes were placed in his path as he attempted to cut, thus slowing him down.[32/]

Company witnesses, principally Luis Avila, stated that delays of this sort would not be tolerated. Since everyone works on a piece rate, delaying a worker would act to the detriment of the crew. However, as noted previously, it may be assumed that a certain amount of animosity existed between the replacements and the returning strikers. Workers such as Parra who experienced problems in performing their work were more than likely being subjected to this particular type of annoyance by the replacement workers.

Whether the company may be held responsible for this type of behavior must be determined according to agency principles. Generally, employers have been held accountable for the acts of non-supervisorial employees where an employer has ratified, condoned, acquiesced in or approved of the anti-union acts of an

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32. Carmona also testified that he was subjected to this tactic as well.

individual or group. (Venus Ranches (1977) 3 ALRB No. 55; Perry's Plants (1979) 5 ALRB No. 17; see also, Vista Verde Farms v. A.L.R.B. (1981) 29 Cal.3d 307; E. & J. Gallo Winery, Inc. (1981) 7 ALRB No. 10; N.L.R.B. v. Russell Manufacturing Company (C.A.5, 1951) 17 LRRM 2311.) More recently, in Nick J. Canata (1983) 9 ALRB No. 8, it was held that an employee may be deemed an agent of an employer and his/her acts attributable to it if the employer "would gain a benefit from those acts, knew about them, and did nothing to disavow or repudiate them." I find that by permitting to proceed unchecked the visible and open harassment by non-striking employees of returning strikers, and by failing to disavow these acts, respondent is liable for them under the cases cited above.

As previously noted, in order for a violation of section 1153(a) of the Act to be found, it must be shown that the "employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employees' rights under the Act." (Nagata Brothers Farms, supra.) It is doubtful whether a more obvious example of the exercise of employee rights could be found where workers seek to return to their jobs pursuant to an order of reinstatement, and the order arises from a prior Board determination that these individuals had been discriminated against and refused rehire as a result of their going on strike. The rights being exercised in this particular case are but a continuation of the previously acknowledged efforts of these same employees to engage in conduct enunciated by section 1152 of the Act. In making the return of the strikers to their former jobs more difficult by the imposition of more onerous working conditions, and by actively

encouraging or tacitly condoning the putting of "pressure" on these employees, respondent clearly engaged in coercion and intimidation of the employees who sought vindication of their section 1152 rights by returning to work for the company. (See, e.g., Merrill Farms (1982) 8 ALRB No. 4.)[33/]

General Counsel also alleged that respondent's actions regarding the returning strikers also amounted to a violation of section 1153(c) of the Act. In order to establish a violation of that section of the Act, it must be shown by a preponderance of the evidence that an employer knew or at least believed that an employee had engaged in protected, concerted activities, and discriminated against him/her for that reason. (Lawrence Scarrone (1981) 7 ALRB No. 13; Nishi Greenhouse (1981) 7 ALRB No. 18.) Employer knowledge of protected activity is established here through the existence of the Board and court orders, the list of striking employees, and in some instances, the actual perception by supervisors of the presence of certain individuals on the picket line during the course of the strike. Discrimination herein is shown by the disparate treatement (see, e.g., Royal Packing Co. (1982) 8 ALRB No. 48) the striking employees received, as compared with that directed at the nonstrikers, in the manner in which their work was criticized and their work assignments changed, and the lack of supervisorial directions to assist and/or not hinder them. Explanations for the respondent's behavior, or "business justifications," were not

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33. The holding in Merrill Farms is also instructive in that a portion of that case involved a union activist who was not given "rides" by the foreman, and was criticized by his coworkers for falling behind the pace of the other lettuce harvesting trios.

sufficient to overcome the inference of discriminatory treatment prompted by participation in Union activities: no plausible explanations were given for shifting personnel from trio to trio, for extensive criticism of experienced workers, for condoning acts designed to hinder the returning strikers in the performance of their jobs, and for the refusal to order assistance, in keeping with company practice, for workers who had fallen behind other trios as they worked their particular lines.

Accordingly, it is recommended that violations of sections 1153(a) and (c) of the Act be found.

RECOMMENDED ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Lu-Ette Farms, Inc. its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Harassing, intimidating, coercing, or otherwise discriminating against, any agricultural employee for having engaged in union activity or other protected concerted activity.

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

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

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

for the purposes set forth hereinafter.

(b) 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 January 29, 1982 and the date such copies of the Notice are mailed.

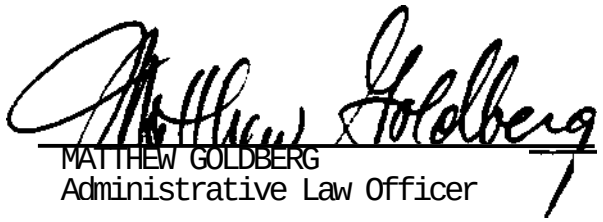
(c) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(d) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and 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 to compensate them for worktime lost at this reading and the question-and-answer period.

(e) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps respondent has

taken to comply with its terms and continue to report periodically thereafter, at the Regional Directors request, until full compliance is achieved.

DATED: April 19, 1983



MATTHEW GOLDBERG
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by harassing and intimidating employees who had shown support for the United Farm Workers of America, AFL-CIO (UFW), who had gone out on strike, and then were ordered reinstated. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act (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 harass, intimidate, coerce, or otherwise discriminate against any employee because he or she has joined or supported the UFW, or any other labor organization, or has exercised any other rights described above.

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

Dated: LU-ETTE FARMS, 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 319 Waterman Avenue, El Centro, California 92243. The telephone number is (714) 353-2130.

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

DO NOT REMOVE OR MUTILATE.