Heber, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SIGNAL PRODUCE COMPANY, DON & DAVE FARMING, A SINGLE EMPLOYING AGENCY. Respondent. and JESUS SILVA GARCIA and GUILLERMO BARRAZA, Charging Parties.	Case Nos. 82-CE-13-EC 82-CE-l3-1 -EC 82-CE-57-EC 82-CE-57-1-EC 82-CE-60-EC 82-CE-60-1-EC 10 ALRB No. 23

DECISION AND ORDER

On May 23, 1983, Administrative Law Judge (ALJ) William H. Steiner issued hi-s attached Decision in this proceeding. Thereafter, Signal Produce Company/Don & Dave Brock Farming (Respondent) timely filed exceptions to the ALJ ' s Decision and a brief in support thereof. A reply brief was filed by the General Counsel.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (Board or ALRB) has delegated its authority in this matter to a three-member panel.

The Board has considered the ALJ ' s Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALJ only to the extent consistent herewith.

The complaint in this case alleged that Respondent

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

violated sections 1153(a) and 1153(d) of the Agricultural Labor Relations Act (Act) by: (1) refusing to rehire its employees Guillermo Barraza and Jesus Silva Garcia because of their participation in protected concerted activity; (2) laying off Barraza shortly after his reemployment because of his participation in the aforesaid protected concerted activity and because of his utilization of ALRB processes; and (3) laying off Silva because of his participation in the aforesaid protected concerted activity.

Charging Parties Barraza and Silva are employed as loaders of Respondent's asparagus trucks. The trucks are rented to Respondent by Jesus Jacobo, who is both an employee and an independent contractor. General Counsel contends that the Charging Parties were not rehired initially because of their participation in protected concerted activity and that, after they were rehired, they were laid off a short time later for the same reason that they were not initially rehired. Respondent contends that the concerted activity in question (the request for a wage increase and time-and-a-half for Sundays) occurred in 1979 or early 1980, and not in 1981 as alleged, and that therefore there was no causal connection between the protected concerted activity and the events of 1982. Respondent also argues that Barraza was not immediately rehired because he reported after the 1982 season had already begun (with *a* full complement of workers) and that Silva was not rehired at the appropriate time because Respondent was unaware of his new address and phone number. Respondent further contends that the layoffs were conducted in a legitimate manner pursuant to a valid business justification.

The Concerted Activity

The Charging Parties (Barraza and Silva) testified that toward the end of the 1981 season (January to April) they, together with another employee, Leopoldo Diaz, went to the company office on behalf of the drivers and loaders to see about getting a wage increase and time-and-a-half for Sundays. The wage rate at that time was either $4 or $4.10. The employees discussed the matter with company representative Don Brock, who indicated he would act to resolve the problem. The workers began receiving time-and-a-half for Sundays sometime afterward.

On cross-examination Barraza was confronted with the fact that in the declaration he submitted with the unfair labor practice charge, he -stated that the meeting with Don Brock took place in mid-February of 1981, that after talking with other loaders, he alone met with Brock at the Signal office, and that as a result of the meeting the wage rate for loaders was raised to $4/hr. from the existing $3.80/hr. He indicated that he believed his inability to get hired at the beginning of the 1982 season was due to the fact that he "asked for the wage raise [in 1981]." Barraza's declaration contained no mention of a request for time-and-a-half for Sundays.

When questioned about the meeting on cross-examination, Barraza could not recall whether the conversation occurred in 1981 or 1979. When asked how much he was earning at the time of the meeting, he said $4.10, but could not recall if the rate was $3.80 when told that was the figure used in his declaration. He also insisted that he went to the meeting with Silva and Diaz.

Under further questioning, he indicated that there had been previous occasions when he went to the Brocks by himself to ask for a raise and that one of those occasions may have been in 1979.

Barraza was asked on cross-examination whether he told the ALRB agent about the meeting of the three workers with Don Brock, whether his declaration said anything about their visit and whether it related the same facts as his testimony did. His answer to all these questions was affirmative. Barraza was sure that it was 1981 when the three workers went to talk to Don Brock about time-and-a-half, but he was not sure whether time-and-a-half had been paid at any time during 1981. Barraza agreed that the Company began to pay time-and-a-half for Sundays in 1980. He testified that time-and-a-half payments continued for awhile and then stopped. Earlier he had testified that Respondent had not previously paid time-and-a-half for Sundays. Respondent granted time-and-a-half, but not until the season following the meeting. Prior to 1981, Barraza regularly asked for a raise.

Charging Party J. Silva testified that time-and-a-half was not being paid at the time of the meeting in question, that the wage rate was then $4.10, and that Barraza was wrong when he stated in his declaration that the wage rate at that time was $3.80. Both a wage increase and time-and-a-half were requested at the meeting, according to Silva. Problems the three workers were having with a foreman named Jack were also mentioned.

David Brock testified that Respondent began paying drivers and loaders time-and-a-half for Sundays early in the 1980 season and that the wage rate was $4 or $4.10 per hour at that time.

Respondent introduced payroll records which showed that Barraza and the other loaders had been receiving time-and-a-half for Sundays since the beginning of the 1980 season. Neither Don nor Dave Brock recalled any other requests for either overtime or a pay increase since January 1980, when a group of employees made a request for time-and-a-half on Sundays in a meeting at the packing shed. The discussion which involved complaints about the foreman took place about the middle of the 1981 season in the company office and both Brocks were present.

With the testimony hopelessly in conflict, the ALJ made a credibility resolution in which he excused the inconsistencies in Barraza's testimony and the discrepancies between that testimony and the declaration Barraza filed with the ALRB.[2/] He chose not to believe the Brocks' testimony concerning the nature of the 1981 meeting because he found it more likely than not that the alleged discriminatees had made a wage request of the Brocks since January 1980,[3/] and because he found untenable the Brocks'

[2/] The ALJ's reasoning was as follows:

> In parts of his testimony, Barraza seemed somewhat confused about dates and the contents of his ALRB statement. This appeared to be honest forgetfulness in part attributable to the fact that Barraza is illiterate in English and Spanish."

This credibility resolution appears to make illiteracy an excuse for confused and otherwise unreliable testimony. To that extent we disavow the ALJ's reasoning and reject the notion that "forgetfulness" has anything to do with illiteracy.

[3/] The ALJ reached this conclusion because the workers were being paid at a "subsistence level, or less" (evidenced, in his opinion, by Respondent's $100 loan to Barraza in June 1981) and because

(Fn. 3 cont. on p. 6.)

contention that Jesus Jacobo, rather than Respondent, was the employer of the Charging Parties.[4/] However, the ALJ failed to discuss or even mention the uncontradicted documentary evidence which showed that Respondent had been paying the loaders time-and-a-half for Sundays since January 1980. According to the testimony of the Charging Parties, a request for time-and-a-half was an integral part of the discussion which took place during the 1981 meeting in question. The documentary evidence indicates that the Charging Parties had no reason to make the request they say they did in 1981 and thus casts considerable doubt on the reliability of their testimony as to the timing of the protected concerted activity.

Although the evidence regarding a wage demand at the

(Fn. 3 cont.)

they testified that they had made several requests for wage increases during their employment with Respondent. Other than his testimony about the alleged 1981 request concerning time-and-a-half for Sundays, it does not appear from the record that Silva made any other direct requests to the Brocks for a wage increase. In fact, he testified that he would first approach Jesus Jacobo if he had a request to make about his wages. Barraza apparently made his requests directly to the Brocks but his testimony indicates that, with the exception of the one which allegedly was made during the meeting in 1981, these requests could have been made in years prior to 1981. Thus, the Brocks' testimony as to wage requests is not so implausible as to justify discrediting their testimony about the 1981 meeting.

[4/] The testimony of David and Don Brock was not viewed as being credible because they did not, in the ALJ's opinion, give a sophisticated or well-reasoned assessment of Jesus Jacobo's status as an employer. Such an assessment was to be expected of them, he felt, because of their educational and occupational background. Even if that were an appropriate basis upon which to discredit their testimony as to an unrelated subject (the details of the meeting with the three workers), the ALJ gives no weight to the fact that Jacobo's role as an independent contractor was certainly not that of a typical employee or supervisor and could easily lead to some uncertainty on the part of an otherwise knowledgeable person.

end of the 1981 season is unpersuasive, there is uncontradicted evidence that Barraza and Silva had sought higher wages at various times in the past and that they complained about abusive conduct by the packing shed foreman in the middle of the 1981 season. We find that in so doing the employees were engaged in protected concerted activity and that the timing of the refusal-to-rehire in January 1982 suggests a causal connection between the protests and the refusal-to-rehire. (See Jim Causley Pontiac v. NLRB (6th Cir. 1980) 620 F.2d 122 [104 LRRM 2190].) However, General Counsel also had the burden of proving that proper applications for work were made when work was available. (Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98.) For the reasons stated below, we find that Barraza and Silva applied for work at a time when it was not available; that no established or observed seniority system gave Barraza or Silva "bumping" privileges; that the two employees were rehired, consistent with past practice, when more work became available; and that they were subsequently laid off, in a non-discriminatory manner, when the work decreased. The allegations are, therefore, not supported by a prima facie case and must be dismissed. The Rehire Issue

The facts relating to this aspect of the case are, for the most part, undisputed.

Barraza returned to Signal on January 4, 1982, several days after the 1982 season had begun. Jacobo told him that he would have to wait a few days because work was slow, that he, Jacobo, had tried to call him at the beginning of the season, but was unable to reach him, and that he would get a job once

another truck was added on. A few days later, Barraza stopped by Jacobo's house and inquired again about work. Jacobo testified that he told Barraza that Brock did not want him to work. Jacobo later asked Brock to give Barraza work and Brock said he would not know if there was work until a second truck was added. Barraza himself went to see Don Brock on January 18 and was referred to David Brock, who told him that the hiring was complete, there was no work available at that time, and he would have to wait for another truck to be added on.

In reaching his conclusion, the ALJ relied heavily on Jesus Jacobo's testimony that Brock told him not to hire Barraza. However, Jacobo's testimony does not indicate that the instruction from Brock is in anyway inconsistent with Respondent's asserted reason for not rehiring Barraza at that time. For all that appears in the record, Respondent did not want Barraza rehired because work for that season had already commenced when Barraza arrived and Respondent already had a sufficient number of workers for the two trucks it was then using. After a third truck was added during the week of February 21, Brock learned that Barraza was not yet on the payroll and ordered Jacobo to offer him work.[5/] This was consistent with Brock's earlier statement to Jacobo and Barraza that additional work would not become available until a third truck was added.

[5/] When work did become available, it appears Barraza was not immediately offered reemployment because the foreman, Jacobo, knew that Barraza was employed elsewhere (in cauliflower). Nevertheless, upon learning of this, David Brock acted expeditiously to have Barraza rehired.

As part of his analysis, the ALJ cited Respondent's failure to observe what the ALJ found to be a "bumping privilege" based on seniority. The record, however, does not show that any bumping system existed except insofar as Jacobo, on his own initiative, dropped one worker when Barraza was rehired and, on one occasion, switched a less senior truck driver to a loader position when a more senior truck driver started work.

As regards Silva, he first requested reemployment sometime in December 1981, but there was not enough work at that time and Jacobo said he would contact him later. The ALJ found that, under an informal system of seniority which the ALJ ascribed to Respondent's operations, Silva would first have become eligible for rehire on February 16, 1982. Instead, two casual workers were hired at that time and they continued to work until March 3.[6/] Silva was ultimately contacted around March 10 when Jacobo had a worker go to Silva's home and let him know that work was available. There is no indication in the record that Jacobo failed

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[6/] The ALJ found a further violation in Respondent's failure to -hire either Barraza or Silva during the period from February 16 to March 3, 1982, because three "non-seniority" workers were employed between those two dates. He found Respondent to have no satisfactory explanation for that period of time. The record indicates that the order of recall is largely discretionary with Jesus Jacobo and, as David Brock put it, "there's no telling how he decides." One of the regular loaders testified that Jacobo occasionally hired individuals outside the regular group in order to fill short-term needs.

At the time the "non-seniority" workers were hired, Jacobo knew Barraza to be working elsewhere in cauliflower and may have had difficulty contacting Silva because of a change in his address, In any event, we do not find the evidence sufficient to conclude that in failing to rehire Barraza and Silva on February 10 Respondent breached an informal seniority system for the purpose of retaliating against those workers.

to contact Silva at an earlier time because of any instructions or intimations from David Brock.

The Layoff Issue

Barraza was rehired by Jacobo at David Brock's request on March 9, 1982, and Silva was rehired on March 10. On March 14, the two workers were laid off because there was insufficient work to justify the use of a third truck. A worker by the name of Gerardo Mendez had been designated by Jacobo for layoff, but Mendez complained to David Brock, who then decided that Mendez should be retained instead of Barraza since Mendez had started at the beginning of the season. The ALJ found this to be a discriminatory layoff in violation of section 1153(a). He considered a prima facie case to have been established for the same reasons as those in connection with the initial refusals to rehire. He construed Respondent's explanation as being an asserted adherence to a strict "last in, first out" system, but found that such a system was not actually observed by Respondent. He concluded that Respondent did have a system of overall seniority and that under that system Barraza should have been retained. However, the ALJ found that Silva did not have sufficient seniority under that system. Therefore, the ALJ concluded that Barraza's layoff, but not Silva's, violated the Act.

It is true that there is no evidence that Respondent had previously observed any particular system for determining the identity of persons to be laid off, but Respondent did in fact use a "last in-first-out" system in 1982 (based on the hiring sequence for that year) when, for the first time, it was confronted

with a dispute as to who should be laid off. The ALJ was therefore incorrect in implying that Respondent used no objective method at all with respect to the 1982 layoffs. Moreover, in finding the layoff of Barraza to be a violation, the ALJ relied upon the animus he perceived in Brock's instructions to Jacobo concerning Barraza's reemployment. As noted previously, those instructions were consistent with the assertion that work was not available at the time Barraza sought reemployment.

For the above reasons, we conclude that neither the delay in rehiring the Charging Parties nor their subsequent layoff was in violation of the Act. Consequently, we shall dismiss the complaint in this matter in its entirety.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: May 8, 1984

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

CASE SUMMARY

Signal Produce Company,
Don & Dave Brock Farming,
A Single Employing Agency

10 ALRB No. 23
Case Nos. 82-CE-13-EC
82-CE-13-1-EC
82-CE-57-EC
82-CE-57-1-EC
82-CE-60-EC
82-CE-60-1-EC

ALJ'S DECISION

Charging Parties Guillermo Barraza and Jesus Silva Garcia alleged that they were denied reemployment at the beginning of Respondent's 1982 season because, at the conclusion of the 1981 season, they spoke to one of Respondent's owners about getting an increase in their wages. Respondent's owners denied that any request for an increase in pay was made during the 1981 season, but the ALJ did not credit their denial. Finding that the concerted activity was as described by the discriminatees and that it did take place at the end of the 1981 season, the ALJ then concluded that there was a causal connection between the protected activity and Respondent's initial refusal or failure to rehire Barraza and Silva. The ALJ rejected Respondent's explanation that the Charging Parties had applied for work when none was available and cited diminished credibility on the part of Respondent's owners, testimony by a foreman that he did not call Barraza to work at the beginning of the 1982 season because of a directive from one of Respondent's owners, and a "bumping privilege" which the ALJ found would normally have been available to an employee with Barraza's seniority. He concluded that, by initially refusing to rehire Barraza and initially failing to rehire Silva, Respondent had retaliated against the Charging Parties in violation of section 1153(a).

Shortly after rehiring the Charging Parties later in the 1982 season, Respondent laid them off for lack of work. The ALJ found this to be a discriminatory layoff in violation of section 1153(a). He considered a prima facie case to have been established for the same reasons as in connection with the initial refusals to rehire. He construed Respondent's explanation as being an asserted adherence to a strict "last in, first out" system, but found that such a system was not actually observed by Respondent. He concluded that Respondent did have a system of overall seniority and that under that system Barraza should have been retained. Silva was not found by the ALJ to have sufficient seniority under that system. Therefore, Barraza's layoff, but not Silva's, was considered a violation by the ALJ.

The ALJ found a further violation in Respondent's failure to hire either Barraza or Silva during the period from February 16 to March 3, 1982, because three "non-seniority" workers were employed between those two dates. He found Respondent to have no satisfactory explanation for that period of time.

Regarding the allegation that Respondent retaliated against Barraza because he filed a charge with the ALRB in January 1982, the ALJ found no sequence of events or conduct by Respondent to suggest that Respondent had an unlawful motivation.

BOARD DECISION

The Board found that, although the evidence regarding a wage demand at the end of the 1981 season was unpersuasive, there was sufficient evidence to establish that the Charging Parties had sought higher wages in the past and that they complained about abusive conduct by a foreman in the middle of the 1981 season. The Board determined that, in so doing, the Charging Parties were engaged in protected concerted activity and that the timing of the refusal to rehire in January 1982 suggests a causal connection between the protests and Respondent's actions. However, the Board further determined that the General Counsel failed to carry its burden of proving that the applications for work were made at a time when work was available. The instructions not to hire Barraza were viewed by the Board as being consistent with Respondent's assertion that work was unavailable at the time Barraza sought reemployment. The Board also found that no established or observed seniority system gave Barraza or Silva "bumping" privileges; that the two employees were rehired, consistent with past practice, when more work became available; and that they were subsequently laid off, in a non-discriminatory manner, when the work decreased. Concluding that the allegations were not supported by a prima facie case, the Board dismissed the compliant in its entirety.

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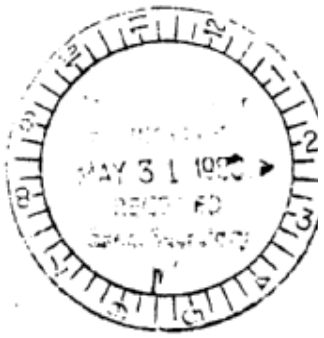

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: SIGNAL PRODUCE COMPANY/ DON & DAVE BROCK FARMING, A single employing entity, Respondent, and GUILLERMO BARRAZA and JESUS SILVA GARCIA, Charging Parties.	Case Nos. 82-CE-13-EC 82-CE-13-1-EC 82-CE-57-EC 82-CE-57-1-EC 82-CE-60-EC 82-CE-60-1-EC DECISION

Appearances:

For the General Counsel: JORGE VARGAS, Graduate Legal Asst.
ALRB El Centro Regional Office
319 Waterman Avenue
El Centro, California 92243

For the Respondent
SIGNAL PRODUCE COMPANY/
DON & DAVE BROCK FARMING: RICHARD A. PAUL
Gray, Gary, Ames & Frye
2100 Union Bank Building
San Diego, California 92101

WILLIAM H. STEINER, Administrative Law Judge:

STATEMENT OF THE CASE

This case was heard before this Hearing Officer in El Centro, California on February 22, 23 and 24, 1983. The consolidated complaint, dated July 2, 1982, and the underlying charges were properly served upon Respondent and duly answered by Respondent.

SIGNAL PRODUCE COMPANY (hereinafter "SIGNAL PRODUCE") and DON & DAVE BROCK FARMING (hereinafter "BROCK FARMING") are companies involved in farming. Their main crop is asparagus. Cantalope and wheat are also grown. BROCK FARMING is responsible for field operations, i.e. growing and harvesting the crops. SIGNAL PRODUCE is responsible for shed operations, i.e. packing and selling harvested produce. It was stipulated for the purpose of this hearing only that BROCK FARMING and SIGNAL PRODUCE are a single employing entity within the meaning of Labor Code Section 1140.4 (c).

GUILLERMO BARRAZA (hereinafter "BARRAZA") and JESUS SILVA GARCIA (hereinafter "SILVA") have been, and at the time of the hearing were, employed by Respondent as loaders, principally engaged in loading asparagus onto trucks owned by Jesus Jacobo and rented by him to Respondent.

The consolidated complaint alleges that SIGNAL PRODUCE and BROCK FARMING violated the rights of BARRAZA and SILVA by the following actions: (1) By discriminatorily refusing to rehire SILVA in December 1981 and BARRAZA in January 1982 because of their participation in protected concerted activity, and (2) By laying off charging parties on or about March 14, 1982 because of their participation in protected concerted activity and because of BARRAZA's utilization of ALRB processes. Specifically, General Counsel contends that the charging parties were not initially hired and later, after hiring, were laid off because they requested wage increases for themselves

and others, and because they protested harassment by the shed foreman, "Jack". Additionally, Respondent is charged with retaliation against BARRAZA because of his recourse to the ALRB beginning in January 1982 (GC Exh's A, b).

Respondent contends that the discussion about a wage increase occurred in 1979 or 1980, that no wage increase was requested in 1981, that a protest about the foreman may have been made in the middle of the 1981 season, but that in any event Respondent did not fail to hire or lay off either charging party because of their alleged protected activities. Respondent argues that BARRAZA reported to work after the 1982 season began and the crew was hired, and that SILVA was not initially hired in 1982 because Respondent was unaware of his new address and telephone number.

All parties were given a full opportunity to participate in the hearing, and after the close of the hearing the General Counsel and Respondent filed post-hearing briefs.

Upon the entire record, including this Hearing Officer's observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, this Hearing Officer makes the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent concedes that it is an agricultural employer within the meaning of Labor Code Section 1140 (c). The charging parties, clearly, are agricultural employees within the meaning of Labor Code Section 1140.4(b). The status of Jesus Jacobo, as discussed below, is that of a co-employee of the charging parties, having some supervisorial responsibilities, and an ordinary lessor with respect to the trucks he rented to Respondent.

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II. The Proper Standards for Determining the Existence of a Discriminatory Failure to Hire or Layoff

Here, both the alleged discriminatory failure to hire and the discriminatory layoff issues require an application of the "dual motive" analysis because Respondent offers a lawful explanation for its conduct in each instance. The procedure adopted by the Board in dual motive cases is explained in Kyutoku Nursery, Inc. (December 24, 1982) 8 ALRB No. 98 at page 3:

> In dual motive cases, this Board has adopted the test in Wright Line. (Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18.) Wright Line requires the General Counsel to establish a prima facie case that the alleged discriminatee engaged in union activity, or protected concerted activity, that the employer had knowledge of that activity, and that the employer took adverse action against the employee because of his/ her union or protected concerted activity. Once General Counsel has established a prima facie case, the burden of production and persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the protected activity. (Royal Packing Co. (Oct. 8, 1982) 8 ALRB No. 74.)

In Anton Caratan & Sons (November 8, 1982) 8 ALRB No. 83 at pages 5-6, the Board held:

> To establish a prima facie case of discriminatory refusal to rehire, the General Counsel must show by a preponderance of the evidence that the employees were engaged in a protected concerted activity, that Respondent had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the subsequent failure or refusal to rehire. (Jackson and Perkins Rose Company (Mar. 19, 1979) 5 ALRB No. 20.)

III. The Alleged Discriminatory Failure to Hire Barraza in 1982

A prima facie case of discriminatory failure to hire BARRAZA is established by the following evidence: (1) BARRAZA was engaged in protected concerted activity when at the conclusion of the 1981 season he, SILVA and Leopoldo Diaz spoke to DONALD BROCK about increasing their wages, obtaining time-and-a-half pay for Sundays, and harassment by a foreman named "Jack". RT 1/116-118; 11/10-11; (2) Respondent was aware of these actions by BARRAZA. However, Respondent contends that no protected concerted activity occurred in 1981. Both DAVID and DON BROCK denied that any request for an increase in pay was made after January 1980. These denials cannot be credited in light of the candid testimony to the contrary by BARRAZA and SILVA, their undisputed testimony that they made several requests for wage increases during their employment with Respondent, the obvious fact that their earnings were subsistence level, or less, as evidenced by the $100 loan to BARRAZA in June 1981 (repaid in November 1981), and Respondent's unfounded insistence that Jesus Jacobo, rather than Respondent, was the employer of the charging parties. On this issue, the testimony by DON and DAVID BROCK was so evasive and inconsistent with the weight of the evidence as to raise serious questions about their credibility. See Vista Verde Farms v. Agricultural Labor Relations Board, 29 Cal. 3d 307; 172 Cal. Rptr. 720 (1981). DAVID BROCK, when asked why he considered Jacobo the employer of the drivers and loaders, replied,

[1] In parts of his testimony, BARRAZA seemed somewhat confused about dates and the contents of his ALRB statement. This appeared to be honest forgetfulness in part attributable to the fact that BARRAZA is illiterate in English and Spanish.

> Well, they were his trucks, he always hired them all—he always got all the people just like he did in the melons. . . . . Other—other people had owned trucks, hauled asparagus for other people like Eddie Mudueno or Torres or Rodriguez, or whoever. They all have their trucks with their names on them like he does, and he tells people that that's their employees.

RT III/105. The evidence flatly contradicted DAVID BROCK'S testimony. Jesus Jacobo never testified that he told anyone the truck drivers or loaders were his employees. His testimony was to the contrary. He testified that he did not pay these workers anything (RT 11/81) and that he considered himself a "regular worker" (RT 11/48). Jacobo, in fact, was paid the same rate as the other workers, and did not have the final say in any personnel matters affecting the asparagus workers. DAVE BROCK's testimony on this subject is even less credible given the fact that his management responsibilities began in the early 1970's (RT III/101-104) and he received a Bachelor's Degree in Agriculture Business from the University of California at Davis in 1974. DON BROCK's credibility suffered for the identical reason. When asked if he considered the truck drivers and loaders to be employees of somebody other than Respondent in 1982, DON BROCK testified,

> Well, I really don't know how to answer that, because as I understand it, all of the truckers and swampers—the helpers— were receiving their paycheck from whoever, Signal or Don & Dave. But I understood them to be responsible to Jacobo. So, whether they're employees of the company or Jacobo I couldn't tell you.

RT III/130-131. Such uncertainty and evasiveness is not what

one would reasonably expect from a farmer whose experience began in 1966 and included six years with the United States Department of Agriculture (RT III/113) .

(3) In light of the above circumstances, particularly the economic threat which BARRAZA and SILVA represented to Respondent because of their insistence upon higher wages at a time of some economic difficulty for Respondent, this Hearing Officer finds that a preponderance of the evidence indicates a connection or causal relationship between the protected activity and Respondent's subsequent refusal to hire BARRAZA, who was a regular employee of Respondent for about seven years (RT I/106). This connection becomes more evident with Jesus Jacobo's testimony that he did not call BARRAZA to work at the beginning of the 1982 season because DAVID BROCK ordered him not to hire BARRAZA. RT I/120; II/ 57-58.

The dual motive aspect of the BARRAZA hiring issue comes into play with the shifting of the burden of production and persuasion to Respondent. Respondent offers a legitimate explanation for its failure to hire BARRAZA, and this explanation, if supported by a preponderance of the evidence, would defeat the General Counsel's case. The explanation *is* that BARRAZA was not hired on January 4, 1982 solely because he was not available for work at the beginning of the season, January 1, 1982. Juan Jacobo was hired in BARRAZA's place. This

explanation is not supported by a preponderance of the evidence in part because of the diminished credibility of the Brocks, in part because of the fact that Jacobo candidly testified that DAVID BROCK ordered him not to hire BARRAZA, and in part because of the bumping privilege apparently given by Respondent to other senior employees (e.g. Jose Collins) who reported late to work, but not given to BARRAZA, despite Respondent's denial that any bumping privileges existed. See Appendix to GC Brief, week of 1-24-82; GC Exh. 18. Therefore, General Counsel's allegation that BARRAZA was not hired on January 4, 1982 because of retaliation in violation of Section 1153 (a) of the Act is established by a preponderance of the evidence. However, there was no substantial evidence that Respondent's conduct was intended to, or did, discourage membership in a labor organization. Therefore, General Counsel's allegation that Respondent violated Section 1153 (c) of the Act must fail. RT I/141-142.

IV. The Alleged Discriminatory Layoff of Barraza and Silva on March 14, 1982

On March 14, 1982 Jesus Jacobo was instructed by DAVID BROCK to stop one truck and lay off one worker. BARRAZA had been working since March 10, and Gerardo Mendez, having the least seniority, was also working.[2] BARRAZA was laid off, along with SILVA (who began March 9, 1982), and Juan Jacobo and Mendez wei

[2]The respective seniority of the asparagus workers was as follows, from most senior to least senior: Truck drivers: (1) Jesus Jacobo, (2) Jose Collins, (3) Gerardo Mendez; Loaders: (1) Guillermo Barraza, (2) Juan Jacobo, (3) Jesus Silva. RT I/18,99; II/78; III/51, 89. Respondent concurred with these rankings (Respondent's Brief, p. 13). See also RT I/93-94 (informal seniority system).

permitted to continue working the remainder of the season with Jesus Jacobo and Jose Collins. A prima facie case as to the discriminatory nature of this layoff of BARRAZA is established by the evidence discussed above. Respondent's explanation for laying of BARRAZA rather than Mendez is that Respondent followed a strict "last in, first out" system, and the four workers who began the 1982 season were Jesus Jacobo, Juan Jacobo, Gerardo Mendez and Jose Collins. This explanation, if supported by a preponderance of the evidence, would serve as a legitimate motive for Respondent's actions. However, a preponderance of the evidence does not support Respondent's assertion that it followed a strict "last in, first out" system'(see above). Therefore, General Counsel's allegation that BARRAZA was discriminatorily laid off from March 14 to April 20 (GC Brief, p. 18) in violation of Section 1153 (a) is established by a preponderance of the evidence. This conclusion is further supported by Respondent's employment of three non-seniority workers between February 16 and March 3, 1982, rather than employing BARRAZA or SILVA (GC Exh. 19; GC Brief, Appendix A). Because SILVA, on March 14, 1982, was not entitled by seniority to one of the four remaining positions, his claim for this period of time fails. However, his and BARRAZA[1]s allegation of discriminatory denial of employment between February 16 and March 3, 1982 is established by a preponderance of the evidence, and Respondent does not establish a satisfactory explanation for this period of time.

V. The Alleged Discriminatory Failure to Hire Silva In December 1981

A prima facie case is established by the evidence discussed above except for General Counsel's failure to show available work for Silva, given the informal seniority system, until after December. The first time work became available for SILVA, given his seniority, was February 16, 1982 when non-seniority workers were employed until March 3. The burden of production and persuasion then shifted to Respondent, which explained that its reason for not hiring SILVA earlier was Respondent's asserted inability to contact SILVA because of his change of residence sometime in 1981. However, the sketchy evidence presented by Respondent (RT III/64-65) and its failure to demonstrate that a sincere effort was made to communicate with SILVA fail to support this explanation by a preponderance of the evidence. There was no evidence of the telephone number actually called by Jesus Jacobo, what the result was, and no evidence of any attempt to locate SILVA through co-workers, by letter or by going to his former residence. General Counsel, therefore, must prevail in the allegation that SILVA was not hired during part of the 1981 season because of retaliation in violation of Section 1153(a) of the Act.

VI. The Allegation That Respondent Retaliated Against Barraza Because He Filed and ALRB Charge in January 1982

The evidence fails to establish a prima facie case because of the absence of evidence of a connection between any adverse treatment of BARRAZA and the filing of his charge with the ALRB. Neither the sequence of events nor any conduct by Respondent suggests that its layoff of BARRAZA on March 14, 1982 was motivated by Respondent's knowledge that he complained to the ALRB. The ALRB agent who contacted Respondent did not testify, and there was no evidence showing Respondent's refusal to cooperate with the ALRB or other circumstantial evidence of unlawful motivation to establish the element of causation.

CONCLUSION

The Allegations Concerning BARRAZA

A preponderance of the evidence supports a finding that Respondent violated Section 1153 (a) of the Act by failing to hire BARRAZA beginning January 4, 1982, by failing to hire him between February 16 and March 3, and by laying him off from March 14 to April 20, 1982. The evidence is insufficient to find violations of Sections 1153(c) or (d) of the Act.

The Allegations Concerning SILVA

A preponderance of the evidence supports a finding that Respondent violated Section 1153 (a) of the Act by failing

to hire SILVA between February 16 and March 3, 1983. The evidence is insufficient to find a violation of Section 1153 (c) of the Act.

THE REMEDY

Having found that Respondent violated Section 1153 (a) of the Act, this Hearing Officer recommends that it cease and desist from like violations and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160.3 of the Act, this Hearing Officer hereby issues the following recommended:

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orderes that Respondent SIGNAL PRODUCE COMPANY/DON & DAVE BROCK FARMING, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to rehire or hire, or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment because he or she has engaged in concerted' activity protected by section 1152

of the Agricultural Labor Relations Act (Act).

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

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

(a) Make whole Guillermo Barraza and Jesus Silva Garcia for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(b) 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.

(c) 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 purpose set forth hereinafter.

(d) 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 from the beginning of the 1982 season (January 1, 1982) to the date of issuance of this Order.

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

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the 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.

(g) 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 therefater, at the Regional Director's request, until full compliance is achieved.

Dated: May 23, 1983

WILLIAM H. STEINER
Administrative Law Judge

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, SIGNAL PRODUCE COMPANY/ DON & DAVE BROCK FARMING, 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 denying employment during portions of the 1982 season to two workers because they protected about their working condition. 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 suspend or refuse to rehire any employees for engaging in protests over working conditions.

WE WILL reimburse Guillermo Barraza and Jesus Silva Garcia for all losses of pay and other economic losses they have suffered as a result of our discriminating against them, plus interest.

Dated:

SIGNAL PRODUCE COMPANY/ DON & DAVE BROCK FARMING

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 (619) 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