Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PIONEER NURSERY/ RIVER WEST, INC.,[1] Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 82-CE-52-D 82-CE-127-D 10 ALRB No. 30

DECISION AND ORDER

On February 8, 1983, Administrative Law Judge (ALJ) William A. Resnick issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent timely filed exceptions to the ALJ's Decision, with a brief in support of its exceptions, and the General Counsel timely filed a brief in reply to Respondent's exceptions, incorporating by reference therein his post-hearing brief to the ALJ.

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.

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[1] Although the complaint in this proceeding named only Pioneer Nursery as the respondent, Pioneer Nursery and River West, Inc. conceded in a prior representation proceeding before this Board that the two companies were a single employer for labor relations purposes. (Pioneer Nursery/River West, Inc. (1983) 9 ALRB No, 38.) We have therefore amended the caption and order in the instant case to reflect that single employer status.

[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 briefs of the parties and has decided to affirm his rulings, findings of fact, and conclusions of law as modified herein and to adopt his recommended Order, with modifications.

During February 1982, about the time that employees in its nursery crew were distributing United Farm Workers of America, AFL-CIO (UFW) authorization cards, Respondent decided to hire employees through a labor contractor, Gilbert Renteria, to fill pots. In order to recruit employees for Respondent, Renteria held a barbecue at his packing shed on March 13, 1982.[3/] At the barbecue, Dulio Chavez, Renteria's labor coordinator, addressed to employees various promises and statements which indicated both anti-union animus and an intent to allow only anti-union employees to work for Respondent. The credited testimony[4/] of three employee-witnesses was that Chavez told the assembled employees that Respondent had plenty of work but was anticipating union activity and expected the employees to resist the unionization efforts in exchange for continued employment. Chavez also told them they would be doing general work at an

[3/] All dates hereafter refer to 1982 unless otherwise specified,

[4/] The ALJ credited the testimony of employees Ramon Gonzales, Maria Robles, and Edward Maldonado, and discredited Chavez. To the extent that an ALJ's credibility resolutions are based upon demeanor of the witnesses, they will not be disturbed unless a clear preponderance of the relevant evidence demonstrates that such resolutions are incorrect. (Adam Dairy dba Rancho dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1521].) We have reviewed the evidence and find the ALJ's resolutions of witness credibility to be well supported by the record viewed as a whole.

hourly rate and that it would continue until July or August at which time Renteria would have other contract work for them in the local grape harvest. When the crews recruited by Renteria commenced work, most of them supported the UFW's organization efforts by signing authorization cards, engaging in conversations supportive of union organization with other employees in the presence of Respondent's foremen, and protesting the arrest of a UFW organizer who attempted to take access to Respondent's premises to talk to them. Most of the employees also participated in a work stoppage on April 6 to protest Respondent's piece-rate method of payment. However, ten employees conspicuously refused to participate in and refrained from participating in, both the union activities and the concerted work stoppage of the other workers. So conspicuous were those ten employees that after the work stoppage Respondent realigned the crew structure so that the non-protesters or anti-union employees were grouped together and isolated into one crew.

As the UFW's organizational effort was successful, an ALRB representation election was conducted on April 12, and the UFW won the majority of the employees' votes. Prior to the date of the election, Chavez and Respondent's foremen repeatedly warned the crews that there would be no work if the union won the election. On April 13, the morning after the UFW's election victory, Respondent notified the crews that they were laid off for lack of work. Only the one crew of anti-union employees was allowed to continue working, and they did so, albeit sporadically, until they were laid off on May 27.

We affirm the ALJ's conclusion that Respondent violated section 1153(c) and (a) by its layoffs on April 13, 1982. We find, however, that Respondent not only discriminatorily selected the ten employees who continued in its employ; its very decision to reduce its work force to a single ten-member crew rather than spread the available work among members of all four crews was made to rid it of union supporters. Respondent's anti-union animus was well established by the statements of Chavez and other foremen and Chavez' threats of loss of employment if the Union won. Given the timing of the layoffs the day after the election as well as Respondent's recruitment promise of general work at an hourly rate until July or August and its pre-layoff consolidation of the ten anti-union employees into one crew, the inference is clear that the April 13 work force reduction to a number of employees corresponding precisely to the number of anti-union employees constituted discrimination in violation of section 1153(c).[5/] Respondent offers, as a business justification for its decision to layoff thirty pro-union employees, the fact that the interruption of potting soil deliveries resulted in a lack of work but fails to explain why they were not recalled when the shipment arrived on May 2, or why the available general work could not have been

[5/] We specifically reject Respondent's assertion that Gutierrez' crew no. 1 was the most productive crew. Company records show that a crew under Pedro Viramontes was, on the average, the most productive crew.

distributed among all forty employees.[6/] Accordingly, we find at least some general work was available for all forty employees despite the hiatus in potting soil deliveries, and Respondent's decision to lay off the thirty pro-union employees on April 13 violated section 1153 (c) and (a). We shall order Respondent to reinstate and make whole the workers it laid off on April 13, 1982.[7/]

We affirm the ALJ's conclusion that Respondent violated section 1153(a) of the Act by laying off nine employees on May 2[7] because they had engaged in protected concerted activity. The timing of the layoffs, just minutes after the employees' concerted protest about the method of pay, the abruptness of the layoff, coming in the middle of a day and in the middle of an assigned work task, coupled with the availability of work amply support the ALJ's conclusion. Respondent's exception that the employees were engaged in an unprotected concerted activity, i.e., a slowdown, is without any factual support in the record. The employees testified that they were working at a normal pace and that they so

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[6/] General Counsel elicited testimony that on several prior occasions, when Respondent ran out of potting soil, all of its employees were given whatever work was available, until all the work was exhausted. This suggests a past practice of distributing available work, during a slack period, evenly among the entire work force, rather than the selective retention of certain workers, as in the instant case. However, we leave it to the compliance stage to determine Respondent's past practice and, on that basis, determine which workers would have been employed after April 13, absent the discrimination.

[7/] Our remedial Order applies to the workers who appeared for work on April 13, and any other workers that were employed on April 8 or 9 but failed to appear on April 13 because they were told, in advance, of the April 13 layoff.

told the foreman who was pushing them to work faster. Respondent did not call the foreman, Oscar Gutierrez to testify. Not only was the employees' version not refuted, but the only company witness to testify, Bud Knight, stated that he had no complaints about the speed at which the crew had been working. We affirm the ALJ's finding that the employees were engaged in protected concerted activity on May 27 by acting together in complaining about a perceived speedup and suggesting that Respondent pay them piece rate if it wanted them to work at a faster-than-normal rate. (Royal Packing Company (1982) 8 ALRB No. 16.) Accordingly, we shall order Respondent to offer those nine employees reinstatement and make them whole for all economic losses they incurred as a result of their lay off.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Pioneer Nursery/River West, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any other term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

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

of the rights guaranteed them by section 1152 of the Act.

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

(a) Offer to all employees discriminatorily laid off on either April 13 or May 27, 1982 immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Reimburse the employees described in section (a) above 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. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, and other records relevant and necessary to a determination, by the Regional Director, of the backpay periods and the amounts of backpay and interest due under the terms of this Order,

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

(e) Provide a copy of the attached notice in the appropriate language to each employee hired by Respondent during

the twelve-month period following the date of issuance of this Order.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between April 8, 1982 and April 8, 1983.

(g) 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.

(h) 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 or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(i) 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

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

Dated: June 21, 1984

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Pioneer Nursery/River West, 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 laying off employees on April 13, 1982, because of their support for the United Farm Workers of America, AFL-CIO, and on May 27, 1982, because of their protest over the method of payment. 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 reinstate all the employees unlawfully laid off on April 13 or May 27, 1982, and make those employees whole for any economic losses suffered by them as a result of the discrimination against them.

Dated: PIONEER NURSERY/RIVER WEST, INC.

By: ______________________________

Representative Title

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

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Pioneer Nursery (UFW)

10 ALRB No. 30
Case Nos. 82-CE-52-D
82-CE-127-D

ALJ DECISION

The ALJ found that Respondent violated the Act by discriminatorily segregating all of its anti-union employees into one crew, then laying off the rest of the work force on April 13, 1982. A layoff had been threatened by supervisors if the Union won the election and the threat was carried out the day after the election. The ALJ also found that another layoff on May 27, 1982, was based on the employees' wage protest that day, and therefore violated the Act.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALJ.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of PIONEER NURSERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	CASE NO. 82-CE-39-D, et al.

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D E C I S I O N

STATEMENT OF THE CASE

WILLIAM A. RESNECK, Administrative Law Officer:

This case was heard before me in Delano, California, on October 12, 13, 14, 18, 19 and 20, 1982.

On June 18, 1982 the Regional Director issued an order consolidating cases, a complaint and a notice of hearing to be held October 12 in Case Nos. 82-CE-39-D, 40-D, 41-D, 46-D, 48-D, 49-D, 51-D, 52-D and 42-D (G.C. Ex.1-L).[1/]

On October 8, the Regional Director issued an amended complaint that added Case No. 82-CE-127-D to the proceedings together with additional allegations at Paragraph 20 of the amended complaint (G.C. Ex.1-M).

On the first day of the hearing, October 12, the parties settled most of the issues (G.C. Ex.8). Paragraphs 5 through 18 of the amended complaint were settled and the related allegations of Paragraph 4 were stricken (I: 19-21). Thus, the only substantive allegations remaining are those set forth in Paragraphs 4, 19 and 20 which relate to charges set forth in Case Nos. 32-CE-52-D and 127-D.

Paragraph 4 now alleges that Dulio Chavez, Bud Knight, and Oscar Gutierrez are supervisors or agents of Respondent within the meaning of Section 1140.4(j) of the Act. Respondent stipulated that Knight is a supervisor, but denies that Chavez or Gutierrez are supervisors or agents.

1/ General Counsel's exhibits will be designated (G.C. Ex.__); Respondent's exhibits will be designated (Resp.Ex.__) References to the transcripts of the proceedings will be a Roman Numeral, I through VI, indicating the transcript volume, followed by the page number of that volume.

Paragraph 19 alleges that on April 13, 1982 Respondent through its agents, including Chavez and Gutierrez, discharged 24 named employees in retaliation for having lost a representation election to the UFW and because of their concerted activities and their support for activities on behalf of the United Farm Workers.[2/]

Paragraph 20 alleges that on May 27, 1982 Respondent through Gutierrez and Knight discharged 7 named individuals because of their protected, concerted activities regarding their working conditions.[3/]

The acts alleged in Paragraph 19 are said to have violated both Sections 1153(a) and 1153 (c) of the Act; the acts alleged in Paragraph 20 are alleged to have violated Section 1153(a). Respondent denies committing any unfair labor practices.

All parties were given full opportunity to participate in the hearing, and after its close, the General Counsel and the Respondent each filed a brief in support of its position. Upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

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2 / The allegation relating to Does III-IX was stricken (V: 142).

3 / The allegation relating to Does X and XI was stricken (V: 142)

FINDINGS OF FACT

I

JURISDICTION

Pioneer Nursery is engaged in agriculture in Delano, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The Union is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II

RESPONDENT'S AGRICULTURAL OPERATIONS

Respondent is engaged in the growing of pistachio trees at Garces Avenue and Browning Road in Delano, California. The trees are grown from seeds which are planted each year in the greenhouse around February. After the seeds have sprouted and grown to the size of 3 to 5 inches and after the weather has warmed up, the small trees are transplanted into 12" x 6" pots located out of doors. The trees thereafter grow to a height of 2 to 3 feet before they are sold the following spring. Thus, the growing season is approximately one year.

A regular crew works in the greenhouse under the leadership of Gracelia Martinez starting in February. When the plants are taken out and placed in the pots around the end

of March, additional workers are hired. The allegations involving the unlawful discharges concern the additional workers hired for the 1982 season, who commenced work on March 24, 1982.

In past years the nursery's potting work had been done on an hourly basis by the hiring of extra employees under the supervision of Gracelia Martinez. In 1982, the company decided to hire workers through labor contractor Gilbert Renteria and have them work on a piece-rate basis. Forty employees were supplied by Renteria, and the recruitment of the employees was done by Dulio Chavez and Oscar Gutierrez in February. The various unfair labor practices stem from this time period, which also marked the start of an organizational drive at Respondent's nursery by the United Farm Workers.

III

EVENTS LEADING UP TO THE LAYOFFS

Although Respondent vigorously objected throughout the hearing as to testimony about events occurring prior to the layoffs involving unfair labor practice charges that had been settled on the first day of the hearing, the pre-layoff events are relevant on the issue of anti-union animus. Thus, the testimony was allowed not to prove or disprove the allegations that had been settled and thus withdrawn, but to establish whether the employer had valid business justifications

for the layoffs, or whether he was motivated by other reasons. Moreover, Paragraph 5 of the Settlement Agreement specifically reserves to the General Counsel "the right to introduce evidence relating to settled charges as background evidence, or evidence of animus, or evidence of company knowledge in the trial of the unsettled allegations." (G.C.Ex.8, p.2).

In February[4/] the UFW began an organizational campaign by the distribution of authorization cards, which ultimately culminated in a representational election, which was held on April 12. General Counsel suggests that the employer's reaction to this organizational drive was the motivating force behind the utilization of Renteria, the labor contractor, to secure employees for the potting. General Counsel argues that by hiring the group of 40 new workers, all during the organizational drive, the employer was attempting to recruit workers greater than the majority needed to defeat a union vote.

I make no finding on this issue, as there are no allegations concerning the recruitment of the work force remaining to be tried before me. Accordingly, it is not necessary for disposition of this matter to decide whether the recruitment in and of itself of new workers was an unfair labor practice.

It is undisputed that in March the employees of Renteria began actively recruiting a work force on behalf of Respondent

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4/ All dates are in 1982, unless otherwise specified.

During the weekend of March 13 some 50 to 60 prospective employees were invited to a barbecue at Renteria's packing shed in McFarland, California, in order to hire the 40 workers needed by Pioneer. Versions of what transpired at that meeting differ substantially.

Dulio Chavez, supervisor for Renteria, spoke at the meeting. His version is that he spoke for only approximately three minutes. (I:64). He stated that he mentioned there was perhaps going to be a union vote, but denied telling the workers that he only wanted people to apply who were against the union. (I:62-64).

A significantly different version of Chavez' comments at the McFarland meeting were presented by workers who were in attendance. Roberto Gonzalez, one of the discriminatees, said that Chavez spoke for 20 to 25 minutes (II:40). Gonzalez testified that Chavez stated no one should apply for work if they supported the union (II:39). Gonzalez also testified that Chavez said that if the union won, the company would move out of town and they would all lose their jobs (II:40).

Maria Robles, another discriminatee, testified that she also attended the meeting at McFarland, but arrived after Chavez had already begun speaking (II:153-153). She heard him speak for 15 minutes; heard him say that a union was not wanted; and that their work would last three months (II:153).

Edward Maldonado, discriminates, also attended the meeting at McFarland. He heard Chavez speak from 25 to 40 minutes (IV:12-13). Chavez said that there would be a union election, and they expected the workers to support the company (IV:13). They were also told they would have work until August (IV:9-10).

I credit the testimony of Gonzalez, Robles, and Maldonado and discredit the testimony of Chavez. Not only did Chavez seriously underestimate the amount of time that he spoke, his version of his comments about the union were not credible. As hereafter discussed, numerous witnesses testified about anti-union statements made by Chavez throughout the events in question. Moreover, subsequent events occurring after the election support the anti-union statements attributable to Chavez.

The workers hired by Renteria commenced work on March 24. On their very first day of work union organizers came around to the various crews attempting to obtain signatures for authorization cards. Maria Robles testified that when the ladies came around to her crew, Oscar Gutierrez, a foreman employed by Renteria, told them not to sign any cards (II:150-151).

Roberto Gonzalez testified that on his second day of work two ladies from the union brought around cards for them to sign. Oscar Gutierrez, their foreman, told them not to sign or pay any attention to the ladies. (II:53-54).

On April 5 various crews engaged in a work stoppage. The work stoppage began in the crews under Pedro Viramontes, when the workers requested that Chavez get them a wage increase. Chavez promised to speak to Renteria and respond to them the next day (III:27-32; 61-65).

The next morning, April 6, not having received a response, the workers in Viramontes' crew approached the other two groups under Oscar Gutierrez and solicited their support for a work stoppage (II:66-69; III:27-32). Many of the workers in the Gutierrez crew refused to go back to work after the morning break.

Chavez arrived and angrily blamed the union for the strike saying the workers had broken their promise made at the McFarland meeting not to be joining strikes or signing union papers (II:71-73; III:27-32; IV:68-69).

Chavez promised to speak to Renteria about the demands and to return. All workers returned to work, but an argument soon broke out when Oscar Gutierrez ridiculed Roberto Gonzalez and other workers for having carried out the strike (II:71-74; III:29-30). Out of Gonzalez's group of ten workers, five were pro-union and five were anti-union. The five anti-union workers went back to work, while the pro-union workers tried to revive the work stoppage.

Chavez then returned and said it was impossible to raise wages with the union election coming, since it would

look like the company was trying to buy their votes (II:74). All workers then returned to work.

The following day, April 7, the crew in Roberto Gonzalez's group was rearranged to divide the five pro-union workers from the five anti-union workers (II:76-77). Also, that day two of Respondent's owners, Ken Puryear and "Corky" Anderson went to the various groups in the nursery asking why they wanted the union and what problems they were having (III:92-95). When they came to Roberto Gonzalez's group, which had already been rearranged by this time to separate the anti-union workers out, they were greeted with accusations that the foremen were threatening people who supported the union and that they were preventing the organizers from taking access to the property (III:95-102). During this same day, Juan Cervantes, the United Farm Workers' organizer, was arrested on the premises at Pioneer Nursery, at 12:55 p.m. (V:117). Cervantes was also arrested the following day, April 8, between the hours of 9:00 and 9:30 a.m. (V:117). Martin Montemayor, one of the workers in Pedro Viramontes' crew, testified that the crew objected to the arrest of Cervantes and yelled to let him go (V:53). His testimony was corroborated by Samuel Viramontes, another worker who was present and heard the crew shouting to let Cervantes go (V:104).

The election was held on April 12, with the results as follows:

UFW	-	40	
No Union	-	16	
Challenged	-	17	
TOTAL	-	73	(G.C.Ex.l-P).

IV

THE APRIL 13 LAYOFFS

On the day following the election the workers showed up to work at the usual time (III:35). However, they were told by Oscar Gutierrez and Dulio Chavez that there was no more work; that only 10 people were needed; and that those 10 people had already been selected (III:36). The 10 people selected were the group who had spoken openly against the union (III:113-114).

Prior to the election many witnesses testified that Oscar Gutierrez and Dulio Chavez threatened them that they would lose their jobs if the union had won the election (II:58-59; 149).

Roberto Gonzalez testified that after the work stoppage he had argued with Oscar about the union (II:58-59). Gonzalez testified that Oscar told him that if the union won that he would be fired, the company would move away, and everybody would lose their jobs (II:59-60).

Martin Montemayor testified that he heard Pedro Viramontes say that if the union won the election, Pioneer

Nursery would move and they would all be without jobs (V:55). Maria Robles testified that Oscar Gutierrez told her on the day of the election that if the union won only the people remaining would be those who had voted for the company (II:149) When she asked Oscar how he would know who had voted, he said they would know more or less who voted for the union (II:149).

Ygnacio Garcia testified that he was present during a conversation the day before work started in March that Oscar Gutierrez had with Chavez, where Chavez asked Oscar not to let workers sign any kind of union papers (IV:90). Gutierrez responded not to worry, that he would not let people sign any papers, and that he and his sister had broken a strike in Coachella (IV:99). Chavez said that if the company wins there would be a lot of money and a lot of work (IV:100).

Pedro Viramontes also corroborated this testimony. He was hired as a foreman, and he and Oscar Gutierrez were the foremen in charge of the 40 workers hired to do the potting work (III:13). He testified that when he started work Oscar Gutierrez told him that the workers had already been recruited and that they would be anti-union (III:20). He also testified that Chavez told him that if the union lost the election there would be lots of work (III:20). However, if the union won they would all lose their jobs "like that" (snapping his fingers for emphasis) (III:21).

Viramontes testified that pursuant to Chavez's request, he interrogated the workers prior to the election to see if

they would vote for the union (III:22). He also corroborated Roberto Gonzalez's testimony about the work stoppage and Chavez's response to that work stoppage (III:61-65).

On the day after the election Viramontes reported for work and expected, along with his crew, to work (III:35). The crew members all complained when they were not given work and about not being notified that no more work was available (III:35). He himself had not been notified that there was no more work available (III:35). He believed there was work that needed to be done: cleaning pots, pulling weeds, raking and cleaning the avenues and filling up the tractors (III:38).

I found Pedro Viramontes to be a particularly persuasive witness and his testimony to be believable. Moreover, his version of events was corroborated by several witnesses who testified they showed up for work the day after the election and were quite angry when, they were told that they were not to work any longer. When they attempted to question Chavez as to how the remaining workers were selected, his response was to refuse to get into an argument and leave (III:114).

V

THE EMPLOYER'S DEFENSE

Employer contends that the layoffs occurring on the day after the election were not motivated by the pro-union vote, but by the fact that the company had run out of dirt the pre-

ceding Thursday before the election. Bud Knight, supervisor, testified that they had run out of dirt the Thursday before the election (V:174). Dulio Chavez testified they had run out of dirt the day after the election; then upon prompting by counsel, he said maybe they had run out of dirt a few days before (VI:4). Ken Puryear, one of the company's owners, testified they had run out of dirt the Thursday before the election (V:10).

Knight testified that since they had run out of dirt, there was no work for any of the workers (V:161). Chavez testified, however, that Knight asked him to keep 10 people on (VI:5). Chavez said he picked the 10 on the basis of their performance (VI:5-6).

But the decision to lay off workers, according to Pur-year, was made on the Friday before the election (V:14). According to Chavez the remaining workers were not told since he did not know if they were going to work or not (VI:24). Yet, Chavez also testified that the decision to lay off the workers was made that weekend prior to the election (VI:-21). However, all agreed that other workers besides the 10 picked showed up for work on the day after the election (VI:24).

Respondent contends that on Thursday, April 8, all 40 employees were laid off because the company ran out of potting soil (VI:152-160). General Counsel disputes that contention. Whether that may be true or not, it was clear that on the

day after the election most, if not all, 40 employees showed up expecting to work.

Respondent contends that the workers picked to remain filled more pots and thus were picked on the basis of their work ability (Resp's. Brief, pp.10-11). General Counsel contends that the workers discharged were the most productive group, those in the crew of Pedro Viramonte (G.C.'s Brief, p.28). I have made no independent review of the records, and note that although records are kept by crew, there were many transfers between the crew prior to the layoffs. Moreover, I do not believe it is necessary, as discussed hereafter, to resolve this factual dispute in order to decide whether or not the April 13 layoffs were an unfair labor practice.

VI

THE MAY 27 LAYOFFS

The May 27 layoffs were either an illegal response to a concerted protest over working conditions, if General Counsel's theory is adopted; or layoffs due to lack of work, if Respondent's theory is adopted. The essential facts are not in dispute.

The crew had been filling 12" pots with dirt on a piece-rate basis. The crew ran out of pots and were switched to fill 18" pots on an hourly basis. Their foreman, Oscar Gutierrez, complained they were not working fast enough (IV:32-34); they responded that they were working as fast as they could; the pots were bigger; and they were working by the hour (IV:34).

The crew then stopped working and told Gutierrez that the company should treat them better because they were doing the best they could and that they were willing to work faster but wanted to be paid by the piece-rate (IV:18; 34). Gutierrez became angry and walked away to see Bud Knight, a supervisor. Knight testified that he told Gutierrez to lay the crew off because there was no more work for them (V:164). Knight recalled that Gutierrez told him that the crew did not like to fill pots by the hour anyway, and they probably wanted to do home right away (V:165). When Gutierrez returned to tell them they were fired, the group was still working (IV:40). Prior to the discharge the group had complained before that the drinking water brought by Gutierrez to them was hot (IV:49-50). Moreover, they testified that there was additional work to do when they were fired (IV:46-48)

ANALYSIS OF ISSUES AND CONCLUSIONS OF LAW

To establish that an employer engaged in unlawful discrimination against employees the General Counsel must prove by a preponderance of the evidence that the employees were engaged in union activity or other protected concerted activity, that the employer had knowledge of that activity, and that there is a causal relationship between the activity and the act of discrimination. Tejon Agricultural Partners (1982) 8 ALRB 92, p.9. Once it is established that protected

activity was the basis for the employer's action, the burden then shifts to the employer to show that it would have taken that action even absent the protected activity. Nishi Greenhouse (1981) 7 ALRB 18; Wright Line, Inc. (1980) 251 NLRB 1083, 105 LRRM 1169.

I find that both the April 13 and May 27 layoffs were discriminatory and thus are violations.

The workers laid off the day after the union elections had engaged in both union activity and concerted activity. Moreover, the workers engaged in the work stoppage on May 27 were engaged in concerted activity.

The work stoppage on April 6 where the workers requested a higher wage from management and the work stoppage on May 27 where the workers complained about the shift from piece-rate to hourly wages were protected concerted activity. The ALRB has consistently held that a work stoppage by two or more employees to protest wages paid is concerted activity protected by the Act. In Royal Packing Company (1982) 8 ALRB No. 16, crew members engaged in a work stoppage in protest over wages. The crew members refused to continue working in an attempt to induce the employer to pay them an hourly wage rate for the afternoon, and allow them to keep the piece-rate earnings for the morning. The employer's response was to fire them.

The Board upheld the ALO's finding that this violated Section 1153(a) of the Act. The Board noted that the employees

were engaged in an economic strike, which is protected concerted activity.

The employer's knowledge of union activities before the layoffs is well-supported by the evidence. After the work stoppage on April 6, the crews were re-assigned so that the union supporters were in one crew and the company supporters were in another crew. Respondent's justification for this reassignment in order to promote harmony may be well-founded, but also indicates a knowledge of the union activities on behalf of the proponents. I think it is more than coincidental that the 10 workers selected to remain the day after the elections were the company supporters, while those workers actively and vociferously supporting the union were discharged for alleged lack of work.

The anti-union animus of Dulio Chavez and Oscar Gutierrez was also well established by the evidence. Commencing with the initial meeting in McFarland and continuing on through the interrogations of the employees about their sympathy for the union, it is clear that Renteria Farm Services, and its supervisors, were adamantly opposed to the union and were quite familiar with the union sympathies of the discriminatees, However, respondent argues that the anti-union animus, if any, of the farm labor contractor cannot be imputed to it. Respondent contends that assuming arguendo that the labor contractor made unlawful threats or promises, this conduct

cannot be used to attribute a motive to Pioneer, which is a separate entity.

The test used to determine employer liability for misconduct of its labor contractor is that set forth by the California Supreme Court in Vista Verde Farms v. ALRB (1981) 29 Cal.3 307:

> Accordingly, even when an employer has not directed, authorized or ratified improperly coercive actions directed against its employees , under the ALRA an employer may be held responsible for unfair labor practice purposes (1) if the workers could reasonably believe that the coercing individual was acting on behalf of the employer or (2) if the employer has gained an illicit benefit from the misconduct and realistically has the ability either to prevent the repetition of such misconduct in the future or to alleviate the deleterious effect of such misconduct on the employees' statutory rights.
>
> 29 Cal.Sd at 322.

In our present case, the employer has more than met the above standard, since Pioneer's superior, Bud Knight, directly ordered the two illegal acts. Thus, it is undisputed that all the layoffs were directly ordered by Respondent Chavez specifically testified that Bud Knight told him to keep 10 employees working after the election, and that Bud Knight told him to fire the workers after the work stoppage on May 27th. Accordingly, an employer is responsible for the acts of its agents which are directly authorized by the employer. Vista Verde Farms, supra.

Respondent also argues that since only 7 out of the 24 alleged discriminatees showed up for work on April 13, the day after the election, there is no evidence to justify that they were unlawfully discharged, and the complaint must be dismissed as to those 17. However, the law is to the contrary. Initially, the testimony of a discriminatee is not an essential element in proving a violation of the Act. Superior Farming Company (1982) 8 ALRB No. 77, p.2. Once "an employer has made clear his discriminatory policy not to rehire a particular group of persons (such as union members or strikers) each member of the group need not undertake the futile gesture of offering in person to return to work." J. R. Norton Company (1982) 8 ALRB No. 89, p.10. The applicable law is once an employer's discrimination is directed not at individuals, but at a group, it is no longer required that discrimination be proved as to each individual discriminatee, only that he or she is a member of the group which the employer discriminatorily treated. J. R. Norton Company, supra, at p. 13; Kawano, Inc. (1978) 4 ALRB No. 104, enforced Kawano, Inc. v. ALRB (1980) 106 Cal.App. 3d 937.

Accordingly, the evidence here is that Respondent discriminated against the work stoppage participants and union adherents as a group. Thus, all of the union supporters and work stoppage participants were terminated on April 13, and all of the work stoppage participants on May 27 were dis-

charged. Accordingly, the finding of group discrimination is appropriate. See J. R. Norton Company (1982) 8 ALRB No. 76; J. R. Norton Company (1982) 8 ALRB No. 89.

The issue then arises whether the layoffs on April 13 and May 27 were motivated by legitimate business considerations and would have occurred anyway. In dual motive cases once General Counsel establishes a prima facie case of discrimination, the burden of production and persuasion shifts to the employer. Thus, violations will be found unless the employer establishes by a preponderance of the evidence that the adverse action would have been taken even absent the employees' protected activity. Royal Packing Company (1982) 8 ALRB No. 74, pp.2-3.

Respondent attempts to justify the layoffs of April 13 and May 27 on the grounds of economic necessity. Thus, it is argued that the layoffs of April 13 were necessitated by the fact that they had run out of potting soil mix; and on May 27, because they had run out of work. Assuming that the evidence would justify such a defense, Respondent is still guilty of violation of Sections 1153(a) and 1153(c) by discriminatorily selecting workers for the layoff who supported the union. San Clemente Ranch (1982) 8 ALRB No. 29; Akitomo Nursery (1977) 3 ALRB No. 73. Moreover, the timing of the layoffs here, the day after the election on April 13, and the day of the concerted protest over working conditions,

further establishes the discriminatory nature of the discharges. S. Kuramura, Inc. (1977) 3 ALRB No.49; Industrial Label Corporation (1982) 261 NLRB No.38, 110 LRRM 1072.

In fact, I find that Respondent had work available the day after the election, and the workers reasonably expected to continue to work. Prior to starting work, many witnesses testified that they were told that work would be available into July and August. Further, many workers showed up for work the day after the election, and there was work available on an hourly basis. Instead, I find that the layoffs were in retaliation for the workers voting in the union, and would not have occurred absent this anti-union animus.

The facts surrounding the May 27 layoff are even stronger. The workers were engaged in protected concerted activity and were fired on the spot. Moreover, there was plenty of work available. Accordingly, I find that the discharges would not have occurred absent the protected concerted activity.

REMEDY

After the close of the hearing and after the submission of the briefs, General Counsel requested by motion that I take judicial notice of the recent case of Martin City Ready Mix (1982) 264 NLRB No. 66, 111 LRRM 1475, which holds that a bargaining order was an appropriate remedy where the em-

ployer laid off certain employees the day following the filing of an election petition. Although no bargaining order was requested either prior to or during the hearing, General Counsel argues that paragraph 11 of the Complaint (G.C.Ex.l-L) requesting in the prayer for relief "such other and further relief as will effectuate the policies" of the Act covers this remedy.

Respondent filed a memorandum in opposition contending (1) that the motion was an improper attempt to amend the complaint after the hearing; (2) that the case cited was decided in September, 1982 and thus should have been cited in General Counsel's brief filed December 2, 1982; and (3) the issue of the appropriateness of a bargaining order was never litigated or briefed.

I find Respondent's last reason the most persuasive one and decline to recommend that a bargaining order issue.

CONCLUSIONS OF LAW

Based on the foregoing, I make the following conclusions of law:

1. PIONEER NURSERY is a California corporation engaged in agriculture, and is an agricultural employer within the meaning of §1140.4(c) of the Act.

2. UNITED FARM WORKERS OF AMERICA, AFL-CIO, is a labor organization within the meaning of §1140(f) of the Act.

3. The employer engaged in unfair labor practices within the meaning of §1153(a) and §1153(c) of the Act.

4. The unfair labor practices affected agriculture within the meaning of §1140.4(a) of the Act.

On the basis of the entire record and on the Findings of Fact and Conclusions of Law, and pursuant to §1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging, failing or refusing to hire or rehire, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(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) Offer to the employees named in Appendix A, attached hereto, immediate" and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole each of the employees named in Appendix A for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board or 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 amounts of makewhole and interest due under the terms of this Order.

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

(e) 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 deter-

mined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Provide a copy of the attached Notice to each employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: February 8 ,1983.

WILLIAM A. RESNECK
Administrative Law Officer

APPENDIX "A"

Roberto Ramon Gonzales

Roberto Lopez

Eulalio Hernandez

Martin Montemayor

Santos Montemayor

Ricardo Marin

Jose Soto aka
Everardo Viramontes

Rogelio Avila

Rogelia Viramontes

Fidel Viramontes

Remberto Valdovinos aka
Ramon Gonzalez

Artemio Sanchez

Efrain Ramos

Edward Maldonado

Ignacio Correa

George Gonzalez

Alvaro Martinez

Manuela Tapo

Vicente Montemayor

Samuel Viramontes

Ignacio Garcia aka
Sergio Nunez

Eduardo Aldecoa aka
Alfonso Viramontes

Maria Robles

Carmen Sanchez

Victor Alvarez

Guillermo Robles

Tirzo Gasca

Lorenzo P. Ochoa

Jose Valle

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, Pioneer Nursery, 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 discharging workers on April 13, 1982 who supported the union; and by discharging workers who participated in a work stoppage on May 27, 1982. 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 discharge, fail or refuse to rehire, or otherwise discriminate against any employee because he or she has exercised any of the above rights.

WE WILL OFFER Roberto Ramon Gonzales, Roberto Lopez, Eulalio Hernandez, Martin Montemayor, Santos Montemayor, Ricardo Marin, Jose Soto aka Everardo Viramontes, Rogelio Avila, Rogelia Viramontes, Fidel Viramontes, Remberto Valdovinos aka Ramon Gonzalez, Artemio Sanchez, Efrain Ramos, Edward Maldonado, Ignacio Correa, George Gonzalez, Alvaro Martinez, Manuela Tapo, Vicente Montemayor, Samuel Viramontes, Ignacio Garcia aka Sergio Nunez, Eduardo Aldecoa aka Alfonso Viramontes, Maria Robles, Carmen Sanchez, Victor Alvarez, Guillermo Robles, Tirzo Gasca, Lorenzo P. Ochoa and Jose Valle their old jobs back, and will pay them any money they lost because we discharged them or failed to rehire them unlawfully, plus interest on such amounts.

Dated:__________,1983 PIONEER NURSERY

By:______________________________

Representative Title

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

DO NOT REMOVE OR MUTILATE.