Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BEN AND JERRY NAKASAWA d/b/a NAKASAWA FARMS AND B. J. HAY HARVESTING, Respondents, and GUSTAVO CARRENO, BALTAZAR CHAVEZ, ROSENDO DE LA TORRE , TOMAS DE LEON, ANTONIO GARCIA, ISIDRO GARCIA, PABLO GARCIA, REFUGIO MINERO, JOSE OLIVARES, CARLOS PULIDO, SALVADOR PULIDO, DAVID ROJAS, FEDERICO SALGADO CHAVEZ, RUBEN SILVA, ABRAHAM SOLIS AND RAMON SOLIS, Charging Parties.	)	Case Nos. 82-CE-123-EC 82-CE-140-EC 82-CE-179-EC 10 ALRB NO. 48

DECISION AND ORDER

On December 14, 1983, Administrative Law Judge (ALJ) William H. Steiner issued the attached Decision. Thereafter, Respondent Nakasawa Farms, Respondent B. J. Hay Harvesting, and the General Counsel filed timely exceptions to the ALJ's Decision with supporting briefs. Nakasawa Farms and the General Counsel filed timely reply briefs as well.

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

The Board has considered the record and the ALJ's Decision in light of the exceptions, briefs and reply briefs

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

and has decided to affirm his findings,[2/] conclusions and rulings as modified herein and to adopt his recommended order with modifications.

Nakasawa Farms and B. J. Hay Harvesting are two partnerships, the partners in both instances being Jerry Nakasawa and his brother, Ben Nakasawa. Nakasawa Farms was formed in June of 1981, and B. J. Hay Harvesting in January of 1982. Nakasawa Farms grows lettuce, broccoli, alfalfa, sudan grass, wheat and watermelons on 4,000 crop acres[3/] in and around Holtville and Westmoreland, California. B. J. Hay Harvesting harvests the alfalfa and sudan grass grown by Nakasawa Farms. The other crops grown by Nakasawa Farms are harvested by, among others, Bud Antle, Rod Reynolds, Ben Abatti, and D. A. Brady. Nakasawa Farms subleases most of the land it farms from Bud Antle, Inc. and Bud Antle, Inc. owns a percentage of Nakasawa Farms' lettuce and alfalfa crops. B. J. Hay Harvesting and Nakasawa Farms share some equipment and some supervisors. Labor policy is jointly made by Ben and Jerry Nakasawa for both entities.

In late 1980, or early 1981, Jerry Nakasawa, then general manager of the Imperial Valley operations of Bud Antle,

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[2/] Respondent Nakasawa Farms has excepted to certain credibility resolutions made by the ALJ. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24.) Our review of the record herein indicates that the ALJ's credibility resolutions are supported by the record as a whole.

[3/] A single acre may be counted several times depending on the number of crops rotated on that ground in one year.

Inc. learned that Bud Antle, Inc. planned to cease its southern operations. Jerry Nakasawa decided to take over those operations. In May or June 1981, Jerry Nakasawa informed his employees that Bud Antle, Inc. was going out of business and he was taking over those operations. He informed the employees that the new operation, Nakasawa Farms, would be a non-union farm, paying substantially lower wages. Nearly all employees previously employed by Bud Antle, Inc. in the southern operations then transferred to Nakasawa Farms. A series of meetings of the affected employees followed, organized by former employees David Rojas, Gustavo Carreno, Ruben Silva, and Baltazar Chavez. Eventually, Local 890 of the International Brotherhood of Teamsters (Teamsters) was drawn into the dispute and an unfair labor charge against Nakasawa Farms, Bud Antle, Inc., and Castle and Cook, Inc. was filed.[4/] A settlement was reached wherein Rojas, Carreno, and Silva were reinstated, wages to the prior level for all Nakasawa employees were restored retroactively, Bud Antle, Inc. assumed all payroll responsibility for the employees and the Regional Director directed the pending charge be dismissed. The employees worked for, and were supervised by Nakasawa Farms.

In May or June 1982, Nakasawa Farms assumed control of its payroll and notified employees of a new lower wage rate and of the fact that no unions would be permitted at the operation. Applications were solicited from interested persons.

[4/] See Charge No. 81-CE-40-EC.

Nakasawa Farms thereafter employed, at peak, approximately 50-55 employees. The present charges were filed in July 1982, alleging the above conduct by Nakasawa Farms violated the terms of section 1153(c) and (a) of the Agricultural Labor Relations Act (ALRA or Act).

In the consolidated complaint that issued on January 12, 1983, B. J. Hay Harvesting was named as a joint employer with Nakasawa Farms. The ALJ denied B. J. Hay Harvesting's motion to dismiss the complaint insofar as it named B. J. Hay Harvesting.[5/] The ALJ ruled that B. J. Hay Harvesting and Nakasawa Farms were sufficiently intertwined so as to permit trial to proceed.

In light of the substantial interrelation between the operations of B. J. Hay Harvesting and Nakasawa Farms, the centralized control exercised over those operations, their common management and ownership, and the interrelation of the finances between the two partnerships, and we find B. J. Hay Harvesting and Nakasawa Farms to be a single employing entity under the Act. (See, e.g., Valdora Produce Co. (1984) 10 ALRB No. 3; Perry Farms, Inc. (1978) 4 ALRB No. 25; Pioneer Nursery/River West,

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[5/] B. J. Hay Harvesting has argued that the failure to name it in the original complaint bars these subsequent proceedings. This defense is without merit. (Sturdevant Sheet Metal & Roof Co., Inc. (1978) 238 NLRB 186 [99 LRRM 1240].)B. J. Hay Harvesting was amended into the complaint, served with the amended complaint, offered an opportunity to be represented at the hearing, and participated fully in the proceeding. George C. Shearer, Exhibitors Delivery Service (1979) 246 NLRB 416 [102 LRRM 1624], cited B. J. Hay Harvesting is therefore inapposite since there the alleged alter ego was not provided the opportunity to be represented at the hearing. (See. Southeastern Envelope Co. (1979) 246 NLRB 423 [102 LRRM 1567].)

Inc. (1983) 9 ALRB No. 38.)

The ALJ concluded that Rojas, Carreno and Silva were discriminated against because of their participation in the processes of the Board. The ALJ found that these three employees were named in a charge brought by the Teamsters, against Bud Antle, Inc., Nakasawa Farms and others which resulted in the December 1981 settlement with Bud Antle, Inc., and Nakasawa Farms. The terms of the settlement included the rehire of Rojas, Carreno and Silva to operations supervised by Nakasawa Farms and an increase in wages for all Nakasawa Farms' employees. The employees were to be paid by Bud Antle, Inc., until May 1982. Subsequently, Rojas, Carreno, and Silva were not rehired to their former job classifications, as required by the settlement agreement, and were not rehired by Nakasawa Farms in June 1982. when the settlement agreement lapsed. The ALJ found all three to be competent, valued employees who were discriminated against because they brought charges against Nakasawa Farms. He found that Nakasawa Farms failed to meet its burden of demonstrating a substantial business justification for its actions.

Nakasawa Farms does not assert that it complied with the terms of the settlement but rather defends itself on the grounds that the Board is without jurisdiction to rule on these allegations of violations of 1153(d)[6/] of the Act because no

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[6/] Section 1153(d) provides:

> It shall be an unfair labor practice for an agricultural employer to do any of the following:

(Fn. 6 cont. on p. 5.)

charge remains unsettled that asserts a violation of this section of the Act. This defense is without merit.

It is true that the National Labor Relations Board (NLRB) has held that a formal Board-approved settlement will bar subsequent litigation of all prior violations of the Act unless such violations were unknown to the General Counsel and were not readily discoverable by investigation or were specially reserved from the settlement agreement. (See Jefferson Chemical Co., Inc. (1972) 200 NLRB 992 [82 LRRM 1200]; Roadway Express, Inc. (1981) 254 NLRB 688 [107 LRRM 1074]; Laminite Plastics Mgf. Corp. (1978) 238 NLRB 1234 [99 LRRM 1471]; and Hollywood Roosevelt Hotel Co. (1978) 235 NLRB 1397 [98 LRRM 1150].) Since the events raising the 1153(d) charges here all follow the settlement agreement, the charges do not concern previous violations of the Act that have been settled. The General Counsel may issue complaints based on conduct discovered during an investigation of related charges.[7/] (NLRB v. Fant Milling Co. (1959) 360 U.S. 301 [79 S.Ct. 1179]. Compare, Nish Noroian Farms (1982) 8 ALRB No. 25.)

The violations of the Act here at issue, that Rojas, Carreno, and Silva were discriminated against by the assignment

(Fn.6 cont.)

> (d) To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part.

[7/] In fact, if the General Counsel does not include discoverable charges in the complaint, they may be forever waived. (Laminite Plastic Mfg. Co., supra, 238 NLRB 1234; see, also, Cambridge Taxi Company (1982) 260 NLRB 931 [109 LRRM 1241].)

of demeaning work, and their subsequent discharge and refusal of rehire as a result of their filing of a charge with the Board, is related to the other allegations under investigation. Accordingly, the allegation that the three were denied employment from December 1981 to June 1982, because they organized a protest of the lower wages and filed a charge with the Board was properly included in the complaint. (Grammis Bros. Farms, Inc. (1983) 9 ALRB No. 60.)

To establish a violation of section 1153(d) the General Counsel must prove that the discriminatees filed charges or gave testimony (or otherwise involved themselves in the processes of the Board). (See J. R. Norton (1983) 9 ALRB No. 18; Bacchus Farms (1978) 4 ALRB No. 26; John Hancock Mutual Life Ins, v. NLRB (DC Cir. 1951) 191 F2.d 483 [28 LRRM 2236].) General Counsel must also establish that Respondent knew of the above activity and discriminated against the employees because of their involvement in the processes of the Board. (McCarthy Farming (1982) 8 ALRB No. 78.)

We agree with the ALJ that Nakasawa Farms refused to comply with the reinstatement terms of the settlement agreement, gave Rojas, Silva and Correno work of a demeaning character because of their involvement in the processes of the Board, and then laid the three employees off after they threatened to protest subsequent harassment received from irrigation supervisor Apolonio Escoto. Accordingly we find that Nakasawa Farms, by the above conduct, violated section 1153(d) and (a) of the Act.

In May and June of 1982, Nakasawa Farms again took

over the payroll responsibilities for its employees from Bud Antle, Inc. Nakasawa Farms solicited applications during this period and eventually hired some 61 persons, 18 of whom had been employed during the previous year and 2 of whom are charging parties herein. (Those two are Carlos Pulido and Isidro Garcia.)[8/]

The General Counsel asserted, and the ALJ found, that Nakasawa Farms denied employment to the charging parties because of their concerted activities in violation of section 1153(c) and (a) of the Act.[9/]

To prove a violation of section 1153(c), the General Counsel must establish that a person engaged in activities protected by the Act, that this activity of the person was known to the employer and that it was due to the protected activity that the person was denied rehire or terminated. (Bruce Church (1983) 9 ALRB No. 75.) Once the General Counsel establishes a prima facie case containing the above elements, the burden of proof shifts to the employer to establish that the person would have been denied rehire or terminated notwithstanding any

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[8/] In 1983 (through May of that year) Nakasawa Farms employed some 42 persons, 39 of whom had been employed in 1982, and 17 of whom had been employed in 1981. Carlos Pulido and Isidro Garcia appear on the 1983 payroll records as well.

[9/] Section 1153(c) provides; in relevant part that:

> It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

protected activities. (Mike Yurosek (1984) 9 ALRB No. 69; NLRB v. Transportation Management Corp. (1983) 459 U.S. 1014 [103 S.Ct. 2469].)

We find, in agreement with the ALJ, that the charging parties engaged in protected activities when they conducted meetings at various on and off work sites so as to formulate strategies to deal with the changes in ownership, working conditions and the exclusion from Nakasawa Farms of their representative, the Teamsters. We find, in agreement with the ALJ, that Nakasawa Farms knew of this activity by the charging parties and made every effort to discourage or eliminate such activity.

Employees Federico Salgado, Antonio Garcia, Pablo Garcia, Ramon Solis, and Tomas de Leon all testified that after Rojas' reinstatement in late 1981, irrigation foreman Escoto warned the other irrigators against speaking to Rojas because of his activism. Salvador Pulido stated that foreman Guadalupe Gonzalez also warned irrigators about associating with Rojas. Federico Salgado testified that foreman Jose Gonzalez issued such warnings. While the above foremen denied making the comments, Escoto testified on cross examination that in December 1981, he took Rojas to the gathered irrigators and told them not to speak to this "troublemaker." Several witnesses testified that supervisors Jose Gonzalez and Escoto warned them to avoid contact with Silva. Also Refugio Minero and Jose Olivares, among others, testified that tractor driver supervisor Luis Munger warned them to stay away from Carreno and any organized protest

activities. When irrigator Ramon Solis protested his termination to Jerry Nakasawa in June of 1982, he was told that the failure to heed the warnings given about avoiding the protest meetings and associating with the employees involved, specifically Rojas, Silva and Carreno, had resulted in Ramon Solis' discharge.

Finally, we note that when Carreno submitted his application for work to Jerry Nakasawa in June of 1982, he appended a petition of protest to the application. The protest objected to the necessity for applications as the signers believed that Nakasawa Farms and Bud Antle, Inc. were "one and the same." The petition was signed by Carreno, Ramon Soliz, Abraham Soliz, Antonio Garcia, Pablo Garcia Barrios, Refugio Garcia, Baltazar Chavez, Gregorio E. Briones, Rojas, Silva, and Tomas de Leon, none of whom were hired by Nakasawa Farms and all of whom are charging parties save for Gregorio Briones. Jerry Nakasawa testified that the protest appended to Carreno's application led him to believe that, if Carreno were hired, more protest and trouble would follow.

The above evidence, credited by the ALJ, presents a prima facie case of discrimination. To meet its burden of proof, Nakasawa Farms put on the testimony of Jerry Nakasawa, Ben Nakasawa and various supervisors, including Apolonio Escoto and Luis Munger, to show that the charging parties were either hired or were denied hire for valid business reasons. For example, Respondent alleged that Silva and Rojas were denied rehire due to lack of work; that Carreno, Abraham Solis, Federico Salgado, Tomas de Leon, Rosendo de la Torres, and Pablo Garcia were not

hired because they were lazy or unreliable; that Minero and Chavez were not hired because they were only average workers; that Jose Olivares was excluded because he was rough on equipment; that Antonio Garcia and Ramon Solis were unsuitable because they either drank alcohol at work or were argumentative; that Salvador Pulido was offered rehire but refused it;[10/] and that Isidro Garcia and Carlos Pulido were rehired to their prior jobs.

In response to the defense of Nakasawa Farms, the General Counsel called Ramon Duenas, an irrigation foreman for Bud Antle in Southern California until he was terminated by Jerry Nakasawa in 1980. Duenas testified that Abraham Solis, Federico Salgado, Antonio Garcia, Pablo Garcia, Ramon Solis, Tomas de Leon and Rosendo de la Torres, among others, were good or very good employees. Duenas had previously supervised the above employees for approximately ten or more years.

We find that the weight of the evidence supports the findings of the ALJ that Respondents discriminatorily denied employment in June of 1982 to David Rojas, Gustavo Carreno, Jose Olivares, Baltazar Chavez, Refugio Minero, Abraham and Ramon Solis, Federico Salgado, Antonio and Pablo Garcia, Tomas de Leon and Rosendo de la Torres. We find, however, that the evidence herein does not support allegations that Nakasawa Farms discriminated against Ruben Silva in June of 1982. On this record, there was presented insufficient evidence demonstrating that work was available for this employee when or after he applied

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[10/] However, Salvador Pulido subsequently reapplied in August of 1982 and was not rehired.

for employment. Insufficient evidence was also adduced warranting a finding that Isidro Garcia and Carlos Pulido were denied employment by Nakasawa Farms in June of 1982. Accordingly, we will modify the ALJ's proposed order consistent with the above decision.

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondents, Nakasawa Farms and B. J. Hay Harvesting, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or refusing to hire or to consider for employment or assigning discriminatory assignments or otherwise discriminating against any of its agricultural employees because of their participation in a protected concerted work stoppage, resort to the processes of the ALRB, or other protected activities;

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

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

(a) Offer to the employees listed below, who were unlawfully denied employment in June 1982, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights

and privileges, and make them whole for all losses of pay and other economic losses incurred by them as a result of their discharge by Respondent, such backpay award to be computed in accordance with established Board precedents, together with interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55:

David Rojas	Baltazar Chavez Garcia
Rosendo de la Torres	Gustavo Adolfo Carreno Valenzuela
Tomas de Leon Torres	Jose Olivares
Antonio Garcia Barrios	Federico Salgado Guzman
Abraham Solis Delgado	Pablo Garcia
Refugio Minero Perez	Ramon Solis Hernandez
Salvador Pulido	

(b) Make whole the following employees for all losses of pay and other economic losses incurred by them as a result of Respondent's discriminatory discharge from January 1982, to June 1982, such backpay award to be computed in accordance with established Board precedents, together with interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55:

Ruben Silva Zapada	David Rojas
Gustavo Adolfo Carreno Valenzuela	

(c) Preserve, and upon request, make available to the Board or its agents for examination, photocopying, and otherwise inspecting all records relevant and necessary to a determination of the amounts of backpay and interest due to the affected employees under the terms of this Order.

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

(e) Post copies of the attached Notice in conspicuous places on its property for sixty 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) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order to all agricultural employees employed by Respondent during the period from January 1982, to January 1983.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to the assembled employees of Respondent on company time and property at times and places 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 employees may have concerning the Notice and/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 to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within

thirty days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

Dated: December 13, 1984

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

MEMBER HENNING Concurring:

While I concur in the majority's opinion I would decline to address the theoretical question regarding the relationship between Nakasawa Farms and B. J. Hay Harvesting. I note that no charging party made an application for work with B. J. Hay Harvesting and several testified that they were unaware of its existence; no allegation of discrimination was made against B. J. Hay Harvesting by any charging party; and no assertion of inability to pay or pending dissolution by Nakasawa Farms was made on this record. While B. J. Hay Harvesting harvests some crops grown by Nakasawa Farms, and may have succeeded to some of the prior functions of Bud Antle, Inc., at least the harvesting of the lettuce grown by Nakasawa Farms is still performed by Bud Antle, Inc. No question concerning the scope or extent of the diminution of the bargaining unit in and around Westmoreland and Holtville was argued to the Board, (see for example Sumner Peck (1984) 10 ALRB No. 24, pp. 7-9 and cases cited therein)

nor is the conduct of the B. J. Hay Harvesting part of the employing entity relevant to any issue raised in this proceeding (see for example Gourmet Harvesting and Packing, Inc. (1982) 8 ALRB No. 67). I would direct the parties to litigate this issue, if necessary, during the ensuing compliance phase of this matter.

Dated: December 13, 1984

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint that alleged that we, Nakasawa Farms and B. J. Hay Harvesting, 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 discriminating against employees for filing unfair labor practice charges with the ALRB and organizing themselves to protest changes in working conditions. 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 (Act) is a law that gives you and all farm workers 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 to obtain a contract covering 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 or 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 terminate or refuse to hire or consider for employment or otherwise discriminate against any employees, previous employee, or applicant for employment because he or she has exercised any of the above-stated rights or because he or she has filed unfair labor practice charges with the ALRB.

WE WILL OFFER David Rojas, Baltazar Chavez Garcia, Rosendo de la Torres, Gustavo Adolfo Carreno Valenzuela, Tomas de Leon Torres, Jose Olivares, Antonio Garcia Barrios, Federico Salgado Guzman, Abraham Solis Delgado, Pablo Garcia, Refugio Minero Perez, Salvador Pulido, and Ramon Solis Hernandez their jobs back and pay them any money they lost because we refused to rehire them.

WE WILL REIMBURSE David Rojas, Gustavo Adolfo Carreno Valenzuela, and Ruben Silva Zapada their lost wages from January 1982, to June 1982.

Dated:

B. J. HAY HARVESTING

By: _____

NAKASAWA FARMS

By: _____

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.

CASE SUMMARY

BEN AND JERRY NAKASAWA
d/b/a NAKASAWA FARMS
and B. J. HAY HARVESTING

10 ALRB No. 48
Case Nos. 82-CE-123-EC
82-CE-140-EC
82-CE-179-EC

ALJ DECISION

Nakasawa Farms and B. J. Hay Harvesting are two partnerships owned by Ben and Jerry Nakasawa. Nakasawa Farms took over growing operations in Holtville and Westmoreland, California previously operated by Bud Antle, Inc. B. J. Hay Harvesting harvests some crops grown by Nakasawa Farms. At the time of the shift in control from Bud Antle, Inc. to Nakasawa Farms, certain changes were made in the working conditions of the irrigators, tractor drivers and welder. Specifically, all unions were forbidden from the ranch and the wage rate paid to employees was reduced. Following a protest by employees, three organizers of the protest were given demeaning work and subsequently terminated. Later, several other employees were refused rehire for engaging in the above protests.

The ALJ found that Nakasawa Farms and B. J. Hay Harvesting were a single employing entity under the Agricultural Labor Relations Act, that Nakasawa Farms had retaliated against the three for organizing the protests and the other employees for joining the protests. He specifically rejected Nakasawa Farms proffered business defenses for its conduct.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALJ with some modifications. The Board found that the welder had not been discriminatorily discharged for his job duties were eliminated. The Board also found that two other employees had not been discriminated against.

CONCURRING OPINION

Member Henning, while agreeing with the majority's analysis, would have declined to reach the question of whether Nakasawa Farms and B. J. Hay Harvesting were a single employing entity. He found the issue not germane to any matter raised in the complaint and would have deferred the matter to ensuing compliance proceedings, should resolution become necessary.

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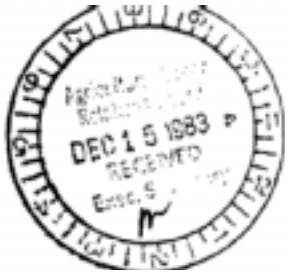

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: BEN AND JERRY NAKASAWA, dba NAKASAWA FARMS and B. J. HAY HARVESTING, Respondents, and GUSTAVO CARRENO, BALTAZAR CHAVEZ, ROSENDO DE LA TORRE, TOMAS DE LEON, ANTONIO GARCIA, ISIDRO GARCIA, PABLO GARCIA, REFUGIO MINERO, JOSE OLIVARES, CARLOS PULIDO, SALVADOR PULIDO, DAVID ROJAS, FEDERICO SALGADO CHAVEZ, RUBEN SILVA, ABRAHAM SOLIS, RAMON SOLIS, Charging Parties.	Case No. 82-CE-140-EC

Appearances:

William F. Macklin of
Ewing, Kirk & Johnson
for Respondent Nakasawa Farms

Joanne L. Yeager of
Ewing, Kirk & Johnson
for Respondent B.J. Hay Harvesting

Helen Cauchon and
Eugene Cardenas
for General Counsel

DECISION OF ADMINISTRATIVE LAW JUDGE

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I.

STATEMENT OF THE CASE

William H. Steiner, Administrative Law judge:

This case was heard by me on May 24, 25, 26, 27, 31, June 1, 7, 8, 9., 10, 29, 30, July 19, 20 and 21, 1983 in El Centro, California. The pretrial conference was held in El Centro before me on May 9, 1983.

The Third Amended Complaint, issued on May 3, 1983, alleges that respondents Ben and Jerry Nakasawa do business through Nakasawa Farms and B.J. Hay Harvesting, and that these entities are a single employer under the Agricultural Labor Relations Act (hereinafter "Act"). It is further alleged that respondents violated sections 1153(a) and (c) of the Act by refusing to hire the sixteen charging parties as tractor drivers, irrigators and maintenance service workers because of their participation in union and protected concerted activities. It is also alleged that respondents violated section 1153(d) of the Act because their refusal to hire charging parties was motivated by charging parties' participation in Agricultural Labor Relations Board (hereinafter "Board") proceedings.

On May 16, 1983 General Counsel issued and served its Motion to Amend Third Amended Complaint, alleging that certain individuals were supervisors and foremen of respondents. This motion was granted without opposition.

The original complaint issued on December 7, 1982 and was based on charges filed by each of the sixteen charging parties herein. An Answer was filed on December 14, 1982 denying all

allegations.

All parties were given a full opportunity to present evidence and participate in the proceedings. General Counsel and respondents filed briefs after the close of the hearing. General Counsel then filed a Motion to Correct Transcript and Respondent Nakasawa Farms filed an Erratum. The motion is granted and the Erratum is noted.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondents are agricultural employers. The charging parties are all agricultural employees. The instant charges were served on respondents in a timely manner.

B. The Employer

The issue of whether respondents are a single employer under the Act will be discussed in a later section of this decision.

Nakasawa Farms is a general partnership in the Imperial Valley organized by Ben and Jerry Nakasawa in 1981, with operations commencing on or about June 1, 1981. Nakasawa Farms performs a variety of growing and farming operations short of harvesting - from initial ground preparation to actual planting and plant care. It grows a variety of crops, including lettuce, alfalfa, broccoli,

Sudan grass, wheat and watermelons, on land which is leased by respondents in Holtville and Westmoreland (Tr. Vol. XIV,p. 36). Total crop acreage for Nakasawa Farms in 1981 and 1982 was between 3,500 and 4,000 acres. Nakasawa Farms operates on a year-round basis with a peak season in October and November of each year. During the peak planting season 50 to 55 workers are employed. (Tr. Vol. X, p. 17.)

The various crops at Nakasawa Farms have been harvested by several companies. Since January, 1982 B.J. Hay Harvesting, a general partnership formed by Ben and Jerry Nakasawa, has harvested the alfalfa, sudan grass and hay. As of the hearing in this matter, B.J. Hay Harvesting had harvested only for Nakasawa Farms, and had no other operations. During the harvest season (March through September) B.J. Hay Harvesting employs between four and eight employees. (Tr. Vol. XIII, p. 99; XIV, p. 51; X, p. 17)

In late 1980 or early 1981 respondents heard that Bud Antle, Inc. was going to stop its farming operations in the Imperial Valley, and respondents decided to take over those operations (Tr. Vol. XIV, p. 64; XIII, p. 136). Jerry Nakasawa had been general foreman at Bud Antle, Inc. since 1972. His duties included supervising foremen, irrigators, tractor drivers and shop workers. (Tr. Vol. X, p. 82.)

Ben Nakasawa was farm manager at Hipino Farms in Salinas, California from December, 1970 to June 1, 1981 when he joined his brother, Jerry, to form Nakasawa Farms. (Tr. Vol. XIII, p. 136.)

When Nakasawa Farms took over Bud Antle's growing operations on June 1, 1981 respondents attempted to substantially

reduce wages (from $5.90 hr. to $4.80 hr. -- Tr. Vol. IV, p. 85). This resulted in charges being filed by the Teamsters Union, Ruben Silva, David Rojas and Gustavo Carreno (hereinafter "Silva", "Rojas" and "Carreno") against Bud Antle, Inc., Castle & Cook and Nakasawa Farms. These charges resulted in a settlement agreement in December, 1981 (G.C. Ex. 1.11). The agreement provided, among other things, for the reinstatement of Rojas, Silva and Carreno, "in their former job classification" (G.C. Ex. 1.11, p. 6) plus back wages, and retroactive pay for them and other workers hired by Nakasawa Farms, effective June 2, 1981 (Tr. Vol. VIII, p. 12). Rojas, Silva and Carreno had been laid off by Bud Antle, Inc. in January, 1981. Bud Antle, Inc. contended this was due to lack of work. Pursuant to the settlement agreement, beginning January, 1982, the tractor drivers, irrigators and related service and maintenance workers went back on the Bud Antle, Inc. payroll at their former wage rates, and a renegotiated Farming Agreement between Bud Antle, Inc. and Nakasawa Farms went into effect. All back pay was paid by Bud Antle, Inc., and Ben Nakasawa testified that the settlement agreement, except for attorney's fees, had no economic effect on Nakasawa Farms. (Tr. Vol. XIII, pp. 147-149). The settlement agreement expired at the end of May, 1982.

On December 22, 1981 Rojas, Silva and Carreno attempted to return to work, pursuant to the settlement agreement. They reported for work at Starr Ranch, Nakasawa Farms' agricultural operations located in Holtville. This is the beginning of the series of events immediately surrounding the present charges involving Nakasawa Farms' failure to hire charging parties during the summer of 1982.

When these three charging parties reported for work on December 22, 1981, foreman Luis Hunger allegedly refused to give them work and told them to go to the union (Tr. Vol. I, pp. 74-75). These allegations and the other relevant events will be described in greater detail in the following discussion of the facts.

At no time during respondents' existence has any labor organization filed a petition for representation (Tr. Vol. XIII, p. 139), nor is there evidence that any formal union organizing campaign has been attempted.

C. The Discriminatory Refusal to Hire Allegations

1. The Alleged Refusal to Hire Based Upon Charging Parties' "Participation in ALRB Proceedings" (ALRA section 1153(d))

(a) The Applicable Law

Section 1153(d) of the Act makes it unlawful for an agricultural employer,

> To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part.

(b) The Facts

Whether or not any of the charging parties was not hired by respondents because of their alleged participation in a complaint or proceeding under the Act (or for other unlawful reasons) requires an examination of each charging party's work history. Their work histories may be summarized as follows:

1. David Rojas

Rojas was employed by Bud Antle, Inc. as a service truck operator in October, 1975.

The service truck operator job involved greasing machinery,

changing oil, clutches, transmissions and all maintenance of machinery.

Rojas alleges his hours were cut and he was unduly pressured by foreman Luis Munger in 1978 after Rojas sent a petition to Bud Antle, Inc. concerning an alleged denial of breaks in violation of the union contract. At that time Rojas was named the employees' representative for the Teamsters Union at Bud Antle, Inc. (Tr. Vol. I, pp. 65-69).

In January, 1981 Rojas was laid off, for the first time, by Luis Munger, a Bud Antle, Inc. foreman who in June, 1981 became a foreman for respondents. An unfair labor practice charge (hereinafter "ULP") followed, and Rojas was reinstated pursuant to a settlement, effective on or about December 22, 1981. On December 22, 1981 Rojas reported to work (at Nakawawa Farms on Bud Antle, Inc's payroll) but allegedly was not given work and was told by foreman Luis Munger to see the union. He did so, and promptly was given work, but not his regular duties. Instead, Rojas was told to clean ditches and pipes and to move pipes.

Rojas, as a result of alleged undue pressure from foreman Apolonio Escota, filed a ULP against him. Two weeks later, on January 22, 1982, Rojas, Silva and Carreno (all joined in the charge against Escoto) were laid off.

In June, 1982 Rojas submitted an application for employment with respondents. He was not offered employment. Rojas alleges Jerry Nakasawa told him he would not be hired because he was causing too many problems. Respondents allege that in June, 1982 there was no regular position for Rojas as a full-time service truck operator.

Jesus Garcia, allegedly a more senior employee of Bud Antle, Inc., was hired as a maintenance man and worked part-time as a service truck operator. Respondents allege there were also problems with Rojas[1] job performance, including his breaking of equipment, improperly servicing equipment, being unusually slow in carrying out his duties, and having personal conflicts with his foreman, Escoto.

2. Ruben Silva

Silva was hired by respondent jerry Nakasawa at Bud Antle, Inc. in September, 1976 as a welder.

The welding job involved building equipment and maintenance of equipment used in the farming operation.

In 1978 Silva made a complaint to Jerry Nakasawa regarding alleged unfair allocaction of overtime to Jesus Garcia, whereas the other shop workers wanted their fair share (Tr. Vol. VIII, p. 30). The matter was resolved - all workers in the shop were to be given equal hours. Also in 1978 Silva signed a petition regarding the alleged wrongful denial of breaks in violation of the collective bargaining agreement. All of the shop workers except Jesus Garcia signed the petition. The matter was resolved by allowing the breaks (Tr. Vol. VII, pp. 76-77).

In early 1981 Bud Antle, Inc.'s foreman Luis Munger informed Silva that Bud Antle, Inc. was going to close and there would be no work. Silva was laid off in January, 1981. Baltazar Chavez and Gustavo Carreno sent a letter to the Teamsters Union concerning this problem. Several meetings of the workers were held. According to Silva, all of the charging parties attended these

meetings, and the workers hired by respondents in June, 1982 did not attend with one exception. Three workers who were hired attended one meeting. These were Ernesto Cota, Ramon Valdez and Elias Orozco. (Tr. Vol. VIII, pp. 6-10.)

In December, 1981 Silva and others filed a ULP against respondents, which resulted in his reinstatement and back pay award (Tr. Vol. VIII, pp. 11-12). Silva shortly thereafter joined Rojas and Carreno in a ULP against foreman Apolonio Escoto, alleging undue pressure. (Tr. Vol. VIII, p. 15.) This charge apparently was resolved. (Tr. Vol. VIII, p. 15.)

In January, 1982, one month after Silva's reinstatement, he was again laid off. According to respondents, there was not enough work. Silva applied for work with respondents in late May or early June, 1982, but never was offered a job. Respondents contend that there was no regular welding position available, and no one was hired for this work. Respondents also contend that Silva often came to work "hung over", which adversely affected his job performance. (Tr. Vol. XIII, p. 12.)

3. Gustavo Carreno

Carreno was hired by Jerry Nakasawa at Bud Antle, Inc. in 1976. In 1978 he became a full-time tractor driver.

In 1980 Carreno was laid off by foreman Luis Munger. According to Munger this was due to Bud Antle, Inc.'s decision to stop its growing operations. Carreno replied to Munger that he had a contract until September of 1983. Carreno sent a letter requesting a meeting with a Teamster representative. He

participated in meetings of the workers, and on December 2, 1981 participated in filing a charge against respondent (Tr. Vol. IX, p. 80). He also benefited from the settlement agreement – he was reinstated with back pay. On or about December 22, 1981 Carreno returned to work with Rojas and Silva, and was also given the job of cleaning ditches under the supervision of Apolonio Escoto (see above).

In January, 1981 Carreno was laid off. He subsequently submitted an application for work with respodents, which included a protest that he and his co-workers at Bud Antle, Inc. were required to submit written applications (G.C. Ex. 1.12). Respondents did not offer Carreno work. Respondents' alleged reason was that Carreno was unreliable in his attendance (Tr. Vol. XIV, pp. 76-77).

4. Baltazar Chavez

Chavez was hired by Jerry Nakasawa at Bud Antle, Inc. as a tractor driver in about 1974. He signed the petition concerning the break issue in 1978.

In February, 1981 Chavez was laid off from Bud Antle, Inc. by Luis Munger. He then joined Silva and Carreno in sending a letter to the Teamsters Union requesting a meeting. He attended several meetings with the other workers involving the layoff issue. He testified Luis Munger told him that Jerry Nakasawa specifically told Munger he did not want Chavez, Rojas, Silva or Carreno to go to work (Tr. Vol. VII, pp. 44-45).

In December, 1981 Chavez participated in the charge againt respondents (G.C. Ex. 1.28) and was awarded by back pay.

In February, 1982 he was laid off from Bud Antle, Inc. by Luis Munger, and obtained employment with another farmer, Walter Britchgi.

In June, 1982 he submitted an application for employment with respondents, and joined in the written protest about being required to file a job application. Chavez was not offered work, according to Jerry Nakasawa, because he was considered to be only an average tractor driver, and others he knew about at Bud Antle, Inc. were better (Tr. Vol. XIV, p. 81).

5. Rosendo De La Torre

De La Torre was employed by Bud Antle, Inc. in 1971 as an irrigator. He attended the workers' meetings in Mexicali and at the ALRB office. In April, 1982 he was laid off by foreman Jose Gonzalez.

In June, 1982 he submitted an application for employment with respondents, but was not offered work.

Respondents contend that De La Torre worked for Nakasawa Farms in 1981, 1982 and 1983 as a seasonal irrigator. They contend that De La Torre did not wish to work full-time.

De La Torre testified that no one told him not to speak to Rojas, Silva or Carreno, or not to attend employee meetings.

Respondents also contend, as a further reason for not employing De La Torre full-time, that he was only an average worker.

6. Tomas De Leon

De Leon was employed by Bud Antle, Inc. as an irrigator in

1972.

He testified that he signed the petition requesting breaks in 1978, and attended most of the employees' meetings.

De Leon testified that Apolonio Escoto told him not to speak with Rojas, Silva and Carreno after they were reinstated. He rejected this admonition, replying that he would speak to them because they were the workers' representatives.

In May, 1982 De Leon was laid off by Escoto. In June, 1982 he submitted an application for employment with respondents, and signed the protest letter submitted by Carreno. He thereafter was not offered employment by respondents.

Respondents contend that De Leon was an undesirable employee because he flooded fields, damaged crops, drank liquor on the job, arrived at work inebriated, and was twenty to forty minutes late to work approximately three times per week, and once missed three consecutive days without authorization.

7. Antonio Garcia Barrios

Garcia was employed by Bud Antle, Inc. in 1964 as a irrigator.

In May, 1981 Garcia and Abraham Solis allegedly refused to sign a paper as requested by Escoto. The paper was an acknowledgment that there was no work at Bud Antle, inc. and that Nakasawa Farms was taking over its operations. Shortly thereafter Jerry Nakasawa called a meeting a the Starr Ranch shop where the Bud Antle, Inc. employees were told that Jerry Nakasawa was taking over Bud Antle, Inc.'s operations and would pay $4.80 per hour

(about $1.00 less than Bud Antle, Inc. paid). He also stated that there would be no union at Nakasawa Farms (Tr. Vol. IV, p. 85).

Garcia testified that he worked on Nakasawa Farms payroll from June, 1981 to December, 1981, and in January, 1982 he started receiving pay checks from Bud Antle, Inc. (Tr. vol. IV, p. 87).

He further testified that when Rojas, Silva and Carreno were reinstated, Escoto told Garcia he did not want him speaking to them because they were troublemakers (Tr. Vol. IV, p. 88).

Garcia testified that he attended the workers' meetings, and on or about June 1, 1982 submitted a job application with Nakasawa Farms, while still employed there. On June 3, 1982 he was laid off by Escoto, who told him and three co-workers, "That's it boys. Your fired."

Escoto denied accusing Silva or Carreno of being troublemakers, and denied making any statements about employee meetings.

Respondents contend that Garcia was an undersirable employee because he was a very slow worker, flooded fields, slept on the job, and once negligently drove a car into a ditch.

8. Isidro Garcia

Garcia was employed by Bud Antle, Inc. in 1976 as a seasonal irrigator. In March, 1981 Garcia was laid off by irrigator foreman Guadalupe Gonzalez. He then began attending the employee meetings.

In December, 1981 Garcia received retroactive pay as part of the settlement. In March, 1982 he was laid off by Gonzalez.

Thereafter, in June, 1982, he submitted a work application with Nakasawa Farms, but was not then offered a job. In September he spoke with Jerry Nakasawa personally, and Mr. Nakasawa allegedly commented ambiguously, "... you signed. ..." Mr. Nakasawa went inside his house for about ten minutes, and then told Garcia he could speak with Gonzalez about work. Garcia did so and was hired the next day.

9. Pablo Garcia Barrios

Garcia was employed by Bud Antle, Inc. as an irrigator in about 1964. In 1978 he signed the petition requesting breaks. In 1981 he refused to sign the paper submitted to him by Escoto concerning the closure of Bud Antle, Inc.'s He testified that Jerry Nakasawa refused to permit him to take a copy of the paper home.

Garcia testified that after the reinstatement of Rojas, Silva and Carreno, Escoto told him not to speak with them.

Garcia corroborated Antonio Garcia's testimony that Escoto asked them about the employees' meetings.

He was laid off by respondents on June 2, 1982, and then submitted a work application. Respondents did not offer him reemployment.

Respondents contend Garcia is an undersirable employee because he is a very slow worker, habitually wastes water and is lazy.

10. Refugio Minero

Minero began working for Bud Antle, Inc. as a tractor

driver in 1972. He was transferred in 1979 to the Imperial Valley operation as a tractor driver.

He attended the employees' meetings and received retroactive pay in the December, 1981 settlement.

In February, 1982 Minero was laid off by foreman Luis Munger. He testified that after his layoff he spoke with Jerry Nakasawa, and Mr. Nakasawa accused Rojas of being crazy, and expressed his opposition to having a union. He also said Mr. Nakasawa asked him why he went along with Rojas, a statement denied by Mr. Nakasawa.

Minero submitted a job application with respondents, but was not offered employment.

Respondents contend Minero is an undesirable employee because he is very slow, seemed not to understand instructions, and is not a good tractor driver.

11. Jose Oliveres

Olivares was employed by Bud Antle, Inc. in 1960 as a pipe foreman. In 1968 he began working for Bud Antle, Inc. as an irrigator. In 1970 or 1971 he started working as a tractor driver. He signed the 1978 petition requesting breaks.

He testified that in 1978 he spoke with Jerry Nakasawa about the petition, and in that conversation Jerry Nakasawa told him he had a "lot of problems" with David Rojas.

In January, 1981 Olivares was laid off by Munger. He then began attending the employees' meetings.

Oliveres testified that when he submitted his job

application with the protest letter, Jerry Nakasawa told him "You're dead", and he responded, "I'm am not dead because I am returning this."

Respondents contend Olivares is an undesirable employee because he had a practice of improperly driving his tractor, causing damage to the crops, and that he drove too fast, broke equipment, would not follow instructions, and was insubordinate toward his foreman, Luis Munger.

12. Carlos Pulido

Pulido was employed by Bud Antle, Inc. as an irrigator in about 1975. After about four years he switched from year-round to seasonal work.

He was laid off for the first time in February, 1981, and was then rehired by Nakasawa Farms at a reduced wage.

He attended some of the employees' meetings, and received back pay in the December, 1981 settlement.

In February, 1982 he was laid off, and continued to attend the employees' meetings. He also testified that Escoto told him he might not be rehired because Jerry Nakasawa knew he was attending the meetings. He further testified Gonzalez told him Jerry Nakasawa was award who was going to the meetings. Nevertheless, Pulido apparently worked his usual period in 1982, and Ben Nakasawa indicated he would be eligible for reemployment in September, 1982.

Respondents contend Pulido did not want to work during the summer because of his admitted high blood pressure.

13. Salvador Pulido

Pulido was employed by Bud Antle, Inc. in 1964 as an irrigator and sprinkler worker.

He testified that in December, 1981 foreman Guadalupe Gonzalez told him he was going to fire the irrigators if they attended meetings, a statement denied by Gonzalez. Pulido also testified Gonzalez accused Rojas of agitating the workers, and became angry when he saw Rojas speaking with the workers (Tr. Vol. VI, p. 20).

Pulido attended the employees' meetings after his layoff in December, 1981. On or about August 2, 1982 Pulido submitted a work application, but was not offered a job.

Respondents contend they sought Pulido for employment after his December, 1981 layoff, but he was employed elsewhere.

14. Federico Salgado Guzman

Salgado was a Bud Antle, Inc. irrigator since about 1965.

He testified that in 1981 Gonzalez and Escoto told him not to speak to Rojas because Rojas was misleading people. Salgado disregarded these instructions (Tr. Vol. IV, p. 7).

In January, 1981 Salgado was laid off, and was rehired by Nakasawa Farms in July, 1981 at a reduced wage. He than began attending the employees' meetings.

In December, 1981 he received backpay from the settlement. He allegedly was told by Gonzelez that only the workers who did not attend the meetings would keept their jobs.

In March, 1982 Salgado was laid off, and thereafter

submitted his work application with respondents. Respondents did not offer him reemployment.

Respondents contend that Salgado is an undesirable employee because he flooded fields, causing substantial damage, left his work assignment without prior approval from his foreman, irrigated improperly a "majority of the time", and would not correct his errors.

15. Abraham Solis

Solis began working for Bud Antle, Inc. as an irrigator in 1971.

In 1981 Solis refused to sign the paper submitted by Escoto. After Jerry Nakasawa addressed the workers, including Solis, in the shop, Solis began attending meetings with the other workers because of the wage reduction. He testified that Escoto asked him about one meeting.

On June 3, 1982 Escoto laid Solis off, and allegedly asked him why he got "involved" (Tr. Vol. III, p. 88).

Respondents contend Solis is an undesirable employee because he slept on the job, had a practice of flooding fields, causing damage to crops, and would not follow instructions. He was not considered a "top quality" irrigator.

16. Ramon Solis

Solis was employed by Bud Antle, Inc. as an irrigator in 1965.

In 1981 Solis refused to sign the paper submitted by

Escoto.

After the shop meeting addressed by Jerry Nakasawa, Soils began attending employee meetings.

In December, 1981 Solis allegedly was told by Escoto not to speak with Rojas, Silva or Carreno, or he would be fired.

On June 3, 1982 Solis was laid off by Escoto, along with Antonio Garcia and Abraham Solis. The day before he submitted a work application, and was never rehired. He also signed the protest letter submitted by Carreno.

Respondent contends Solis is an undesirable employee because he allegedly has a drinking problem, was discovered drinking on the job twice a week, flooded fields, and was only an average irrigator.

(c) Analysis and Conclusions

Respondents' counsel correctly points out that there can be no section 1153(d) violation if the employer had no knowledge of an employee's participation in ALRB proceedings. In the present case, the charging parties, except for Rojas, Silva and Carreno, did not actively participate in the ALRB process. The charge in December, 1981 regarding the wage reduction and the layoff of Rojas, Silva and Carreno was brought by the Teamsters Union and the three named employees. True, all charging parties herein benefited from the back pay settlement, as did the Bud Antle, Inc. employees who subsequently were employed by Nakasawa Farms during the summer of 1982.

Thus, without knowledge by respondents that the charging

parties herein participated in any ALRB proceeding, respondents cannot be held to have violated section 1153(d). As for charging parties Rojas, Silva and Carreno, there clearly was knowledge by respondents that they participated in the charge. A prima facie case is therefore established if a preponderance of the evidence establishes the third element - to establish a prima facie case of a refusal to hire in violation of section 1153(d), General Counsel must show by a preponderance of the evidence: (1) participation in the ALRB process; (2) respondent's knowledge of such activity, and (3) some causal relationship between the applicant's protected activity and the employer's failure to hire. (Verde Produce Company (1981) 7 ALRB No. 27; McCarthy Farming Company, Inc. (1982) 8 ALRB No. 78.)

The apparent causal relationship between the participation of Rojas, Silva and Carreno in the December, 1981 charge and respondent's failure to hire them is established by reason of the following facts:

1. All three charging parties are long-time employees of Bud Antle, Inc., having worked under Jerry Nakasawa as General Foreman for several years each, as year-round employees.

2. All three charging parties proved by a preponderance of the evidence their qualifications as competent employees by reason of their repeated rehiring and the scarcity of credible or documented complaints about their job performance.

3. The apparent availability of work for these three charging parties is established in part by reason of the December, 1981 settlement agreement, signed by both Bud Antle, Inc. and

respondents. The agreement provides that charging parties were to be rehired (on Bud Antle, Inc.'s payroll) "in their former job classifications" through May, 1982. (Brief of Respondent Nakasawa Farms, p. 3, Ins. 16-26; G.C. Ex. 1.11 "Settlement Agreement", pp. 5-6.) Also, foreman Luis Munger and Ben Nakasawa's testimony suggested that the Nakasawa Farms farming operation in 1982 was substantially the same as in previous years (TR. XIII, p. 78; X, pp. 56-58). No differences in the amount of equipment were mentioned, and a large amount of equipment was owned and apparently operated by respondents during 1972 and 1973 (Resp. Ex. 14).

4. Respondents' hostility toward charging parties' objective in the December, 1981 charge is apparent from their testimony that they believed the reduced wage was necessary for Nakasawa Farms to survive economically. Additionally, they were required to pay attorney's fees to defend the charge and reach a settlement. Clearly, the participation of these three charging parties contributed to their reputation as "troublemakers", which was abundantly established by the charging parties' straightforward and generally consistent testimony. The absence of direct evidence of respondents' motives for failing to hire charging parties is not fatal to charging parties' case. Unlawful motivation may be inferred from evidence showing that the employer was hostile to the protected activity and knew the employee was engaged in it. Knowledged of an employee's protected activity itself may be inferred from circumstantial evidence. (Kitayama Brothers (1983) 9 ALRB No. 23.)

In mixed motive cases, such as this, once a prima facie

case is established by General Counsel, the burden shifts to respondent to prove by preponderance of the evidence that its action (here, failure to hire) would have occurred even absent the employee's protected activity. Wright Line, a Division of Wright Line Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], Zurn Industries v. N.L.R.B. (9th Cir. 1982) 680 F.2d 683? Rigi Agricultural Services, Inc. (1983) 9 ALRB No. 31.

Respondents' evidence to counter Rojas[1] prima facie case consists chiefly of the testimony of foreman Luis Munger and Jerry Nakasawa. Munger's testimony was primarily directed at Rojas' alleged incompetence as an employee. This testimony, however, appeared exaggerated, contradictory and biased against Rojas. Munger testified that when an employee demonstrated serious performance problems, he preferred to terminate the employee, which was within his authority (Tr. Vol. XIII, pp. 73-80). He testified that Rojas had serious performance problems, but he was neither terminated nor given written warnings in accordance with Bud Antle, Inc.'s discipline system. (Tr. Vol XIII, pp. 73-80.) These contradicitions were left unexplained. It was not explained why such serious problems would not have resulted in a denial of employment to Rojas before 1982.

Respondents' testimony about not needing Rojas' services because of lack of work simply was not sufficiently credible or certain to preponderate against General Counsel's evidence.

Credibility Determinations

According to Munger, Rojas and Minero stood out in his mind

as the leading union activists at Bud Antle, Inc. (Tr. vol. XIII, p. 77). When foreman Apolonio Escoto and Jerry Nakasawa were reviewing the workers' job performance in May, 1981, Jerry Nakasawa commented to Escoto that there was not going to be a union at Nakasawa Farms (Tr. Vol. XII, p. 91). Again in June, 1981, at a meeting in the Nakasawa Farms shop with foreman Bud Antle, Inc. employees, Jerry Nakasawa announced that there would be no union at Nakasawa Farms (Tr. Vol. IV, p. 85; XIV, p. 66; XV, pp. 4-5). The non-union status was mentioned, according to respondents, to avoid any "misunderstanding" because at Bud Antle, Inc. there was a union. This explanation, however, does not explain why the June, 1982 job notice issued by Nakasawa Farms and posted at the Employment Development Department, specified "Nakasawa Farms will be operating as a non-union company." (J.Ex. 1b; Tr. Vol. XIV, pp. 14-15) The explanation given by both Jerry and Ben Nakasawa for the "non-union" announcement was at best evasive. This testiony as a whole seriously impeached their credibility and clearly established their anti-union animus. The December, 1981 ALRB charge filed by these three charging parties was integrally related to the charging parties' assertion of union contract rights found offensive by respondents.

The above analysis and considerations apply with substantially the same force to charging parties Silva and Carreno. There was insufficient credible evidence by respondents to establish by a preponderance of the evidence any legitimate business justification for not employing Rojas, Silva and Carreno in the summer of 1982.

2. The Alleged Refusal to Hire Based Upon Charging Parties' Participation in Union and Protected Concerted Activity (ALRA section 1153(a), (c))

(a) The Applicable Law

To establish that an adverse action taken against an employee violates section 1153(a) and (c) of the Act, the General Counsel has the initial burden of providing by a preponderance of the evidence that the employee engaged in protected activity, that the employer knew about it, and that a causal connection, or nexus, exists between the employee's involvement and the adverse action taken against him. Lawrence Scarrone (1981) 7 ALRB No. 13; Jackson and Perkins Rose Company (1979) 5 ALRB No. 20.

(b) Additional Facts

Here, a key issue is identifying the "protected activity". It cannot be the charging parties' mere status as beneficiaries of the December, 1981 settlement (see above). Apart from this, and the 1978 shop workers' petition regarding breaks, there was no union-related activity. There was, however, protected concerted activity, which may exist without any union affiliation. This activity consisted of the meetings held in 1982 and the protest letter attached to Carreno's job application (G.C. Ex. 1.12), signed by ten employees. It includes the conversations between Rojas, Silva, Carreno and the charging parties unless the conversations violated non-discriminatorily applied work rules. There was no substantial evidence that any such rule was violated.

(c) Analysis and Conclusions

A preponderance of the evidence established that

Rojas, Silva and Carreno were perceived by respondents as leaders and "troublemakers", and any individual communicating with them became suspect in respondents' eyes. In fact, any employee who was suspected of communicating with Rojas, Silva or Carreno because suspect and the target of threats or warnings by respondents or their foremen.

The element of employer knowledge was not established with respect to the workers' meetings — no charging party testified that respondents, their foremen or any suspected "informers" attended their meetings. There was testimony which raised a suspicion of employer knowledge, but this testimony was not sufficiently certain to establish by a preponderance of the evidence that respondents actually knew which employees attended the meetings.

A preponderance of the evidence, however, does establish that respondents were suspicious about certain employees who associated with Rojas, Silva and Carreno, and that respondents probably placed the signers of Carreno's protest letter in the same category of suspect employees.

The signers of Carreno's protest letter included the following charging parties: Abraham Solis, Ramon Solis, Antonio Garcia Barrios, Pablo Garcia Barrios, Refugio Minero, Baltazar Chavez, David Rojas, Ruben Silva and Tomas De Leon. The fact that Gregorio Briones also signed and was hired does not, in itself, preclude the application of this "group analysis" -- absolute uniformity of treatment is not required, and other evidence is relied upon here to establish these charging parties' cases. (J.R. Norton Company (1983) 9 ALRB No. 18).

The additional charging parties who have shown by a preponderance of the evidence that they were catagorized as suspicious because of their actual or suspected contracts with Rojas, Silva and/or Carreno include the following: Baltazar Chavez (Tr. Vol. VII, pp. 44-45); Tomas De Leon (Tr. Vol. VI, pp. 68-69); Antonio Garcia Barrios (Tr. Vol. IV, pp 88, 128-129); Pablo Garcia Barrios (Tr. Vol. V, p. 16); Refugio Minero (Tr. Vol. VIII, pp. 82-86); Jose Olivares Ybarra (Tr. Vol. III, pp. 34-35, 40); Salvador Pulido (Tr. Vol. VI, pp. 19-21); Federico Salgado Guzman (Tr. Vol. IV, p. 7); Abraham Solis (Tr. Vol. Ill, p. 88); Ramon Solis (Tr. Vol. V, p. 63).

Respondents' failure to hire the above-mentioned thirteen charging parties (all charging parties except Rosendo De La Torre, Isidro Garcia and Carlos Pulido Garica), who all had good work records for several years, in light of the other unusual circumstances described above, amply establishes a prima facie case for each of them. Because of the involvement of Rojas, his identification as a union activist, and respondents' anti-union animus, a prima facie violation of section 1153(c) is also established.

The burden therefore shifts to respondents to prove by a preponderance of the evidence that their failure to employ these thirteen charging parties was for some cause not proscribed by the Act. In each case, respondents attempted to show that charging parties were not employed because they are undersirable employees.

In each case the evidence of incompetence or misconduct fails to outweigh the evidence favorable to charging parties for

several reasons: (1) Each charging party had a basically good performance record for several years, and no one received more than one written warning under the disciplinary system at Bud Antle, Inc; (2) In light of charging parties' basically good performance records in previous years, respondents' testimony severely criticizing their performances appeared exaggerated and biased; (3) Respondents failed to explain how the job performance of so many employees could fall below an acceptable level in the same year; correspondingly, respondents failed to demonstrate by the evidence a credible expectation of employing substantially better employees, nor did respondents show they did employ better employees; and (4) Finally respondents' testimony concerning the "no union" job notice impaired their credibility. On the other hand, the demeanor of these charging parties demonstrated an aire of frankness which was not as apparent in the testimony of respondents' witnesses, particularly Guadalupe Gonzalez, who was continually staring at the floor.

Respondents' purported reasons for failing to employ these charging parties must, -therefore, be characterized as pretextual.

D. The Single Employer Issue; Are Ben and Jerry Nakasawa, dba Nakasawa Farms and B. j. Hay Harvesting a Single Employer for Purposes of Agricultural Labor Relations Act?

This issue was thoroughly briefed by the parties. Preliminarily, it should be noted that respondents' procedural objections to including B. J. Hay Harvesting as a respondent were addressed and overruled in the prehearing motions, and need not be

addressed again in this decision. The issue whether respondents Nakasawa Farms and B. J. Hay Harvesting are a "single employer" under the Act is the only remaining issue.

The criteria for determining whether a single employer relationship exists are explained in N.L.R.B. v. Browning-Ferris Industries (3d Cir. 1982) 691 F.2d 1117, 111 LRRM 2748, 2751; Saticoy Lemon Association (1982) 8 ALRB No. 94, ALJ opn. at p. 19. See ALJ Jennie Rhine's opinion (May 9, 1983) in Holtville Farms, Inc., etc., Case Nos. 80-CE-245-EC, etc. ALJ Rhine explains an important distinction which respondents seem to overlook:

> A "single employer" relationship exists where two or more nominally separate and independent entities in reality constitute a single integrated enterprise, whereas the "joint employer" concept does not depend upon the existence of a single integrated enterprise but rather is a matter of whether two or more otherwise independent entities that are participating in a common enterprise jointing control the labor relations of a given group of workers. (Browning-Ferris Industries, supra, 111 LRRM at 2751-2752.) In a single employer situation, the focus of the inquiry is upon the relationship between the entities, and the degree of common control over their separate labor forces is but one indicator of their interrelationship; in a joint employer situation, on the other hand, the focus of the inquiry is the relationship of each entity not to each other but to the workers, and the critical factor is whether another entity in fact exercises sufficient control over the terms and conditions of employment to be considered a joint employer of the workers along with their nominal employer.

Respondents address the four basic criteria:

(1) interrelation of operations; (2) common ownership; (3) common management, and (4) common control of labor relations. Rivcom Corporation and Riverbend Farms, Inc. (1979) 5 ALRB No. 55, affd. (1983) 34 Cal.3d 743.) However, respondents give undue importance to differences in the actual operations, for example, differences between "growing" and "harvesting", specific banks used and lines of

credit, wage rates paid for different jobs etc..

There is no substantial disagreement that there is common ownership and the two entities are highly interrelated. A preponderance of the undisputed evidence establishes each of the other criteria. The two entities need not be identical, and all factors need not be present in order to find a single employer. Local 627, International Union of Operating Engineers v. N.L.R.B. (D.C. Cir. 1975) 518 F.2d 1040, 90 LRRM 2321, rev'd on other grounds sub nom. South Prarie Construction Co. v. Operating Engineers, Local 627 (1976) 425 U.S. 800, 92 LRRM 2507.

III.

SUMMARY

General Counsel has established by a preponderance of the evidence section 1153(d) violations with respect to charging parties David Rojas, Ruben Silva and Gustavo Carreno. No violation of this section is established with respect to the other charging parties.

General Counsel also has established by a preponderance of the evidence violations of section 1153(a) and (c) with respect to all charging parties except Rosendo De La Torre, Isidro Garcia and Carlos Pulido Garcia.

Finally, General Counsel has established by a preponderance of the evidence that respondents Nakasawa Farms and B. J. Hay Harvesting are a single employer under the Act.

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IV.

Accordingly, pursuant to section 1160.3 of the Act, I recommend the following:

ORDER

Respondents Ben and Jerry Nakasawa, dba Nakasawa Farms and B. J. Hay Harvesting, their officers, agents, supervisors and representatives, shall:

1. Cease and desist from:

(a) Failing or refusing to hire or otherwise discriminate 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"), or because he or she has exercised rights under section 1153(d) to file charges and testify in ALRB proceedings.

(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) Give hiring preference next season to the following named charging parties for vacancies in the same or comparable positions as said charging parties sought and were denied in the summer of 1982: Gustavo Carreno, Baltazar Chavez, Tomas DeLeon, Antonio Garcia, Refugio Ninero, Jose Olivares, Pablo Garcia, Salvador Pulido, David Rojas, Federico Salgado Chavez, Ruben Silva, Abraham Solis, Ramon Solis. Said charging parties' seniority, if

they are hired for the next season, shall date from the dates of their respective job applications (if no employee was hired in their place) or from the date that a non-charging party applicant was hired for the job they sought. (Phelps Dodge Corp. v. N.L.R.B. (1941) 313 U.S. 177 [8 LRRM 439, 443]; Lexington Electric Products Co., Inc. (1959) 124 NLRB 1400.)

(b) Make whole the following named charging parties for all losses of pay and economic losses they have suffered as a result of the discrimination against them, such amounts to be in accordance with established Board precedents, plus interest thereon computed in accordance with its Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55: Gustavo Carreno, Baltazar Chavez, Tomas De Leon, Antonio Garcia, Refugio Minero, Jose Olivares, Pablo Garcia, Salvador Pulido, David Rojas, Frederico Salgado Chavez, Ruben Silva, Abraham Solia, Ramon Solis.

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

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

(e) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during its 1982-83 operations.

(f) 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.

(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 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: December 14, 1983

William H. Steiner

WILLIAM H. STEINER
Administrative Law Judge

DO NOT REMOVE OR MUTILATE

NOTICE TO EMPLOYEES

After a hearing where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by discriminating against certain workers because of their union and other protected concerted activities, and because of their participation in charges filed with the Board. Because of these violations, the Board has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farms workers these rights:

1. To organize themselves;

2. To form, join, or help any union;

3. To bargain as a group and to choose anyone they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect each other; and

5. To decide not to do any of these things.

Becacuse this is turn, we promise you that:

WE WILL NOT refuse to hire or consider for employment or otherwise discriminate against any employee or previous employee because he or she exercised any of these rights.

WE WILL pay the following named persons any money they lost because they were not hired during the summer of 1982: Gustavo Carreno, Baltazar Chavez, Tomas De Leon, Antonio Garcia, Refugio Minero, Jose Oliveres, Pablo Garcia, Salvardo Pulido, David Rojas, Pederico Salgado Chavez, Ruben Silva, Abraham Solis, Ramon Solis.

DATED:

BEN AND JERRY NAKASAWA, dba NAKASAWA FARMS and B. J. HAY HARVESTING

By: _____

Representative Title

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