

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. R. NORTON COMPANY,)	
)	
Respondent,)	Case Nos . 81-CE-9-EC
)	81-CE-61-EC
and)	82-CE-79-EC
)	82-CE-80-EC
UNITED FARM WORKERS OF AMERICA,)	82-CE-81-EC
AFL-CIO, CASEY FLORES, BENJAMIN)	82-CE-83-EC
HERNANDEZ, GUADALUPE GONZALEZ ,)	82-CE-84-EC
and RAFAEL CONTRERAS,)	82-CE-103-EC
Charging Parties.)	10 ALRB No. 7

DECISION AND ORDER

On February 4, 1983, Administrative Law Judge (ALJ)^{1/} Thomas Patrick Burns issued the attached Decision in which he recommended that the complaint be dismissed in its entirety.^{2/} Thereafter, General Counsel timely filed exceptions to the ALJ's Decision and a supporting brief; Respondent timely filed a reply brief to General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings,^{3/} and conclusions as

^{1/} At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

^{2/} Three charges, 81-CE-9-EC, 81-CE-61-EC, and 82-CE-103-EC, were settled informally prior to hearing.

^{3/} General Counsel excepts to the ALJ's failure to find that Respondent adhered to seniority when laying off and/or recalling its irrigators and tractor drivers. We find no merit to this exception, notwithstanding our findings in prior J. R. Norton cases (8 ALRB No. 76 and 8 ALRB No. 89) regarding seniority of lettuce harvesters.

modified herein^{4/} and to adopt his recommended order with modifications.

We affirm the ALJ's finding that Respondent's supervisor David (Bud) Micalizio unlawfully interrogated agricultural employees Casey Flores and Benjamin Hernandez in violation of Labor Code section 1153(a).^{5/} We find merit in General Counsel's exception to the ALJ's finding that Respondent sufficiently repudiated and therefore remedied the unlawful acts of its supervisor, Micalizio.

In Passavant Memorial Area Hospital (1978) 237 NLRB 138 [98 LRRM 1492] (Passavant), the National Labor Relations Board (NLRB or national board) summarized minimum criteria for effective employer disavowals of unlawful conduct in this manner:

It is settled that under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." Douglas Division, The Scott & Fetzer Company, 228 NLRB 1016 (1977) and cases cited therein at 1024.. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. Pope Maintenance Corporation, 228 NLRB 326, 340 (1977). And, finally, the Board

^{4/} We disavow the ALJ's suggestion that Respondent may have elected to transfer, rather than lay off, a vigorous proponent of the Union in order to avoid a charge of discriminatory discharge and that another worker's isolation may have been an appropriate punishment for his poor performance. The statements, lacking record support, are purely subjective and speculative.

^{5/} Respondent took no exception to the ALJ's findings that Micalizio unlawfully interrogated Casey on two separate occasions regarding his union sentiments and unlawfully interrogated Hernandez regarding his protected concerted activity.

has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

We find that the minimum criteria as stated in Passavant are appropriate in the agricultural context and, because these criteria are general in nature, they must be applied on a case-by-case basis. We encourage respondents to relieve themselves of liability for unlawful conduct of their supervisors and agents by retracting, disavowing or otherwise repudiating isolated and relatively minor unfair labor practices or objectionable conduct. However, in this case, we find that Respondent did not meet the minimum requirements to relieve itself of liability.

Respondent received notice on or about May 3, 1982, through service on it of two unfair labor practice charges, that its supervisor Bud Micalizio had allegedly interrogated two agricultural employees, in violation of Labor Code section 1153(a), in March of 1982. On May 14, 1982, Respondent mailed a notice to each of its employees. (See Appendix A.) The burden is on Respondent to show that it effectively disavowed or otherwise repudiated the unlawful conduct.

Applying the Passavant criteria to Respondent ' s attempt to correct the unlawful acts of its supervisor, we find that Respondent's Notice did not include the elements required for an effective repudiation. The Notice is ambiguous and does not

specifically identify the nature of the unlawful conduct.^{6/} The Notice does not repudiate or disavow the unlawful conduct but states that "no wrong was intentionally being committed."^{7/} Although the Notice contains a recitation of rights guaranteed to agricultural employees by the Agricultural Labor Relations Act (ALRA or Act),^{8/} it does not give the agricultural employees any assurances that the employer will not interfere with their section 1152 rights in the future. Respondent delayed more than a week in publishing this notice after it learned of the supervisor's conduct.

The record does not indicate to which employees Respondent mailed the Notice. Neither Hernandez nor Flores were employed by Respondent on May 14., 1982, and a number of other agricultural employees who worked at Rancho Fillaree when Hernandez and Flores were interrogated had also been laid off prior to the mailing of the Notice. For these reasons, we find that Respondent did not adequately publish its alleged repudiation. Respondent has not shown that Hernandez and Flores

^{6/} The Notice mentions "any worker" who believed he or she had been threatened or mistreated, whereas the charge specifically alleged that supervisor Micalizio interrogated agricultural employees.

^{7/} In *Passavant Memorial Area Hospital*, supra, 237 NLRB 138, the NLRB found that the employer failed to admit any wrongdoing. We would not require Respondent to admit any wrongdoing, but would not allow a denial of liability, as is present in this Notice.

^{8/} The Notice fails to inform the agricultural workers of their right to a secret ballot election to choose a collective bargaining representative. However, this omission is not a serious defect, since Respondent's employees were already represented by the UFW.

and the other workers, who may have learned of the unlawful interrogation, received the Notice Respondent used to attempt to repudiate the unlawful conduct.

This is a case of first impression, and we have not previously expressed our approval of the criteria set forth in Passavant for an adequate repudiation. While we commend Respondent for its efforts to disavow and repudiate the unlawful conduct of its supervisor, we are nonetheless mindful of our primary obligation to assure that the effects of such unlawful conduct are adequately and effectively remedied. We find that the minimum standards stated by the NLRB in Passavant must be met before an adequate repudiation can effectively remedy the unlawful conduct. There is no indication that Respondent acted in bad faith when it mailed its Notice on May 10, 1982, and Respondent did not engage in any other unlawful conduct. Therefore, we shall not require Respondent to remedy the violations in the usual manner, but shall require that Respondent mail the attached Notice to Agricultural Employees to all agricultural employees who worked at Rancho Fillaree between March 1, 1982 and June 1, 1982,^{9/} and post the Notice for 30 days at Rancho Fillaree.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that

^{9/} This ninety-day period encompasses not only the period in which the violation occurred but also the period in which Respondent's own Notice was sent.

Respondent J. R. Norton Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating any agricultural employee about his or her feelings about his or her union activity and/or protected concerted activity.

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

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

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

(b) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees in the bargaining unit who worked for Respondent at Rancho Fillaree at any time between March 1, 1982 and June 1, 1982.

(c) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its Rancho Fillaree property for 30 days, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(d) 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 14, 1984

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

MEMBERS MCCARTHY and HENNING, Dissenting:

As we would confirm the Administrative Law Judge's (ALJ) findings and conclusions, we dissent from the majority's determination that the ALJ erred when he ruled that Respondent's voluntary disclaimer of its supervisor's interference with employees' protected activity was adequate to remedy the effects of the unlawful conduct.

We are compelled to agree with the ALJ's finding that a supervisor interrogated two employees on three occasions in violation of Labor Code section 1153(a), as no exceptions thereto were filed by any party. In any event, there is no showing that the statements were part of a pattern, that they were made in a critical pre-election period, or that they had a coercive impact on employees. Nor was Respondent found to have engaged in any other violations of the Act.

In rejecting the ALJ's finding that the letter of repudiation that Respondent mailed to all employees "was at least

as effective in stating a disavowal as one that might be ordered by the Board," our colleagues would require Respondent essentially to repeat that process nearly two years later. The point our colleagues fail to appreciate is that early repudiation, retraction, or disavowal of coercive conduct by an employer permits the remedial process to serve its function at a time when employees are most in need of assurances that their rights under the Act will not be diminished. Sometimes that objective may be accomplished even though the voluntary, self-remedial action fails to mirror the traditional Board Notice in every respect.

In The Broyhill Company (1982) 260 NLRB 1366 [109 LRRM 131-4], the full National Labor Relations Board (NLRB) endorsed the criteria for employer disavowals set forth in Passavant Memorial Area Hospital (1978) 237 NLRB 138 [98 LRRM 1492], but a majority of that board cautioned against applying those standards in a "highly technical and mechanical manner" because employer disavowals "should be encouraged." We believe that in this instance the ALJ properly invoked the principles set forth in Broyhill, and that he was correct in dismissing the complaint.

Dated: February 14, 1984

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office of the Agricultural Labor Relations Board, the Regional Director issued a complaint which alleged that we, J. R. Norton Company, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Agricultural Labor Relations Board (Board) found that we did violate the law by questioning Benjamin Hernandez and Casey Flores, two agricultural employees, about their union activities or sympathies and other protected concerted activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We want to tell you that the Agricultural Labor Relations Act is a law that gives you and all 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 ask our employees about their union activities or sympathies.

Dated:

J. R. NORTON COMPANY

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

J. R. NORTON COMPANY

10 ALRB No. 7
Case Nos. 81-CE-9-EC
81-CE-61-EC
82-CE-79-EC
82-CE-80-EC
82-CE-81-EC
82-CE-83-EC
82-CE-84-EC
82-CE-103-EC

ALJ DECISION

The ALJ found that Respondent did not lay off and rehire employees based on a seniority system. Although Casey Flores, Benjamin Hernandez and Rafael Contreras engaged in protected concerted activity and/or union activity which was known to Respondent, Respondent did not discriminatorily lay off or refuse to rehire them because of their protected activity. The ALJ also found that Respondent had a reasonable business justification for dismissing Casey Flores.

The ALJ found that Respondent's supervisor Bud Micalizio unlawfully interrogated Casey Flores and Benjamin Hernandez concerning their feelings about the United Farm Workers of America. Respondent later mailed out a letter to its employees which the ALJ found sufficiently repudiated the supervisor's conduct.

BOARD DECISION

The Board affirmed the ALJ, but found that Respondent did not sufficiently repudiate its unlawful interrogating of Casey Flores and Benjamin Hernandez. The Board found that the minimum criteria for repudiation of unlawful conduct as stated in Passavant Memorial Area Hospital (1978) 237 NLRB 138 (Passavant) are appropriate in the agricultural context and should be applied on a case-by-case basis. Respondent's notice did not meet its burden of showing that it met the minimum requirements of Passavant for an effective repudiation. However, there was no indication that Respondent acted in bad faith when it attempted to repudiate its unlawful conduct, and the Board therefore ordered a limited mailing and posting.

DISSENT

Members McCarthy and Henning would find that Respondent's voluntary disclaimer of its supervisor's unlawful conduct was adequate to remedy the effects of the conduct. Citing The Broyhill Company (1982) 26 NLRB 1366, they caution against

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applying the Passavant standards in a "highly technical and mechanical manner" because employer disavowals "should be encouraged."

* * *

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

* * *

APPENDIX A

May 14, 1982

AVISO A TODOS LOS TRABAJADORES DEL RANCHO FILLAREE

Esta noticia es para informar a todas los empleados que tienen ciertos derechos bajo la ley de California. El consejo de Relaciones Laborales Argicolas les dan a los trabajadores del campo los siguientes derechos.

- 1) El derecho de organizarse
- 2) El derecho de formarse, unirse, o de apoyar a la union
- 3) El derecho de negociar en grupo y escojer quien habla por ellos.
- 4) Actuan juntos con otros trabajadores para trator di obtener un contrato o protejersa uno al otro
- 5) Deciderse a no hacer ninguna de estas cosas

Si algun empleado cree que lo han amenazado o maltratado por haber participado en sus derechos legales la compania J.R. Norton quiere avisar a todos los trabajadores y empledos del Rancho Fillaree que ellos no condonan ninguna amenaza al trabajador por haber participade en sue derechos legales.

Durante los ultimos meses does mayordomos supervisors comenzarorn a trabajar en el Rancho Fillaree. Si alguno de estos hombres les da la impresion que estaban hablando con los emplados sobre sus derechos legales, ninguna dano intencional se intentava al empleado. Si algo asi ocurrio fue por inexperiencia del mayordomo o el supervisor en tralando con el Acta del Consejo de Relaciones Laborales Argricolas.

Ya se les informo los mayordomos y supervisores que los trabajadores tiene estos derechos lajo el acto del Consejo del Relaciones laborales Argricolas. Supervisores y mayordomos asignan el trabajo, suspenden empleados, emplean y desporden a empleados del Rancho Fillaree sin ninguna referencia a la actividad legal de cualquier trabajador.

/s/ Bob Micalizio
Bob Micalizio

/s/Buddy Micalizio
Buddy Micalizio

[See original General Counsel's Exhibit No. 6]

APPENDIX A
(ENGLISH TRANSLATION OF SPANISH ORIGINAL)

May 14, 1982

NOTICE TO ALL WORKERS OF RANCHO FILLAREE

This notice is to inform all workers that they have certain rights under California law. The Agricultural Labor Relations Board gives farm workers the following rights.

- 1) The right to organize themselves.
- 2) The right to form, join, or help the union.
- 3) The right to bargain as a group and choose someone to speak for them.
- 4) To act together with other workers to try to get a contract or to protect one another.
- 5) To decide not to do any of these things.

If any worker believes that he has been threatened or mistreated for having exercised his legal rights, J.R. Norton Company wants to inform all workers and employees of Rancho Fillaree that they do not condone threatening any worker for having exercised his legal rights.

During the last few months, two supervisor foremen started working at Rancho Fillaree. If either of these men give you the impression that they were talking with the workers about their legal rights, no wrong was intentionally being committed against the employees. If something like that happened, it was due to the foreman's or supervisor's inexperience (in dealing with)* the Act of the Agricultural Labor Relations Board.

The foremen and supervisors have already been informed that the workers have these rights under the Act of the Agricultural Labor Relations Board. Supervisors and foremen assign, suspend, hire, and fire the employees of Rancho Fillaree without any relation to the lawful actions of any worker.**

Bob Micalizio

Buddy Micalizio

* The Spanish, "en tralando con," contains a misspelling. Our best guess is that the Spanish should be "en tratando con," which means "in dealing with."

** Alternate translation: "the legal activity of any worker."

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by firing five workers for protesting the layoff of a fellow employee.

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 pay Manuel Herrera, Raul Perez, Miguel Alanis, Roberto Alanis, and Alejandro Garcia backpay for the money they lost during November and December 1982.

WE WILL NOT, in the future, fire any employee for protesting over working conditions.

Dated:

MARDI GRAS MUSHROOM FARM

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 112 Boronda Road, Salinas, California 93907. The telephone number is 408-443-3161.

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

Mardi Gras Mushroom Farm

10 ALRB No. 8
Case No. 82-CE-125-SAL

ALJ DECISION

The ALJ found that Respondent became angry with a group of workers who refused to start work in protest of the layoff of a fellow worker, and therefore fired the protesters. The ALJ concluded that the protest was protected activity and that the firing therefore violated Labor Code section 1153(a).

BOARD DECISION

The Board affirmed the ALJ's Decision in its entirety.

* * *

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
)
J. R. NORTON COMPANY,) CASE NOS. 81-CE- 9-EC
Respondent,) 81-CE- 61-EC
) 82-CE- 79-EC
and) 82-CE- 80-EC
) 82-CE- 81-EC
UNITED FARM WORKERS OF) 82-CE- 83-EC
AMERICA, AFL-CIO, CASEY) 82-CE- 84-EC
FLORES, BENJAMIN HERNANDEZ,) 82-CE- 103-EC
GUADALUPE GONZALEZ, and)
RAFAEL CONTRERAS,)
)
Charging Parties.)

APPEARANCES:

Larry A. Dawson of
Dressier, Quesenbery, Laws,
Barsamian
Attorneys at Law for Respondent

Nicholas Reyes for General Counsel

DECISION OF
ADMINISTRATIVE LAW OFFICER
STATEMENT OF THE CASE

THOMAS PATRICK BURNS, Administrative Law Officer: This matter was heard by me on August 9, 1982, ("prehearing conference) August 16, 17, 18 and 19, 1982, in El Centro, California.

The original complaint issued in this matter on August 28, 1981. That complaint dealt with one charge, 81-CE-9-EC. It was timely answered. The complaint was consolidated on

December 18, 1981 r with, a new charge in 81-CE-61-EC, It too was timely answered. After the date scheduled for the prehearing conference and the hearing were set, the Regional Director issued a third consolidated complaint which added six new charges to the complaint. The new charges that were consolidated are 82-CE-79-EC, 82-CE-80-EC, 82-CE-83-EC, 82-CE-84-EC and 82-CE-103-EC. Respondent opposed the consolidation, but its motion was denied. The answer to the second amended consolidated complaint was timely served.

At the prehearing conference the General Counsel and Respondent informed me that charges numbered 81-CE-9-EC, 81-CE-61-EC and 82-CE-103-EC, had been resolved through an informal settlement agreement. Accordingly, the facts involving those three charges were not litigated although they remained captioned as part of the hearing.

The Notice of Hearing and second amended consolidated complaint was amended at the hearing. The amendments were put in written form and were timely served on the parties, the ALO and the Board.

General Counsel asserts that Respondent has violated Section 1152 of the Agricultural Labor Relations Act (hereinafter, Act) and that Respondent has violated Sections 1153(a), (c) and (d) of the Act. Respondent denies all charges.

During the hearing fifteen witnesses testified. Though the United Farm Workers of America served notice that it would be an intervenor in the matter, no active participation was made by any representative during the hearing. All parties were given full opportunity to participate in the hearing, and after the close

thereof, General Counsel and Respondent each filed a brief in support of their respective positions. Upon the entire record, including my observations of the demeanor of the witnesses, and in consideration of the briefs filed by the parties, I make the following findings of fact, analyses, conclusions of law and recommended remedy.

FINDINGS OF FACT

A. Jurisdiction;

J. R. Norton Company, headquartered in Phoenix, Arizona, grows a variety of crops in Arizona and California. The company grows lettuce and cotton on leased land in the Imperial Valley of California. Respondent is an agricultural employer within the meaning of Section 1140.4 of the Act.

The United Farm Workers of America, AFL-CIO, is the certified bargaining representative for employees of the J. R. Norton Company involved in this hearing.

B. Alleged Unfair Labor Practices;

This case involves the alleged interrogation of agricultural employees Casey Flores and Benjamin Hernandez, as well as alleged discrimination through layoff and refusal to rehire of Casey Flores; and the alleged layoff and refusal to recall Rafael Contreras according to his alleged seniority rights; and the reassignment of Guadalupe Gonzalez to more onerous duties in lower earnings. It was alleged that such actions were taken in retaliation for participation in union and protected concerted activities.

Testimony of Guadalupe Gonzalez:

Mr. Gonzalez has worked for the Norton Company since June 7, 1980. He is an irrigator. He said that the company now assigns the shovel work to the irrigators, though on cross examination he admitted he did not know that. When doing shovel work, the duties are to clean ditches, rows and canals, and to cut weeds, once in a while. As a shovel worker, one works eight hours. As an irrigator, one works 24 hours and quits the following day.

Mr. Gonzalez testified that both irrigation work and shovel work are assigned by Mr. Jose Cruz Bretado, the foreman. He alleged that the irrigation shifts were assigned in the order of whoever has more time with the company as to whoever has less. He said the list was made in February, 1981, in Field 17. Question: "Do you know how the list was made?"

Answer Gonzalez: "Yes, because we the irrigators--we the irrigators wanted to have the even time of--Yes. So that we could get even pay. . . . At about 12:30 that day, Jose Cruz (Bretado) came, and he didn't have the list of rotation. . . . And we told him that we wanted a list--that we wanted a list so that everything would be done in order. . . . That's when we started to make the list. . . . He started from the one that had more time to the one that had less time there."

In February, 1982, a meeting took place under some trees with a U.F.W. representative and a number of workers. Mr. Gonzalez is a member of the worker negotiation committee at J. R. Norton Company.

In March, 1982, Mr. Gonzalez served as spokesman for the workers in a protest to the company in front of the company shop. Also present were Foreman Jose Cruz Bretado and Foreman David Micalizio.

In March, 1982, a petition was circulated among the workers to support Mr. Gonzalez with the union. (See Exhibit GCX 10). Mr. Gonzalez got the signatures from all of the workers except one in front of the shop. The last signature, that of Benjamin Hernandez, he obtained in Field 9. "He was working on a caterpillar." TR III 88.

It was March 24, 1982, at about 12:10 p.m.

Question: "Specifically what was Mr. Hernandez doing when he signed the petition?"

Answer: "He was raking ground with a chisel."

Question: "Was he working at 12:10?"

Answer: "No, that was a lunch hour."

Question: "Well, at 12:10 what was Mr. Hernandez doing?"

Answer: "He took out his lunch to start eating his lunch."

TR II 88, 89.

April 1, 1982, Mr. Gonzalez attended a negotiation meeting at which Mr. Robert Micalizio was present on behalf of the company.

On March 5, 1982, Mr. Gonzalez worked in Field 24 of the Norton Company. He was with Rafael Contreras. They were starting to arrange the water. David Micalizio spoke to Mr. Gonzalez. He asked who had placed a poster on the water tank. Mr. Gonzalez admitted that he had done it that same day before

starting work. Mr. Micalizio told him not to be placing anything there that didn't belong to the company. TR II 94.

On March 31, 1982, Mr. Gonzalez handed a charge against the company to Mr. John Norton. TR II 97.

April 9, 1982, at about 7:00 or 7:30 a.m., in Field 19, Mr. Gonzalez spoke to Mr. Norton about Mr. Gonzalez' allegations that Mr. Bretado was constantly harassing him. Mr. Norton said he had already talked to him, (Bretado), but that he was going to have to have another interview with him, to speak to him.

Question: "What else did you and Mr. Norton talk about?"

Answer: "We talked about some workers, that they were not going to continue working, but he said that he could not fire him--them--he could not fire them because--due to the charge that I had brought against the company."

Question: "Did you give him any reply?"

Answer: "Yes." Question: "What did you reply?"

Answer: "I told him to give them a note so they could get together and to go to work."

Question: "Did Mr. Norton say anything else?"

Answer: "Yes."

Question: "What did he say?"

Answer: "He said, regarding you, you're not the same--you're not the same, you're different." TR II 98, 99.

That same day, Mr. Gonzalez alleges, he had another conversation with Mr. Norton at about 9:30. Two others were also present: Jose Maria Espinoza and Dario Valenzuela. Speaking on

behalf of Mr. Espinoza, Mr. Gonzalez told Mr. Norton that Espinoza wanted his position as tractor driver. Mr. Norton said that he was thankful and appreciated the fact that he was working for him, but that at that time he did not have that type of work; and besides, that the tractor driver was a very expensive work. TR II 99, 100.

Mr. Gonzalez testified that he worked on April 13, 1982, in Field 15, as an irrigator and left on the 14th at six o'clock in the morning. He said there were no problems. On April 15, 1982, he spoke to Mr. Bretado and Mr. Norton. Mr. Bretado told him that he had left some dry rows on Field 15 on the 13th. Mr. Gonzalez then spoke to Mr. Norton: "I told him—we talked that morning, and I told him that if they was going to continue stepping on me, stepping on my tail, that I was also going to start pushing and place charges against the company."

Question: "Why did you think the company was stepping on your tail?"

Answer: "Because I constantly felt that I was constantly being questioned by the foreman." TR II 101.

Late that same day at the same Field No. 15, Mr. Norton and Mr. Gonzalez had another conversation.

Question: "And what did you and Mr. Norton discuss?"

Answer: "He told me that if I couldn't get along with Jose Cruz (Bretado) then why didn't I look for something else, another job, that he felt sure that there wouldn't be no problem for me to find another work--another job."

Question: "And what did you tell him?"

Answer: "I told him to give me my check and I would leave."

Question: "What did Norton say then?"

Answer: "We start talking about Casey, and I told him that he could not be discriminating people just--just like that."

Question: "And what did Norton say in reply?"

Answer: "He told me that he could do whatever he wanted, that he could fire whoever he wished; and he said, 'As you see, Jose Aguilar is working and Casey is not.'"

Question: "What else did Norton say?"

Answer: "And he told me, 'I believe you already have a fight, you have filed charges against the company; and you're not going to beat us, because we are three against one. It is I, Bud, and Jose. '"

Question: "Did Mr. Norton say anything else?"

Answer: "He said, 'Chavez has been fighting against us for the last three years, and he has not beaten us yet.'"

Question: "Who is Chavez?"

Answer: "Well Ceasar Chavez from the union."

"Did you reply anything?"

Answer: "I had told him, 'Nothing can be arranged here or done here. I will continue making calls to Sacramento.'" TR II 101, 102

Mr. Gonzalez further testified that on April 24, 1982, he was working in Field 27, arranging the water, opening some rows at the front edge of the field. He started at 6:00 a.m. According to Mr. Gonzalez, Mr. Bretado, his foreman, spoke to him at about 2:30 p.m. telling him there would be an increase of water, about

two feet more coining in. He was told to arrange the water. Mr. Gonzalez testified that he did arrange the water further ahead, and that he had checked the canal level during the day and the night. He said he checked the canal every hour or hour and a half during the night, and at about 2:30 a.m. noticed that the canal had lowered itself. He asserts that, because it was close to his quitting time it was the responsibility of the new worker who was coming in to take over. He said he discussed it with Jose Calles, another irrigator, at about 6:10 a.m. in the shop. He said he explained that the canal had gone down and that he couldn't do anything, because he felt that perhaps more water may be coming in, and it was close to his quitting time. He said he couldn't do anything, because the gates are set in a certain level and if the water was going to be coming in, then it is necessary to spread to other gates so that it could cover the field in the same manner as it was started. He said that he reached an understanding with Mr. Calles that the work belonged to him (Calles) and that was his job to do.

By April 26, 1982, Mr. Gonzalez was assigned to do other work and not to continue as an irrigator. He said that both Mr. Bretado and Mr. Micalizio told him of his reassignment. He said Mr. Micalizio told him in the presence of Heriberto Ibarra and Antonio Villegas, and Mr. Bretado told him in the presence of those two plus three other workers.

Mr. Gonzalez testified that on April 28, 1982, he attended a union-company negotiation session in which he spoke up in the presence of Mr. Stole and Mr. Robert Micalizio of the Norton Company

and stated that the company discriminates against the workers. He said that Mr. Robert Micalizio said that Gonzalez was a pretty good worker and that was the reason he was still working for the company.

On April 28, 1982, according to Mr. Gonzalez, he and other workers wrote a petition, (See Exhibit 13) to have seniority established as a procedure at the Norton Company. He passed the petition to workers in the presence of Mr. Jose Cruz Bretado.

Mr. Gonzalez said that on April 30, 1982, he personally served charges against the company on behalf of Casey Flores, Benjamin Hernandez, and Rafael Contreras. He served the charges on Mr. David Micalizio.

Mr. Gonzalez testified that he was returned to his duties as an irrigator from that of shovel worker on approximately June 27, 1982.

Testimony of Benjamin Hernandez:

Benjamin Hernandez testified that he has worked for the Norton Company since March 7, 1982, as a caterpillar and tractor driver. He worked injecting cotton, cultivating cotton and making rows. He said he had been driving a tractor since age 13, over 40 years. He was hired by Bud Micalizio.

March 27, 1982, at 12:09 p.m., during his lunch break in the field, Mr. Hernandez claims, someone named Lupe came up to him and asked him to sign a paper to help him with his union.

During the foregoing, Mr. David Micalizio went by, looked, but said nothing. Later that day, as Mr. Hernandez was leaving the field at 4:05 p.m., Mr. Micalizio was sitting in his car and spoke to him.

Micalizio: "How are you doing?"

Hernandez: "All right".

Micalizio: "Benny, what did that guy want?"

Hernandez: "Oh, he just wanted me to sign something, a paper form to help him out with his union."

Micalizio: "Did you sign anything?"

Hernandez: "Yes, I signed."

Micalizio: "I told that guy not to be bothering my tractor drivers." TR I 116.

April 9, 1982, Mr. Hernandez, among others, was laid off. Mr. Micalizio told the men he might call them back as soon as the wheat season started.

June 11, 1982, Mr. Micalizio called Mr. Hernandez at 9:00 a.m. and asked him to return to work that day, which he did. He is still employed.

Testimony of Casey Flores:

Mr. Flores testified that he started at the Norton Company in March, 1979, to work as a caterpillar driver. Other than the water truck, the only vehicles he has driven there were D-5, D-7 and D-8, all of which were caterpillars. His prior experience went back to 1946. He was originally hired by Mr. Frank Silva, then a tractor foreman, now no longer with the company.

In January or February, 1982, Mr. Flores asserts, he went to the company shop to get a key to the gas tank. He testified that Mr. Micalizio was present and the two of them had the following conversation:

Flores: "I asked him what fields they were cutting on, and

what fields they were going to cut the next morning, so I could get the water--those rows watered down. And I asked him how the lettuce was coming along, and he said they were coming along great." . . . "Well, he came out and told me, he says, 'Casey, we're making a lot of money.' . . . Oh, I told him that maybe the company was making money, but we weren't making anything, because I wasn't getting anything out of it except wages, we worked five dollars an hour, and that I could use a raise. He said that we couldn't get a raise right now, he said, because the company is negotiating a contract with the union. He says, 'I would like to help you out,' he says, 'but as it is right now we're negotiating. There's no way we can give you a raise.' 'Well,' he says--he asked me, he says, 'What do you think about the union?' I says, 'I support the union,' I says, 'because it helps out the workers and it would be one way of getting a raise, so I will sign any paper that came along and support the union.'"

Mr. Flores then testified that he supports the union and attended three meetings in February, 1982, one in Calexico, one in the company shop and the third under a tree on some other peoples' property. He testified that near the end of the meeting at the shop, as they were getting ready to go back to work following the lunch break, Mr. Bud Micalizio came up and said to Flores, "What's going on?" Flores alleges he told Bud, "We got a union meeting going on right now so the representative can tell us how the negotiations are getting along in the company." Micalizio allegedly answered, "This guy is no better than them. I don't want him hanging around the shop and talking to you men."

Two or three weeks later, at a noon lunch break, there was another meeting with about 10 or 12 persons there, including the father and brother of the foreman Bretado.

Mr. Flores testified that in March, 1982, he had a conversation with an irrigator named Guadalupe Gonzalez. Mr. Gonzalez asked him to sign a petition to make him representative for the workers at the ranch. Mr. Flores signed the petition.

On another occasion (it is uncertain whether it was before the signing of the petition). Mr. Flores had a conversation with Bud Micalizio in Field No. 9 of the ranch. Mr. Micalizio came by as Mr. Flores was listing at about 8:00 or 9:00 in the morning, and asked how the work was going along. Flores: "Well, I says, the work is going okay, and he says. 'We got some problems at the ranch.' And I asked him what the problems were, and he told me that they had been--that they're trying to cut down the hours of the workers from 24 hours to 10, because they wanted the men to work every day of the week. And I told him, I says, You are going to give them 10 hours a day--10 hours a job a day. There's no way they're going to make the money they're making now when they're working 24 hours on irrigating shifts." He said that Lupe was causing them problems and they were going to have to get rid of him, i.e., Guadalupe Gonzalez. I told him that Guadalupe was doing that thing, is the right thing to do because we need to. have a raise and we'd like to have the--there are two would like to get a raise. Lupe was trying to get a raise for the irrigators, and that we, the tractor drivers, were trying to get a raise ourselves. He got sort of mad, and he asked me if I was for the

company or for the men. I told him I'm with the men, because I'm a working man myself and I need a raise. He got mad and he got in the pickup and said, Shit, and took off."

On April 9, 1982, Mr. Micalizio laid off Mr. Floras along with other workers.

Floras: "He told me I was here for the time being and that he'd call me back whenever the lettuce--I mean the wheat harvest was over."

On May 9, 1982, Mr. Floras received a letter from the company. He went to see Mr. Norton on May 18, 1982, they conversed for about 20 to 30 minutes.

Norton: "You have been getting ice out of the plant and you're not supposed to."

Flores: "I got it twice and that was it." I told him in the years before when I had been laid off, I was led to--I was told that I could have a piece of ice once in awhile, as long as I didn't get it every week. And I would get a piece of ice maybe once or twice during my layoff and that was it. Mr. Flores testified that during his 1982 layoff he would go to the ice plant in Brawley and order 13 Ibs of ice, sign a couple of forms and put down the amount--value about 80 cents. He claimed he took ice only two times during this layoff. Mr. Flores testified that he was given permission to take ice while on layoff from Mr. Frank Silva when he first started working at the company. He also testified that in June, 1980, Buddy Larson, then Superintendent of the ranch, asked Mr. Flores to bring ice to the workers. After picking up the ice Mr. Flores told Mr. Larson that he had gotten a

piece the week before for himself while he was on layoff. He claimed that Mr. Larson said it was okay and not worry about it.

Mr. Flores admitted that he did not tell Mr. Norton that he had ever been given permission by either Mr. Larson or Mr. Silva.

Mr. Flores identified Respondent's Exhibit 1, the Whitted Ice Company forms showing his signatures. He admitted signing his name twice while on layoff and denied a third signature was his, though it appears identical to his other admitted signatures. At first Mr. Flores denied going for ice an additional time other than the ones signed for, but on cross examination he admitted that he had gone to the ice company again, but paid for the ice. Mr. Flores denied that Mr. Whitted of Whitted Ice Co. had refused him ice, then he admitted that Mr. Whitted had said he would have no more ice, because he was on layoff, and Mr. Flores said it was okay because he wanted to pay for it.

In the above mentioned conversation with Mr. Norton, Mr. Flores testified as follows: "I told him there was a lot of stealing going on. I didn't see--I didn't know exactly who, but everybody was taking everything they could get their holds on--could get their hands on, and that was it." "I didn't tell him I was--why I was being disciplined. We didn't come up to that." I told him, I says, "Every time I got out," I says, "there are a couple of times I signed my name to it. Some of those guys right here are stealing you blind, and Bud knows about it. He don't say nothing about it." That was all--that was all I told him about it. That's all we talked about it.

In other testimony Mr. Flores claimed that he does not

remember if he left early on March 2, 1982.

Mr. Flores also denied being reprimanded by Mr. Micalizio for not calling in when he did not go to work on March 13, 1982.

Testimony of Rafael Contreras;

Mr. Contreras was employed as an irrigator at the Norton Company in October, 1981, by Mr. Jose Cruz Bretado.

Mr. Contreras testified that shifts are assigned in the order of who has been there the longest. The irrigators made a list which they gave to the foreman for assigning shifts. Mr. Jose Bretado accepted the list and used it to assign shifts so there would be no problems.

He testified that among others present at a meeting with a union representative under a tree in March, 1982, were the father and brother of Jose Bretado, who were shovel workers. He also testified that both of them were laid off when all the other workers were laid off in April.

Mr. Contreras was present in March, 1982, at a protest in front of the company shop, because the company wanted to reduce the work shift to 10 hours per day. All of the irrigators were present. Guadalupe Gonzalez spoke on behalf of the workers. David Micalizio came out of the shop when the workers refused to work.

Mr. Contreras claimed that Mr. Bretado said to him as he laid him off on April 24, 1982, "It's not my fault."

On about May 14, 1982, he received a letter from the company.
(GCX 6).

Mr. Contreras testified that he went to the company on July 6, 1982, and saw Antonio Villegas and Bernardo Herrera.

Herrera was below him on the rotation seniority list, he said. In another field Heriberto was present. He spoke to Mr. Bretado who told him to return to work the next day. He was reemployed July 7, 1982.

Prior to July 6, 1982, Mr. Contreras had visited the company, but had not asked for work.

He denied flooding Field 20 in the week of April 18, 1982. He denied being admonished by his foreman. He testified that his foreman said to him, "If everybody would irrigate such as you, there would be no problems."

Testimony of Jose Calles;

Jose Calles, currently employed at the Norton Company, was first employed in 1979, then again in July, 1981, to the present, in the position of irrigator.

Mr. Calles was first employed by David Micalizio, who was his foreman in 1979, but when he returned to work in July, 1981, his foreman was Jose Cruz Bretado.

Mr. Calles testified that a rotation system is used for assignment of shifts. It is based, he said, on the order of who has more years working with the company. He alleges that such a system has been in effect at least since his employment in 1979.

Mr. Calles asserts that in 1979, a rotation system was not being followed in the proper order, because it was very uncontrolled. Then the workers went to Pancho who was the foreman at the time, and he accepted the list the workers gave him. "Pancho" is Frank Silva.

In 1981, according to Mr. Calles, the workers formed a new

list and Jose Cruz Bretado, the foreman, copied it down. The purpose of the list according to Mr. Calles was to have control of the shifts and to respect the seniority of each person.

Mr. Calles testified about attending the meeting which took place outside the company shop in early 1982. He recalled the names of some of the workers present including the father and brother of Foreman Bretado, as well as Mr. Bretado himself. Mr. Micalizio came in at the end of the meeting and said that it was no time to be talking at that time. Mr. Calles testified that Mr. Micalizio spoke only to Mr. Bretado, but not to the workers.

He testified also of a protest that took place at the company shop in which all of the irrigators were present. The protest concerned reduction of the hours to 10 hours per day. Mr. Micalizio and Mr. Bretado were present. Guadalupe Gonzalez spoke for the workers. Mr. Calles said that he spoke up also. He said that he spoke to Dave in Spanish, which was translated into English by Mr. Gonzalez.

Calles: "I told them--I told Dave that instead of giving us 10 hours in shift, why didn't they increase our wages, instead."

A petition was circulated by Mr. Gonzalez which the irrigators signed. Only irrigators were present during the signing and circulation of the petition.

Mr. Calles testified that on April 25, 1982, he relieved Guadalupe Gonzalez at the end of a shift. Gonzalez told Calles that the water was very uncontrolled at that time and was still, because the water comes less in the canal, and he told Calles to

arrange the water. Mr. Calles testified that it is very natural to come in and find the water is very uncontrolled, because the canal goes high and it goes low; and if you're watering a high piece of land, the water becomes low, and it is natural that this can happen. (Mr. Calles said he has eight to ten years experience as an irrigator.) To control the water Mr. Calles reduced it, because, he said, it was running very low.

Mr. Calles testified that on a June, 1982, day he went with Mr. Bretado in the pickup truck to burn the wheat field stubble. They rode from the shop to Brawley. A conversation is alleged to have taken place, and Mr. Calles testified as follows: Calles: "Rafael Contreras had come in and asked for work, and I asked when he was going to give him work. He said to me that the company was not going to give him any work because he had filed the charges against the company. . . . I also asked him about Guadalupe Gonzalez. . . . That they had reduced Gonzalez--changed him from the irrigator to a shovel worker. Yeah. I asked him when he was going to give him irrigating shift work again, and he says, 'Well, the company was going to fire him, but we gave him the opportunity to go to shovel work.'"

Testimony of Jesus Ramirez;

Mr. Ramirez was first employed at the Norton Company in 1977 as an irrigator. He was last laid off on July 6 or 7, 1982. He testified that the shifts were assigned by rotation and seniority. He testified that Mr. Bretado uses a list that was made up by the majority of the irrigators who were present one day in October, 1981.

He recalled a meeting at the shop in 1982 with the UFW. He said there were a total of six people there, including shovel

workers, the father and brother of Mr. Bretado, some tractor drivers, and irrigators Gonzalez and Calles. Also present were Mr. Bretado and Mr. Micalizio and the union organizer.

He recalled also a second meeting under some trees on the ranch. Present were shovel workers, tractor drivers and irrigators. He recalled also a protest at the shop at 6:00 a.m. one day in 1982, in which Mr. Gonzalez spoke for the workers and Mr. Bretado and Mr. Micalizio were present. Later he signed a petition for Guadalupe Gonzalez.

Testimony of Jesus Villegas:

Mr. Jesus Villegas, currently director of the U.F.W. San Luis Office in Arizona, was formerly director of the Calexico office in California, for about 18 months. The U.F.W. is certified to represent the Norton employees in the Imperial Valley.

During February, 1982, the U.F.W. met twice at the Norton work site. The first meeting was held by Eduard Garcia, nicknamed "Calacas". The agenda was supposed to include the subject of "seniority", though Mr. Villegas was not present at that meeting.

The second meeting about a week later Mr. Villegas was present when about 18 workers, including tractor drivers, irrigators and shovel workers met under a tree where they discussed the progress of negotiations and the "Problems that they don't have seniority system." TR I 77.

Mr. Villegas recalled that at a negotiation meeting between the union and the company Mr. David Martinez represented the U.F.W. Also present among other workers were Feliz Garcia, Guadalupe Gonzalez and Ramon Diaz. Mr. Gonzalez was negotiator

for the workers. He is: a member of the workers negotiating committee.

Mr. Villegas testified that he was aware that the Norton Company did not use seniority as a basis for determining layoffs. TR I 82.

Testimony of John P. Norton;

John P. Norton testified that he is the manager of the Imperial Valley operations of the J. R. Norton Company, and has been in that position since February 1, 1982. He stated that the Norton Company does not use seniority as a basis for layoff and recall He asserted that layoff for lack of work is based upon an individual's performance, and that recall is made on the basis of selection of the best possible person for the job. TR III 100. Mr. Norton was unable to identify a list purported to be the names of irrigators in order of seniority, i.e., GCX 4. He said that when layoffs occur, he discusses the employees and their work with the foremen under his supervision, i.e., David "Bud" Micalizio and Jose Cruz Bretado. TR I 10. The foremen do not have authority to hire or fire or layoff employees without permission of Mr. Norton. TR I 16.

An awards banquet is held annually to honor long time employees of the Norton Company. The list of employees is maintained in Phoenix, and is not related to seniority, but to show appreciation for performance skills and ability to do the work, nothing more, according to Mr. Norton.

Though Mr. Norton denied being present when the irrigators had allegedly protested a plan to reduce the length of the work

shift, he acknowledged that Mr. Guadalupe Gonzalez had served him with papers setting forth a complaint to the ALRB on March 31, 1982. See Exhibit GC 5. TR I 30.

On February 1, 1982, the first day of Mr. Norton's assignment as Manager, Mr. Gonzalez came to him and complained that Jose Cruz Bretado had been harassing him about his work. He was irate and left the job without working that day.

Mr. Norton testified that, though Mr. Gonzalez had been an irrigator he was transferred to general farm work, i.e., shovel work, from early May thru mid June, 1982. This action was taken for two reasons: There was a general lack of work and for disciplinary reasons. In an effort to keep only the best irrigators during the layoff it was determined that Mr. Gonzalez should be given shovel work, because he had done poor work on certain occasions.

On February, 1982, in Field 9, Gonzalez had left a liquid fertilizer tank running after his shift ended. Norton himself had found it that evening and shut it off. If it had not been shut off, Norton estimates the cost of lost fertilizer would have been about \$20.0. TR III, 115. Gonzalez was told about this violation later and told that such negligence was not necessary.

Upon cross examination by General Counsel, Norton admitted that he did not know whether Gonzalez had been specifically told to turn off the fertilizer, but he stated on re--cross, that it was the duty of the irrigator to know that when a fertilizer tank is set up in a field it is to be turned on with the water and turned off when the water is turned off. In this instance the water had been turned off, but the fertilizer had not. The irrigators know that. TR III 124.

On March. 30, 1982, a field of carrots was flooded by Gonzalez. If over watered, carrots will rot and the yield will be reduced. They do not tolerate large amounts of water.

TR III 116, 117.

Mr. Norton testified that as part of the layoff, Mr. Casey Flores was laid off on April 9, 1982. He had been a caterpillar driver. Mr. Norton said that he was aware that Mr. Flores had filed an unfair labor practice charge against the company, and that it had been alleged that company foremen were claimed to have interrogated him and other workers.

TR I 40.

On May 14, 1982, Mr. Norton sent a letter, with the assistance of the company attorney, to all employees setting forth the rights of the employees under the ALRA and assuring them that any interrogations or threats by foremen were based upon the inexperience of the foremen and were not the company policy. TR I 41 (See Exhibit GC 6) .

On May 18, 1982, Mr. Casey Flores was terminated by Mr. Norton, though still on layoff, on the charge of stealing, by signing for ice at the local ice company and charging it to the Norton Company.

At the end of April, 1982, Mr. Norton had been informed by Jose Cruz Bretado that Mr. Flores was receiving ice while on layoff. Mr. Norton sent him to pick up the ice forms. He saw signatures of Mr. Flores dated during his layoff. Mr. Norton called the ice company and on the basis of the owner's statements concluded that Mr. Flores was, indeed, taking ice while on layoff. He asked the owner, Mr. Whitted, to inform Mr. Flores, should he

return for more ice, that he was not permitted to have any more. In a subsequent conversation with Mr. Whitted, Mr. Norton obtained additional information which caused him to direct a letter to Mr. Flores informing him that he was being charged with stealing, because he had allegedly taken ice while on layoff. He invited Mr. Flores to come in before May 18, 1982, to defend himself against the charge. TR III 110 (See Exhibit GC 3) .

On May 18, 1982, Mr. Flores met with Mr. Norton. Also present were Benjamin Hernandez and Pat Swathout of the Southwest Marketing Corp.

According to Mr. Norton, Mr. Flores asked Mr. Norton why he should be punished for something that others were doing, i.e., stealing from the company. Flores allegedly told Norton that others were stealing gas and tools from J. R. Norton Company. Asked why he hadn't told Mr. Norton, Mr. Flores allegedly stated that he did not think it was his responsibility and that he did not want to get involved. He also is alleged to have said he didn't want to work for the J. R. Norton Company any more anyway and was going up North.

Mr. Flores also told Mr. Norton that Estaben Padilla was stealing discs. Mr. Norton did not investigate that charge. The discs are useless and are either thrown away or sold for scrap at \$30 a ton. TR III 122. Mr. Flores did not mention Frank Silva or Buddy Larson at all. (See his testimony.)

After the conversation with Mr. Flores, Mr. Norton decided to terminate him from his employment.

Testimony of David Micalizio:

Mr. Micalizio testified that he is the tractor foreman for J. R. Norton Co. and has been since June 9, 1981. As such he supervises the tractor operations, as well as the shop. He also sometimes directs irrigators, but that is the job of Jose Cruz Bretado. Mr. Micalizio prepares time sheets for tractor drivers, irrigators and shovel workers which he sends to the main office in Phoenix. He only keeps track of hours for the tractor drivers. He hires and lays off workers, but only after discussion with Mr. Norton. Layoff of irrigators is discussed with Mr. Bretado and Mr. Norton.

Mr. Micalizio stated that he was present in the shop when the irrigators came to protest a proposed reduction in the irrigation shift of cotton from 20 to 10 hours. He attempted to explain to the workers that they received the same number of hours on a weekly basis if they worked 10 hours each day. Also, he admitted that Mr. Guadalupe Gonzalez spoke up on behalf of the irrigators, saying that they objected to the change.

Mr. Micalizio testified that he had hired a tractor driver named Benjamin Hernandez in 1982, and laid him off in April, 1982. He rehired him again on June 11, 1982, because he needed another tractor driver. He said Hernandez was a pretty good tractor driver.

On around March 27, 1982, Mr. Micalizio saw Benjamin Hernandez talking to Guadalupe Gonzalez on the company's field. Later that day Mr. Micalizio asked Mr. Hernandez what Mr. Gonzalez wanted. Mr. Hernandez said that he wanted him to sign a paper

for him, but, according to Mr. Micalizio, Mr. Hernandez didn't know what the paper was for, and that he had not signed it.

Mr. Micalizio testified as follows; "I made it clear that he was not to talk--he was not to bother the tractor drivers in the field during--during working hours. It was approximately 12:40, and at the time mentioned, he should have been working."

Question: "And when you say you made it clear that he should not bother, you are referring to Gonzalez should not bother?"

Micalizio: "Yes, Lupe and Benjamin."

Question: "Well my question is, didn't you tell Mr. Hernandez that you didn't want Gonzalez to be bothering the tractor drivers?"

Micalizio: "No, I did not. I told him that he was not to--that he was supposed to be--he's supposed to be running the tractor during working hours, but I never said anything about Lupe specifically."

Question: "Now returning--you never said anything about Lupe; is that your remark?"

Micalizio: "Yes, I was just speaking in general about working after 12:30." TR I 55, 56.

Upon examination by Counsel for Respondent, two days after the previous testimony, Mr. Micalizio testified about the foregoing incident as follows: Question: "And what did you say?"

Micalizio: "I just told him (Benny Hernandez) that he was supposed to be working after the lunch hour. He was on a cat, and it was approximately 12:40, and the lunch hour is from 12:00 to 12:30. And I told him that he should be running the cat."

Question: "Was the cat running at the time?"

Micalizio: "No, it wasn't."

Question: "Did you say anything else to Benny at the time?"

Micalizio: "Yes, I told him that--at the time he was--that Benny was given a pamphlet, or some sort of paper, to Benny, and I asked him what it was. And he said he didn't know what it was. And that was--it."

Question: "Was that other employee Lupe Gonzalez?"

Micalizio: "Yes, it was." TR III 66, 67.

During cross examination Mr. Micalizio was asked by General Counsel: "Isn't it true that I asked you, that if Mr. Hernandez told you that Gonzalez wanted him, wanted Hernandez to sign a paper? Do you remember me asking you that question?"

Micalizio: "Yeah."

Question: "And didn't you tell us that Hernandez told you that he had not signed the paper?" Micalizio: "Yes."

Question: "So it's true then, isn't it, that you asked him if he signed the paper?"

Micalizio: "Yes, I asked him if he signed that paper, and he said he didn't."

Question: "Okay. But right now you're testifying, isn't it true, that Lupe Gonzalez was holding the pamphlet?"

Micalizio: "Right, talking to Benny at the time."

Mr. Micalizio testified further that later in the month he had a conversation with Mr. Casey Flores. He said Mr. Flores started the conversation.

Question: "And what did he say?"

Micalizio: "Casey asked me if I was having labor problems with the employees and I said yes, I did. And I asked him if anyone had talked to him about it. I asked him if he knew anything about it, and he said that he didn't."

Question: "Alright. Did you mention Lupe Gonzalez in that conversation?"

Micalizio: "No, I didn't."

Question: "At any time have you ever said to Flores that the company was going to get rid of Lupe Gonzalez?"

Micalizio: "No, I didn't."

Mr. Micalizio testified also that he had asked Mr. Guadalupe Gonzalez who had put up a poster on the company property. Mr. Gonzalez said that he had. Mr. Micalizio told him that no posters should be put up without permission. The poster was a U.F.W. poster explaining workers rights, but Mr. Micalizio said that his reference was to any kind of general literature. They must have permission first. Mr. Gonzalez said he understood.

Foreman Micalizio said that Casey Flores was laid off April 9, 1982. On April 26, 1982, he told Mr. Gonzalez that he would no longer be assigned to irrigate, and put him on shovel work. He was kept on shovel work until June 25, 1982, when he was returned to do irrigating. Mr. Benjamin Hernandez was put on layoff about April 9, 1982. Mr. Rafael Contreras was also on layoff as an irrigator.

A man named Claudio Chacon came to Mr. Micalizio for a job, at the time Mr. Bretado was on vacation. Mr. Micalizio

told him to come back and see Mr. Bretado. Mr. Chacon was hired while Mr. Contreras was still on layoff.

About May 4, 1982, Mr. Micalizio hired David Chavez Guzman to do tractor driving work. Mr. Guzman had previously been laid off on April 23, 1982, as an irrigator. Mr. Guzman was recalled from layoff while Mr. Flores and Mr. Hernandez were still on layoff.

Mr. Marvin Keeton was hired as a tractor driver on June 11, 1982, while Mr. Benjamin Hernandez was still on layoff.

Bernardo Herrera, an irrigator, was on leave of absence on April 23, 1982. In the week ending June 22, 1982, Mr. Herrera returned from leave of absence.

Mr. Micalizio explained in answer to questions from Respondent's counsel that both Benjamin Hernandez and Casey Flores were laid off from work on April 9, 1982, for lack of work. Mr. Flores had been primarily a caterpillar driver. In 1981, he did operate a lettuce planter during the lettuce season in October. This is a John Deere Tractor with a pole-type sled for the planter. So far as Mr. Micalizio knew there were no other times that Mr. Flores operated a tractor for J. R. Norton Co. Mr. Micalizio described Mr. Flores¹ tractor driving as poor. He said, "As far as I know, it was lack of experience, irresponsibility in servicing the tractor. And as far as the work in the field, it was--just didn't seem to check the planters as much as he should during lettuce. It's a very critical operation, and it takes a lot of stopping the tractor, getting off and checking the planter boxes, seed depth, et cetera. And he never did that. It was a matter of me coming by and checking it out with him. So, it would just be lack of responsibility on the job." The reason he was

used in 1981, is that Mr. Flores was the only driver that Mr. Micalizio had to do the work.

During the payroll period of May 4 through June 8, 1982, the only tractor drivers were Jose Aguilar and Estibon Pedia, for cotton work and Mr. David Guzman was employed to do the cutting of cotton stocks after harvesting. He was also used as a shovel man. So far as Mr. Micalizio understood, through Mr. Bretado, Mr. Guzman had experience driving a tractor.

Mr. Micalizio stated that he did not use Mr. Hernandez to do the work that was done by Mr. Guzman, because he was unaware that Mr. Hernandez had prior experience driving a tractor. The only driving that had been done by Mr. Hernandez had been that of the caterpillar. (The operation of the vehicles is clearly quite different.) Mr. Flores was not brought back instead of Mr. Guzman because of his poor operation during the previous year.

The reason that Mr. Marvin Keeton was put on instead of Mr. Hernandez on June 1st is that he had driven a caterpillar for Mr. Micalizio the prior year. He had suffered a stroke in October, and he called and asked for his job back. He was released for work on June 1st and was rehired as promised. Mr. Hernandez, on the other hand had not driven a tractor for Mr. Micalizio. TR III 63.

Mr. Micalizio testified that on April 24, 1982, Guadalupe Gonzalez had done a poor job of irrigating. Some of the furrows had no water while others were flooded. There was some flooding at the end of the field. He told Mr. Gonzalez about the poor job that same morning, and Mr. Gonzalez complained that it was the fault of the water being low in the Fillaree canal at the time. Mr. Micalizio

stated that that was not true because he had seen that it was full in the morning.

Mr. Micalizio explained that Mr. Gonzalez was not laid off at the time of the major layoff, but that he was demoted and kept on as a shovel man. He said they did not feel he was good enough to irrigate for them and so they just kept the eight best irrigators. In his opinion Mr. Gonzalez was a poor irrigator. TR III 70.

Testimony of Jose Cruz Bretado;

Mr. Bretado is a foreman for J. R. Norton Company, responsible for the irrigators and the general work. He has been employed by the company since August, 1979, but was made foreman in the Fall of 1981. He is considered part of the management team with Mr. Norton and Mr. Micalizio. He reports to Mr. Norton. When told to hire he hires. He makes assignments of work and checks on the work. In all respects he is a supervisor. Mr. Bretado was told by Mr. Norton, when Norton first took over that he should keep notes of any mistakes made by any worker.

At the request of General Counsel, Mr. Bretado produced a notebook which, he said, contains a list of names he uses to help him in assigning irrigators. He had rewritten the list a few days before the hearing, but had left that list in his desk at the office. Mr. Bretado explained that he had copied the list from one given to him by one of the employees, i.e., Jesus Ramirez. He understood it to be a list that the employees had agreed upon for assignment of irrigation shifts. It was intended that one should follow the other in order of the list. Mr. Bretado denied

that the list was in order of seniority, and, in fact, noted one name that was clearly not in the order of seniority, because he knew that the man named Alfredo Cortez had worked for the company the longest, though his name was third on the list. TR I 99, 100.

Mr. Bretado also stated that the list was used as a reference to put it in the record as to where the workers work, and how many hours they work. The list was never approved by Mr. John Norton, because Mr. Norton does not tell Mr. Bretado who to assign where or what. TR I 108.

In February, 1982, a U.F.W. representative came to the company shop. A number of workers were present for a discussion, but Mr. Bretado does not recall if Mr. Casey Flores was present.

In March, 1982, the company wanted the irrigators to work a 10 hour shift rather than a 20 hour shift. The workers protested the proposed change. Mr. Bretado told the workers that they would end up with the same number of hours at the end of the week in either case. Mr. Guadalupe Gonzalez was the workers' spokesman during the protest. Mr. Bretado was present.

In late April, 1982, there was a general layoff of many shovel workers and irrigators for lack of work.

Rather than laying off Mr. Guadalupe Gonzalez at the time of the general layoff, he was offered the job of doing shovel work at the same pay as he had been earning. He accepted the job. Mr. Bretado told Mr. Gonzalez and another worker that they would have the opportunity to work over eight hours in the field if they wanted to do so. Mr. Gonzalez was also offered

to work on Saturdays. All of the shovel workers are working six days.

Mr. Bretado testified that one of the reasons that Mr. Gonzalez was transferred to shovel work was his performance. On February 1, 1982, Mr. Gonzalez had gone to John P. Norton and was unhappy and angry. He allegedly told Mr. Norton that Mr. Bretado was on his back that he didn't do things well. Mr. Norton told him to go back to work, but Mr. Gonzalez refused to work and went home.

On February 4, 1982, Mr. Bretado alleges, Mr. Gonzalez offered to fight him.

Bretado: "When I arrived in the pickup to work, he began to say in one way or another he was going to win. If it couldn't be done that way, we should leave the ranch to fight." Mr. Bretado said nothing, left in his pickup.

In February, 1982, Mr. Gonzalez allegedly irrigated certain furrows that should not have been irrigated, causing lettuce trucks to get stuck. TR III 20.

Mr. Bretado testified that in late March, 1982, Mr. Gonzalez had inundated some carrots, which can cause them to rot and also to be scalded. Mr. Bretado spoke to him about the incident.

On April 9, 1982, Mr. Bretado asked Mr. Gonzalez to continue working the field where he should have irrigated the day earlier. Mr. Gonzalez allegedly told Mr. Bretado he wasn't going to irrigate. He was going to irrigate when he wanted to. It would have been his- second shift, but all of the workers have

worked up to four shifts. Mr. Bretado believed that it was not Mr. Gonzalez.' right to refuse to work the second shift. TR III 31. On cross examination Mr. Bretado said no one must work a second, third or fourth shift, but they usually want to. He also said that two other workers left at the same time as Mr. Gonzalez, i.e., 9:00 a.m.

Sometime in April, 1982, Mr. Gonzalez allegedly failed to finish irrigating the rows he was to irrigate in Field 15.

On April 24, 1982, four irrigators were laid off, as well as a number of shovel workers. Among the irrigators was Rafael Contreras. Mr. Bretado told him that the work had slowed up, that within the next four or five weeks they would return to work again. Mr. Bretado testified that he did not say it was not his fault. "No, because it was less work."

Mr. Contreras had come looking for work the first week in July. Mr. Bretado told him possibly in about two weeks. Fifteen days later he returned.

The means for rehire is that the majority of the workers are told when they should come back, approximately a month, then at that time it is more certain when they can return to work. Mr. Bretado said he does not send a letter to invite the workers to return. TR III 13.

Though Mr. Bretado recalled that Mr. Calles had helped him burn some wheat stubble in the fields, he denied having a conversation with him concerning Mr. Contreras. Further, he does not recall Mr. Calles notifying him that Mr. Contreras wanted to return to work during layoff. He denied saying to Mr. Calles

that Mr. Contreras was not going to be rehired because he had filed charges.

Speaking of Mr. Contreras, Mr. Bretado testified, "He is a person who misses a lot of work. He gets to work late. There have been occasions when he didn't carry his work equipment, and that's it. Other workers have to loan him equipment." Equipment included boots and a shovel. There were about four occasions prior to his layoff that Mr. Bretado specifically recalls Mr. Contreras being late. He told him he had too many absences and late arrivals and to please be on time.

Mr. Bretado testified that when he returned from his vacation he employed Mr. Claudio Chacon as an irrigator.

Mr. Bretado testified that he hired Bernardo Herrera to work as an irrigator. He had been laid off with the other irrigators but was rehired in June, 1982. Mr. Herrera had come to the company twice looking for work during the layoff. In Mr. Bretado's opinion, Mr. Herrera was a serious person in whom he could have confidence. He asserted that Mr. Herrera was a better irrigator than Mr. Rafael Contreras. He is a worker you can have confidence in his being present the next day, Bretado said.

Testimony of Robert Angelo Micalizio:

Mr. Robert Micalizio is the general manager for two areas of the J. R. Norton Company, i.e., the Imperial Valley and the Palos Verdes Valley. He has worked for J. R. Norton Co. for 22 years, with the last six in the Imperial Valley. He explained that prior to the past six years the company only farmed lettuce,

and then at the end of the season, it would terminate all employees. For the past six years the system has been to layoff people on the basis of achievement, i.e., the ability to work, the best workers. Recall from layoff is done on the basis of achievement also.

Mr. Micalizio testified that he had attended a negotiation session in which Mr. Gonzalez had complained to the negotiating representative that he had been laid off from irrigator and given the job of shovel worker. Mr. Micalizio explained to the representative, in answer to his question about it, that the company had to have a layoff and that there were too many irrigators. He said that the transfer was made strictly on the basis of achievement. The company found Mr. Gonzalez to be a good worker, but not a good irrigator. They offered him the job at the same pay and he accepted it.

Testimony of Spencer "Buddy" Larson:

Mr. Larson worked for the Norton Company from December, 1978, through November, 1979, as Ranch Manager. At that time Frank Silva was Tractor Foreman. Mr. Larson testified that when he came to work at the Norton Company in 1978, the ice bills were out of sight. He made a policy that would limit the amount of ice each, employee would be entitled to each day. He said that no worker was permitted to charge ice to the company while on layoff.

Mr. Larson testified that Mr. Casey Flores, who lived in Brawley, volunteered to pick up the ice for the workers. He was paid an extra hour for performing that task. He never asked Mr. Larson permission to take ice for his own personal use.

Testimony of David Chavez Guzman:

Mr. Guzman started work as a tractor driver, on December 29, 1981. He drove a tractor, shredding the lettuce for about two months.

Mr. Guzman testified to an incident on February 4, 1982, in which he went to a field to pick up tapoons with Mr. Bretado. Mr. Guadalupe Gonzalez was there irrigating the field. He heard Mr. Gonzalez say to Mr. Bretado that if they could not arrange things here, they should go outside and arrange things out there. After that Mr. Bretado and Mr. Guzman left.

Testimony of Ignacio Chapero:

Mr. Chapero works at the Norton Company. He was present, he said, when Mr. Guadalupe Gonzalez made statements about his doing shovel work. He alleges that Mr. Gonzalez said he was happier working the shovel than irrigating because he got out earlier. He also allegedly said, that those who needed more money should continue doubling, working double shifts.

Testimony of Zenon Bretado:

Mr. Bretado works as a general farm worker, doing shovel work for the Norton Company. He has done so for three years. He testified that on approximately April 12, 1982, he was working in Field 15 doing some work that had not been completed by the irrigator who had been there and left the work unfinished. He and Ignacio Chapero had to put water into the borders--into the rows and rebuild the checks that were fallen down and irrigate that. He and Ignacio Chapero worked for three or four hours putting the field in shape.

ANALYSIS

Was there concerted activity? Was there union activity?

1. Guadalupe Gonzalez:

In his post hearing brief Respondent Counsel admits as follows: "Respondent will grant that Gonzalez¹ union and concerted activities were substantial." That admission should be sufficient in answer to the above questions, however I will note some of the specifics that support that admission.

Mr. Gonzalez is a member of the worker negotiating committee, In March, 1982, he circulated a petition among the workers to support him in his bid to be their representative. He was seen getting a signature from Mr. Hernandez by Mr. David Micalizio who commented on it.

In March, 1982, Mr. Gonzalez served as spokesman during a protest to the company in the presence of Jose Cruz Bretado, his foreman, and David Micalizio, also a foreman.

On April 1, 1982, Mr. Gonzalez attended and signed in at a union-company negotiation meeting at which Mr. Robert Micalizio was present. He also attended and signed in at a negotiation meeting on April 28, 1982, during which he spoke up against the company in the presence of Mr. Robert Micalizio and Mr. Stole, both company officials.

On March 5, 1982, Mr. Gonzalez admitted to David Micalizio in answer to his questions that it was he who had posted a U.F.W. poster on a water tank.

On March 31, 1982, Mr. Gonzalez served a charge that he had filed with, the A.L.R.B. on Mr. John P. Norton, Ranch Manager for the company.

On April 9, 1982, Mr. Gonzalez acted as spokesman to Mr. John P. Norton, on behalf of Jose Maria Espinoza, who wanted a position as a tractor driver.

On April 28, 1982, Mr. Gonzalez, in the presence of Mr. Jose Cruz Bretado, circulated a petition among the workers seeking to change the procedures to have seniority rights for the workers.

On April 30, 1982, Mr. Gonzalez personally served charges against the company, in the person of David Micalizio, on behalf of three other workers who had filed with the A.L.R.B.

Clearly, Mr. Gonzalez had engaged in protected concerted activity and in union activity. It is also clear that in the instances cited, the company, through its foremen and Ranch Manager, was aware of such activity.

2. Benjamin Hernandez:

Mr. Hernandez was seen talking to Mr. Gonzalez by Mr. David Micalizio, who asked him what he wanted. Mr. Hernandez admitted to signing a petition for Mr. Gonzalez which related to the union. I credit Mr. Hernandez' testimony in this instance over that of Mr. Micalizio who appeared to contradict himself between direct and cross-examination. His manner of testifying on this point created the impression that he was not being entirely honest.

Accordingly, I find that Mr. Hernandez was engaged in union activity and that it was known to the company through the foreman, David Micalizio.

3. Casey Flores:

In January or February, 1982, Mr. Flores claims he told Mr. David Micalizio that he supported the union and that he would

sign any paper that came along in support of the union.

On another occasion Mr. Flores testified that he spoke up to Mr. Micalizio in opposition to the company proposal to reduce the working hours for certain workers. On that same occasion he claims to have spoken in support of Guadalupe Gonzalez, who was trying to get a raise for the workers. Mr. Micalizio denies any conversation about Mr. Gonzalez.

General Counsel asserts that Mr. Flores was among many other workers who attended two U.F.W. meetings at the work site. At one of those meetings at the shop U.F.W. contracts and the status of the negotiations took place. Foreman Bretado admitted being present also. There is no indication that Mr. Flores acted as spokesman or that he did anything other than listen, along with the other workers, which included the father and brother of the foreman, Bretado.

At the second such meeting, which took place under the trees, there was no company agent present. The fact that immediate members of the Bretado family were present does not prove a knowledge on the part of the company. In any case Mr. Flores is not portrayed as having done anything different than other workers, i.e., listen to the status of negotiations.
TR II 2, 8.

Mr. Flores was known to have filed charges against the company.

I find that Casey Flores did engage in protected concerted activity and in union activity. I also find that the company was aware of such activities.

4. Rafael Contreras:

Mr. Contreras was present at a meeting under the trees at

the time a U.F.W. representative reported on negotiations. The fact that the father and brother of Foreman Bretado were also present does not constitute knowledge on the part of the company of that activity.

Mr. Contreras was present in March, 1982, at a protest of all of the irrigators over a reduction of hours proposed by the company. He took no active part in the meeting. Mr. Micalizio and Mr. Bretado saw the protest.

Mr. Contreras was known by the company to have filed charges against the company.

I find that Mr. Contreras did engage in protected activity when he filed charges against the company with the Board.

Was the company aware of complaints filed with ALRB?

I find that Mr. Gonzalez personally served a charge on Farm Manager, J. P. Norton on March 31, 1982, and that he served charges on Mr. David Micalizio on April 30, 1982, on behalf of Casey Flores, Benjamin Hernandez and Rafael Contreras. Accordingly, the company had knowledge of those employees asserting their rights under the Act. If action was taken against such employees on account of their exercise of such rights it would be a violation of Section 1153(d) of the Act.

Were Micalizio, Norton and Bretado statutory supervisors?

I find that John P. Norton, Manager of the Imperial Valley operations of the company, is a statutory supervisor, not only because of the duties and responsibilities he described, but

also because it was stipulated to by Respondent at the prehearing conference.

I find David Micalizio is a statutory supervisor, because he testified to the fact that he is the tractor foreman, oversees work done in the company shop and prepares time sheets for all employees. He has the required independent judgment and authority of a supervisor under Section 1140.4(j) of the Act.

I find Jose Cruz Bretado is a statutory supervisor. Mr. Norton as well as Mr. Micalizio and Mr. Bretado said that he is the foreman of the irrigators and general farm laborers. He was part of the management team with the other two. I find that he had the required independent judgment and authority of a supervisor under Section 1140.4(j) of the Act.

Was there unlawful interrogation of Flores and Hernandez?

On two separate occasions Mr. Micalizio asked Mr. Flores his views. In January or February, 1982, he asked Mr. Flores how he felt about the union. In March, at the time of a protest over reduction of working hours, he asked whether Mr. Flores supported the company or the men.

I find that both of these instances constitute interrogation consistent with Abatti Farms, Inc. 5 ALRB No. 34. Questioning an employee as to his union sympathies constitutes unlawful interrogation. Giannini & Del Chiaro Co., 6 ALRB No. 38. Supervisors asking employees to reveal their union sentiments was found to constitute unlawful interrogation. Foster Poultry Farms, 6 ALRB No. 15.

Because of the conflict in the testimony of Mr. Micalizio,

discussed ante, I credit the testimony of Benjamin Hernandez in his assertion that Mr. Micalizio asked whether he had signed the paper presented by Mr. Gonzalez which was characterized as intending to help him out with the union. I find this to be interrogation proscribed by the Act.

I find that such conduct on the part of a company supervisor did take place as to both Mr. Flores and Mr. Hernandez in violation of Section 1153(a) of the Act.

Did the company sufficiently repudiate its surveillance conduct?

The surveillance took place in March, 1982. Charges were filed in May, 1982. Upon receipt of the charges the company immediately mailed a letter to all employees of its Fillaree Ranch operation, disavowing the acts of the supervisor. This letter informed the employees that the company did not intend to harm the employees, and said that it did not condone the actions of the supervisor. The letter was at least as effective in stating a disavowel, as one that might be ordered by the Board.

The National Labor Relations Board held, in Broyhill Co., 260, NLRB No. 10, 187, 109 LRRM 1315 (1982), that the company had sufficiently repudiated the conduct of a supervisor who had threatened an employee when it posted a notice on the bulletin board disavowing his conduct. The NLRB held that no remedial order was necessary in light of the repudiation.

I find that the company did sufficiently repudiate its conduct, in so far as the surveillance aspect is concerned. Hence, though I find the company responsible for the 1153(a) violation in this instance, I will not recommend that this specific conduct be further repudiated by posting or mailing of notices.

Was there a seniority system at J. R. Norton Company?

General Counsel contends that there was a seniority system in effect at the Norton Company and that layoff and rehire should have been based upon such a system.

I do not find that a seniority system existed at Norton. While there is ample testimony from workers as well as Mr. Jose Cruz Bretado that the irrigators had provided Mr. Bretado, their foreman, with a list of their own making, it was not shown that the list did in fact represent an accurate statement of seniority. Further, there was at least some indication that the order of seniority of the irrigators was not accurate.

In any case, the list that was provided to Mr. Bretado was used for the purpose of assigning shifts, i.e., so that each person could be assigned in order, and thus one would not get more work than another. There was no testimony that such a list was intended for, or, indeed, used for layoff or rehire. Further, there was no indication that anyone other than Mr. Bretado had sanctioned the use of the list even for assignment of shifts.

There was testimony to the effect that the employees wanted a seniority system and that the concept was discussed in their own meetings with the U.F.W. representative in February. Mr. Villegas said he was aware that the company did not have a seniority system for layoff and rehire. TR I 82.

Company representatives all testified that there was not and never had been a seniority system in effect at the Norton Company.

In addition, there was no evidence whatsoever that a list had been made of tractor driver or caterpillar operators in the order of seniority.

I find that the Norton Company did not have a seniority system in effect prior to, and during, the period covered by the issues in this case.

Was there a discriminatory layoff of Hernandez, Flores and Contreras?

There was a general layoff of employees near the end of April. The layoff was due to lack of work. The company reduced its irrigator complement from nine to six, its shovel workers from seven to two or three and its "tractor drivers" from four to two.

The tractor drivers, who were kept were Jose Aguilar and Estaban Padilla, who drove wheeled tractors. The two who were laid off were Benjamin Hernandez and Casey Flores, who drove caterpillars.

A caterpillar is a vehicle driven on tracks steered by two levers, and not used for planting. A tractor is a vehicle on wheels, steered with a wheel, and used for planting. A person who can drive one of such vehicles does not necessarily know how to drive the other, according to testimony of Mr. Norton. TR I 38.

According to his own testimony Mr. Flores drove only caterpillars. TR II 3. Mr. Micalizio testified that the one time Mr. Flores had driven a tractor was in the 1981-82 lettuce season. It was his opinion that the quality of Mr. Flores' driving of the tractor was poor and showed lack of experience. Further, in his opinion, Mr. Flores appeared to be irresponsible in servicing, and he failed to check the planting, spacing and depth.

Mr. Hernandez testified that he has had experience driving both tractors and caterpillars. His experience at the Norton Company was only on caterpillars, however. TR I 114.

After April 13, 1982, there was no more caterpillar work to be done. Indeed, there was a general reduction in farm work. It would appear that if caterpillar work was not needed, and that tractor work was needed, the company made the logical choice for layoffs. Even if there had been a seniority system at Norton, which I have found none, there was no showing that Flores and Hernandez had more seniority than the two who remained. Accordingly, I do not find that the layoff, per se, of Hernandez and Flores was discriminatorily motivated.

Rafael Contreras was one of the three irrigators selected for layoff at the time of the general layoff of workers due to lack of work. From the testimony of Jose Cruz Bretado, it is indicated that Mr. Contreras missed work often, had been late to work several times, and when he did come to work he did not bring the necessary equipment sometimes. TR III 9, 10. On one occasion, according to Bretado, Mr. Contreras let too much water run on a field on April 18, 1982, and flooded it. Mr. Contreras denied this and it is difficult to determine which of the two is telling the truth about the flooding. I am more inclined to base my opinion on Mr. Bretado's assessment of Mr. Contreras' attendance and tardiness, but especially his not coming prepared for work.

The company witnesses testified that their selection for layoff and rehire does take into consideration the quality of work of the employee.

The fact that Mr. Contreras testified that when Mr. Bretado laid him off he said "It's not my fault.", in no way implies to me that it was, then, some other person's fault. Since there was a general lack of work, and others were also being laid off, it is

natural to assume that it was, in fact, not Mr. Bretado's fault. Though Mr. Bretado denied saying that, it could have been said and meant nothing to do with discrimination. In fact, if it was anyone's fault that Mr. Contreras was the one selected for layoff, it may have been his own, due to his poor work habits.

I find no connection between Mr. Contreras' presence at a protest meeting along with all of the other irrigators and other workers, or of his presence at a union information giving meeting, in anyway connected to his layoff. In fact, others laid off at that time included Foreman Bretado's own father and brother who were shovel workers. They too had been at the union meetings.

Was there discrimination in the rehire of Hernandez, Flores and Contreras?

General Counsel contends that the Norton Company was in violation of the Act, because it hired two other tractor drivers while Mr. Hernandez and Mr. Flores were on layoff. It is true that in May another tractor driver was needed to cut cotton stocks. The work required a tractor driver, not a caterpillar driver. Both Hernandez and Flores were known as caterpillar drivers. Flores had been found not competent as a tractor driver the previous year. Mr. Hernandez had not driven a tractor for the company, to the knowledge of Mr. Micalizio.

Mr. David Guzman was employed to drive the tractor and cut the cotton stocks. He had prior experience driving a tractor for the company.
TR III 60 IV 3, 4.

At the first of June, Marvin Keeton returned to work as a tractor driver, following his recovery from a stroke. He had been promised by Mr. Micalizio that he would be put back to work

when he got a doctors release. TR III 64.

Mr. Hernandez was reinstated on June 11, 1982, as a result of a call from the company asking him to return.

I do not find that the company discriminated in its refusal to recall Flores and Hernandez. Flores' dismissal is discussed separately.

Two irrigators were rehired before Rafael Contreras. These were Claudio Chacon and Bernardo Herrera. There is no reason that Mr. Contreras should have been put to work before the others. I have already found that there was no seniority system, and even if there had been, there was no showing that Mr. Contreras was the senior employee.

Testimony was offered to show that both Mr. Chacon and Mr. Herrera repeatedly applied to the company to go to work. Mr. Herrera had reported in May and in mid-June looking for work. He was rehired on June 19, 1982. Mr. Contreras had appeared at the company on occasion without asking for work. He spoke to Mr. Ibarra one time and Mr. Gonzalez another, but did not speak to a company representative. He saw Mr. Bretado without asking for work. TR III 61. Finally he did speak directly to Mr. Bretado, just 15 days before his actual reemployment. Mr. Bretado told him to come back in two more weeks, which he did. He was employed on July 9, 1982.

Should the company have made an effort to contact Mr. Contreras, as they did with Mr. Hernandez when they needed him? General Counsel argues that they should have called him in, since they had his address. My question is, why did Mr. Contreras himself

not ask for employment on the other two occasions when he appeared at the work place. If he came there to see certain other employees, as he said, and if he even saw Mr. Bretado without asking for work, it raises a question of his real interest in returning to work.

No irrigators were hired during May, and none were hired during the first week in June. One man returned from leave of absence, and the other was newly applying, but they did so before Mr. Contreras applied. The general policy of Mr. Bretado was to leave it to the workers to apply. Obviously, if a worker did not apply when the company needed someone it would behoove the company to call the workers directly, as was done when they recalled Mr. Hernandez. In any case, it was the practice of Mr. Bretado, as foreman of the irrigators, to leave it to the workers to reapply at a time when they wanted to work. He would indicate the approximate time when he thought the work would be available and it would be up to the worker to come into the company and check for work at that time.

It may be argued that there are shifting reasons for the delay in rehire of Mr. Contreras. It was testified that Mr. Contreras was not as good an irrigator as others, because he allegedly flooded a field. (Mr. Contreras denies that he flooded a field, and on the contrary says he was complimented by his foreman.) It was my impression that according to the testimony of the company supervisors, the layoff considered quality of work by a worker. It was not mentioned by Mr. Bretado that he took that into consideration in the rehire of Mr. Contreras. It does not appear that the fact that Mr. Contreras had allegedly

flooded a field was a reason for any delay in his rehire. It may have been in the thinking of the order of layoff, but it was not mentioned as a specific consideration for his rehire. Accordingly, I do not find any shifting reasons for delay in rehire.

If there was any delay in the rehire of Mr. Contreras it would have had to take place within the 15 day period including the last week in June and the first week in July, as he was hired on July 9, 1982. It would be necessary for the General Counsel to show that work was available during that 15 day period and that Mr. Contreras was purposely kept from working. That has not been accomplished.

Notwithstanding all of the foregoing discussion, it is important to consider the testimony of Mr. Jose Calles, who alleged that he had spoken to Mr. Bretado on the occasion when they rode in the pickup truck to burn the wheat field stubble. He claimed that when he asked when they were going to rehire Mr. Contreras, he was told by Mr. Bretado that they were not going to rehire Mr. Contreras, because he had filed a charge against the company. Mr. Bretado testified that no such conversation ever took place. He said they were together for a minute and a half during the ride to the field. Clearly, there is a conflict in testimony.

The difficulty in this instance is in determining who is telling the truth and who is lying. On the one hand it is hard to imagine that Mr. Calles could be so precise about the time and place of the alleged conversation unless such conversation had

actually taken place. On the other hand, Mr. Bretado recalls the situation equally well and denies saying anything to Mr. Calles other than to tell him to get into his pickup and go for a ride in the field. In most instances there is some indication in the manner of the witness which indicates that the testimony may or may not be relied upon. In this instance both witnesses were equally believable. When both are believable, I can only conclude that it is incumbent upon General Counsel to overcome the stalemate in testimony by other evidence in order to prove the charges. I do not find that other evidence achieves that goal.

Was the dismissal of Casey Flores an act of discrimination?

As indicated supra, Casey Flores was known to the company as a supporter of the union and he had engaged in protected concerted activity in having spoken up on behalf of himself and others concerning job related conditions.

His layoff was discussed supra, and found not to be discriminatory. Before he was considered for return from layoff, he was dismissed from his job as irrigator on account of the discovery that he had been signing his name to the Whitted Ice Co. forms and charging ice to the J. R. Norton Company.

Mr. Flores admitted that he had signed his name on two occasions, but he denied that he had been there more than those two occasions. He denied a third signature that certainly appears the same as the others. I found that his testimony did not have the sound of truth. His manner of testifying with regard to the ice matter had the ring of falseness.

In any case, the fact is that he did admit to taking ice while on layoff and charging it to the company. His defense was that he had been permitted to take ice on a previous layoff under a different foreman, i.e., Mr. Buddy Larson. Mr. Larson testified that he had never at any time authorized Mr. Flores to take ice for himself and charge it to the company while on layoff.

Also, the manner in which Mr. Flores attempted to describe his discussion of the charge with Mr. Norton had the sound of one who recognized he was guilty of theft, i.e., his reference to others as stealing without anyone doing anything about it.

I believed the testimony of Mr. Norton in describing the conversation with Mr. Flores. I did not believe Mr. Flores.

The company has a perfect right to dismiss anyone for theft. It is a reasonable business justification. I find no discrimination.

Was the reassignment of Mr. Gonzalez an act of discrimination?

There is no question about the fact that Mr. Gonzalez was an active union supporter and spokesman for the workers. It was well known to the company officials. Ample testimony as well as an admission in Respondent's brief is to that effect. The question is whether or not the reassignment from irrigator to shovel work was intended as retaliation for such activities.

Mr. Gonzalez was reassigned to shovel work at a time when other workers were being laid off from all of the positions, i.e., tractor drivers, irrigators and shovel workers. He could just as well have been laid off with the other irrigators at that time. Instead he was kept in the employ of the company and told that if

he wanted to work extra hours he could do so to offset the loss of hours worked by an irrigator. The hourly pay was the same for both classifications. He chose not to work any of the extra hours and, according to the testimony of one witness, preferred the shorter work day.

A question raised by General Counsel in his brief is, how is it that if the company needed fewer shovel workers they were willing to allow those that remained to work overtime to gain additional hours. I can see the possibility of such an arrangement. While there may be enough work for a certain number of persons, including the overtime hours, it may not be enough for additional workers. In any case, it would strike me as strange that the company would so much want to discriminate against Mr. Gonzalez that they should also layoff the father and brother of Mr. Bretado from the position of shovel workers to make room for him as a way of embarrassing him.

If there is any unstated reason for the transfer instead of the layoff, I suspect it would be more likely that the company did not want to be accused of laying off the chief spokesman for the union while keeping others. At least by transferring him, they could offer him the chance to make the same money he made as an irrigator.

The company spokesmen admitted that there was some aspect of punishment involved in the transfer. The punishment was not for having engaged in union or concerted activities, but for having done a poor job as an irrigator. The fact that he felt isolated while doing shovel work does not, in itself, indicate

discrimination. It is possible that, as part of his punishment for being a poor irrigator, separation from others, whom he was likely to talk to during working hours, might have been appropriate. Certainly, if Mr. Gonzalez felt that he did not want that job he could have accepted layoff instead.

The question is whether the company had a good reason to discipline Mr. Gonzalez. If they did not, it may be concluded that the punishment was for his concerted or union activities. If they did, there would have been nothing wrong with using this form of discipline for failure to perform effectively.

The testimony of both Mr. John P. Norton and Mr. Jose Cruz Bretado indicates a general buildup of difficulties. From the first day of Mr. Norton's assignment as Farm Manager, Mr. Gonzalez was complaining about Mr. Bretado. When he was told to return to his work he left the job altogether. On February 4, 1982, according to an allegation by Mr. Bretado, Mr. Gonzalez had challenged him to fight when he was trying to tell him what to do. I agree with General Counsel that the testimony of David Chavez Guzman is not sufficient to prove that allegation, because he only heard part of the conversation, but it does support the fact that such challenge took place at the time stated.

In February, 1982, Mr. Gonzalez caused some lettuce trucks to be stuck in the mud, because he irrigated certain rows that were marked off limits. Also in February, Mr. Gonzalez left the liquid fertilizer running after the water had been turned off, Mr. Norton caught it later in the night. It was an expensive mistake.

On March 30, 1982, Mr. Gonzalez allowed water to inundate a field of carrots which has the effect of causing them to rot, to scald, and to reduce the yield.

I reject the further complaint of Mr. Bretado that Mr. Gonzalez left after his first shift on April 9, 1982. The testimony supports the right of a worker to leave after his first shift, even though most may choose to remain.

April 13, 1982, Mr. Gonzalez was alleged to have failed to finish irrigating rows in Field 15. He was spoken to about this when he returned to work on the 16th. His testimony did not deny that he had allowed the rows to remain dry. He testified to a conversation he had with Mr. Norton about how tired he was of having the foreman step on his tail by questioning him about his work.

Mr. Gonzalez testified about another occasion when he believed that the work he had left undone was done by an arrangement between himself and another worker who was taking over at the end of the shift, i.e., Mr. Calles. This was on April 24, 1982, two days before Gonzalez' transfer to shovel work. Mr. Calles supported the fact that such an arrangement had been made, and that it was a problem with water level in the canal. Mr. Norton and Mr. Bretado said otherwise.

I find that there was sufficient reason to transfer Mr. Gonzalez to shovel work given the accumulation of incidents in which his work as an irrigator had been deficient. One may not hide behind the fact that he is a union representative or an activist in protected concerted activities to complain that

he is being harassed when he is given legitimate correction for poor work performance.

In my opinion, the company had a legitimate business justification for taking the action it took in transferring Mr. Gonzalez to shovel work. I suspect that another worker might have been fired altogether in similar circumstances, but given the fact that he had filed charges with the ALRB and was such an ardent representative of the employees, would have most certainly been a reason to avoid further charges being lodged. If anything, I find that the company acted with restraint toward this employee. I do not find discrimination.

SUMMARY OF FINDINGS

I have found that John P. Norton, Jose Cruz Bretado and David Micalizio are supervisors within the meaning of Section 1140.4 (j) of the Act.

I have found the J. R. Norton Company is an agricultural employer within the meaning of Section 1140.4 of the Act.

I find that the company was responsible for the acts of its Supervisor David Micalizio when he interrogated Benjamin Hernandez and Casey Flores in separate incidents. The General Counsel established a prima facie case by proving that the employer engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the exercise of their rights under the Act. That is sufficient under Lawrence Scarrone, 7 ALRB No. 13. It does not matter that the employees interrogated did not themselves feel intimidated, because the test is whether an employer was engaged in conduct which may reasonably tend to interfere

with the free exercise of employee rights. Mel Pack Ranches v. ALRB, 102 Cal. App. 3d 512 (1980).

I find however that the employer sufficiently repudiated its conduct by sending a letter to each of its employees indicating that no harm was intended and that the company did not condone any threats made to the employees. The NLRB has established that such a repudiation is sufficient as a remedial action. Broyhill Co. 260 NLRB No. 10f 187. The letter of repudiation is substantially identical to that of an ALRB order. (See GCX 11). It would be redundant and a waste of time to require the company to again serve such notice on the employees.

I find no discrimination in either the layoff or rehire of Benjamin Hernandez, and Rafael Contreras nor the layoff of Casey Flores and his subsequent dismissal.

It is most appropriate that the persons laid off during a general slow down in work available would be those that are least needed. Hernandez and Flores were caterpillar drivers, and only tractor drivers were needed at the time. When two other persons were hired to help with the tractor work they were persons who had specific experience known to the company in operation of the tractors. There was not a seniority system at the company so it was not required that the laid off workers be hired back in any specific order. There was not a long delay. As soon as the work was available the caterpillar drivers were hired back.

Mr. Contreras was rehired within fifteen days of the date he made actual application for work. It was not up to the company to ask him to go to work. He was on company property

visiting other workers on other occasions without asking for work. If there was a delay in rehire it was his own doing.

I do not find that General Counsel met his burden of showing that the layoff of Hernandez, Contreras and Flores was motivated by an attempt to discriminate because of their concerted activity or their union activity. I do not find that the alleged delay in rehire was an act of discrimination either. Certainly there was concerted activity and union activity, but there must be some showing of a connection between the action taken by the company and an intent to discriminate on that account. It does not meet the test of Lawrence Scarrone, 7 ALRB, No. 13.

If it were found that these workers were rehired later than others, who had not engaged in concerted or union activity, and that an intent to discriminate had been the motivating force, that finding would be overcome by the fact that when the burden shifts to the Respondent he shows a legitimate business justification, Nishi Greenhouse, 7 ALRB, No. 18. Here, the Respondent Company had a policy of no seniority. The practice was left up to the foremen. In the case of the tractor drivers or caterpillar operators the foreman apparently called someone back from layoff if he needed him. In the case of the irrigators, the foreman waited for people to apply for work and then rehired them when the work was available. Further, he took into consideration the factor of work performance. Hence, when considering someone for layoff or rehire, the least competent were laid off first and rehired last. This may be a fine line, but even one or two incidents such as the flooding of a field or the failure to water some rows could make a difference.

I find that there was a legitimate business justification for the general layoff, i.e., lack of sufficient work, and that the least effective were laid off first. In the case of Mr. Hernandez he was rehired as soon as a caterpillar operator was needed. Indeed, he was called. In the case of Mr. Contreras he was rehired within 15 days of his application and the usual practice for rehire by Foreman Bretado was followed. I believe it is a reasonable policy to layoff the least competent first and rehire them last. So whether we look to the fact of Contreras'' hesitance to apply or his not being quite as good an irrigator as another worker, the company appears justified in its action.

I find that the dismissal of Casey Flores while he was on layoff was justified. He was fired for taking ice while he was not employed and charging it to the company. Theft is a just cause for dismissal. It may be argued that each piece of ice was only valued at eighty cents, but the sum is not for us to consider. The company has a right to dismiss someone for the slightest infraction. It is apparently true that the company once had a problem with people signing for ice to the point that it was out of control. They put an end to that practice some time earlier. If it were allowed to pass that Mr. Flores stole ice and was not penalized the practice could easily be rekindled.

"An employer may discharge an employee for good cause, bad cause, or no cause at all without violating Section 8 (a)(3) as long as his motivation is not union discrimination and the discharge does not punish activities protected by the Act." L'Eggs Products, Inc. vs. NLRB, 619 F 2d 337, (9th Cir. 1980).

The General Counsel has the burden of proving an unfair labor practice charge by a preponderance of the evidence (Labor Code Section 1160.3). In a discriminatory firing case, when the General Counsel proves a prima facie case of employee firing because of union activity, the employer bears only the burden of clearly explaining the non-discriminatory reasons for its actions. Montebello Rose Co. vs. ALRB, 119 CA 3d 1, (1981). In my opinion, the Respondent has shown a reasonable non-discriminatory explanation of its action in firing Casey Flores.

I find that the transfer of Mr. Guadalupe Gonzalez to the position of shovel worker was not an act of discrimination. While it is true that Mr. Gonzalez was well known to the company as having engaged in protected concerted activity and union activity, it is not proved that his transfer was meant to discriminate against him for those causes. Even if it had been shown that the General Counsel demonstrated a prima facie case of discrimination, it would have to meet the "but for" test of Wright Line, Inc. 251 NLRB No. 150. The Board discussed its application of the Wright Line test in Nishi Greenhouse 7 ALRB No. 18.

If it is contended that the General Counsel met his burden of showing discriminatory intent, then the burden shifts to Respondent to show that it would have reached the same decision absent concerted activity. I believe Respondent has done this by demonstrating a series of incidents in which Mr. Gonzalez failed to perform effectively in his job as irrigator. Clearly, it is appropriate to take some disciplinary action when the company has an employee who makes repeated serious mistakes that are

costly to the company. Here the company might have taken more drastic action, but it chose to allow Mr. Gonzalez to continue working at a less pleasant job. (Foreman Bretado must not have seen it as so onerous though, as he supervised his own father and brother in the shovel work.) Mr. Gonzalez could well have earned more money as a shovel worker if he had chosen to do so. He wanted to work only the standard week and put in no overtime or Saturdays with the other workers. He would have 24 hour shifts as an irrigator.

General Counsel contends that Respondent demoted Mr. Gonzalez without as much as a cursory investigation of his explanation of what happened with regard to the final incident of not watering certain areas. In my opinion, it was not necessary to even consider the final action of this employee to decide that he should be disciplined. The transfer took place at the time it did, because it was the time of the general layoff. Rather than lay Mr. Gonzalez off, the company gave him shovel work. I disagree that any further investigation need to be made of the final incident.

I find no violation of the Act with regard to Mr. Gonzalez

CONCLUSIONS OF LAW

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

1. J. R. Norton Company is an agricultural employer within the meaning of Section 1140.4(c) of the Act.
2. United Farm Workers of America, AFL-CIO, is a labor organization with the meaning of Section 1140.4(f) of the Act.

3. Respondent employer engaged in unfair labor practices in so far as it conducted surveillance of agricultural workers Benjamin Hernandez and Casey Flores within the meaning of Sections 1152 and 1153(a) of the Act.

4. Respondent repudiated its conduct in the foregoing incidents of surveillance by sending appropriate letters to all of its employees consistent with the usual remedy required by the Board.

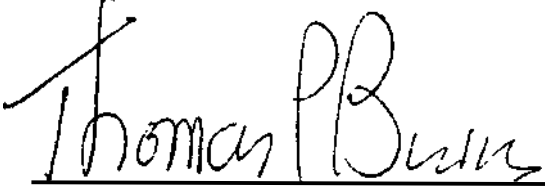
5. The unfair labor practices affected agriculture within the meaning of Section 1140.4(a) of the Act.

6. The remaining charges against Respondent should be dismissed in so far as they relate to Rafael Contreras, Benjamin Contreras, Guadalupe Gonzalez and Casey Flores.

ORDER

Having found that Respondent has sufficiently repudiated its violation of Section 1153(a) of the Act, and having found that the Respondent did not violate Sections 1153(a), (c) and (d) of the Act in the remaining charges, the complaint is dismissed in its entirety.

DATED: February 4, 1983



THOMAS PATRICK BURNS
Administrative Law Officer