Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ADMIRAL PACKING COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 82-CE-192-EC 10 ALRB No. 9

DECISION AND ORDER

Pursuant to California Administrative Code, title 8, section 20260, Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union), the General Counsel, and Admiral Packing Company (Respondent) have submitted this matter to the Agricultural Labor Relations Board (ALRB or Board) by way of a Stipulation of Facts filed with the Executive Secretary on June 29, 1983, and have waived an evidentiary hearing. Each party filed a brief on the legal issues, and Respondent and Charging Party each filed reply briefs.

On December 31, 1982, the El Centro Regional Director issued a Complaint alleging that Respondent (1) interfered with, restrained and coerced agricultural employees in the exercise of their rights guaranteed by Labor Code section 1152[1/] in violation of section 1153(a); (2) discriminated in regard to terms and conditions of employment against union supporters and

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

discouraged union support in violation of section 1153(c);[2/] and (3) attempted to undermine the status of the UFW as the certified representative of its employees in violation of section 1153(e), when Respondent on or about November 8, 1982 failed and refused to rehire agricultural employees because of their participation in union/concerted activity and support for the UFW. On April 21, 1983, General Counsel severed the allegations in the Complaint and (1) withdrew the section 1153(c) allegation of the Complaint, and (2) withdrew and placed in abeyance the section 1153(e) allegation of the Complaint pending a final resolution by the Arizona Agricultural Employment Relations Board (AERB) and the Arizona courts of a case regarding the AERB's certification of a collective bargaining representative for Respondent's Arizona employees. On April 29, 1983, the Regional Director reissued the Complaint,[3/] alleging a violation of section 1153(a) and section 1153(c) as previously alleged in the original Complaint. Respondent filed an Answer to the Complaint on May 19, 1983, and a Motion to Dismiss the Complaint on May 26, 1983. Administrative Law Judge (ALJ) Stuart Wein denied Respondent's Motion to Dismiss at the Prehearing Conference on June 7, 1983. On September 6, 1983, after this matter was transferred to the Board, General Counsel filed a Motion to

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[2/] The Regional Director issued an Erratum to the Complaint which originally alleged this to be a violation of section 1153(a).

[3/] The Regional Director issued an Erratum on May 11, 1983 to correct the April 29, 1983 Complaint which was erroneously entitled a First Amended Complaint.

Withdraw the Complaint. The UFW and Respondent have each filed separate Motions to Augment the Record pursuant to the Stipulation of Facts.

The Board has considered the record and makes the following rulings, findings and conclusions.

There being no objections to either the UFW's or Respondent's Motions to Augment the Record, we hereby grant each of those motions.

General Counsel's Motion to Withdraw the Complaint is hereby denied. General Counsel argues that this Board does not have jurisdiction to decide the issues in this matter and that there is insufficient evidence to decide whether Respondent has committed the violations alleged. As discussed below, we find that this Board has both subject matter and personal jurisdiction in this matter. The sufficiency or insufficiency of the evidence does not bear on our jurisdiction, but goes only to the issue of whether Respondent should be found to have violated the Agricultural Labor Relations Act (Act).

Backgound

Respondent is a California corporation, incorporated in 1957, and has had continuous agricultural operations in California[4/] since that time. Respondent is an agricultural employer within the meaning of section 1140.4(c) of the Act. Respondent is also licensed to do business in Arizona and has

[4/] Respondent harvests lettuce in Salinas, the Imperial Valley and prior to 1979, Blythe. (Respondent has not harvested lettuce in Blythe since 1978.)

harvested lettuce in Poston, Arizona[5/] since 1966.

On December 11, 1975, we certified the UFW as the exclusive bargaining representative of all of Respondent's agricultural employees in California. (Admiral Packing Company (1975) 1 ALRB No. 20.) In 1976, the UFW and Respondent negotiated a collective bargaining agreement which expired on January 15, 1979.[6/] On February 9, 1979, the UFW called a strike against Respondent and a large number of Respondent's lettuce harvest work force walked off their jobs in California in support of the UFW. The strike ended on December 19, 1979, the date the UFW and Respondent executed a second collective bargaining agreement which expired on October 22, 1982.[7/]

In September 1981, agricultural employee Salvador Bravo petitioned the ALRB for a decertification election. The result of the balloting was: UFW - 69, No Union - 66, and 2 Challenged Ballots. Thus the UFW was again certified as the exclusive bargaining representative of all of Respondent's agricultural employees in the State of California.

Under the terms of the seniority supplement of the December 19, 1979 UFW-Admiral Packing Company contract, Respondent

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[5/] Poston is located 5-10 miles from the California border. Until 1982, Respondent harvested lettuce only in Poston. In 1982, Respondent began harvesting lettuce in Marana, Arizona.

[6/] The contract was scheduled to expire in December 1978, but was extended by mutual agreement to January 15, 1979. (Admiral Packing Company (1981) 7 ALRB No. 43.)

[7/] This contract, scheduled to expire on August 31, 1982, was extended by mutual agreement of the parties to October 22, 1982.

kept separate classification seniority lists for the Salinas area (the northern seniority list) and the Imperial-Blythe-Poston area (the southern seniority list). Respondent applied the terms of the contract to employees who worked in Poston, Arizona through the fall of 1981 (the last harvest in Poston prior to the expiration of the contract).

On or about March 15, 1982, Respondent notified the UFW that (1) it had secured a new harvest operation in southern Arizona (Marana),[8/] (2) the new harvest operation would commence around the first week in April, and (3) the collective bargaining agreement between the parties did not, in Respondent's view, apply to this new operation. The UFW responded that, in its view, the collective bargaining agreement did apply to the Marana operation. The harvest in Marana began on April 7, 1982.

On April 14, 1982, Respondent received a petition signed by a number of the Marana employees requesting to be represented by El Comite de Trabajadores de la Compania Admiral (El Comite). In response, Respondent filed a Petition for Election with the Arizona AERB the same day. The AERB held a hearing on April 27, 1982 to determine whether there existed a question of representation. The hearing officer found that a question of representation existed and ordered an election be held in Marana on April 30, 1982.[9/] El Comite received all the valid ballots cast. On May 10, 1982, the UFW filed objections to the

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[8/] Marana is located approximately 250 miles from the California border.

[9/] This was the last day of Respondent's harvest in Marana.

election and petitioned that the election be set aside.

The AERB certified El Comite as the exclusive representative for "all permanent and temporary agricultural employees of [Respondent] in the State of Arizona" on November 8, 1982. On November 15, 1982, the AERB dismissed the UFW's election objections. The UFW appealed the AERB's certification and dismissal of election objections to the Maricopa County (Arizona) Superior Court. Respondent filed a motion to dismiss the UFW's appeal of the AERB's certification of El Comite and its dismissal of election objections. On May 26, 1983, the Superior Court granted Respondent's motion to dismiss the appeal of the AERB's certification of El Comite[10/] but denied its motion to dismiss the appeal of the dismissal of election objections. On August 8, 1983, the Arizona Superior Court granted Respondent's Motion for Summary Judgment on the UFW's appeal of the AERB's dismissal of its election objections; on November 8, 1983, the Maricopa County Superior Court granted the AERB's Motion for Summary Judgment on the same matter. On January 9, 1984, the UFW filed an appeal of these actions in the Arizona Court of Appeals.

In October 1982, El Comite requested that Respondent give preference in hiring for its 1982 fall harvests in Marana and Poston to workers who had worked in Marana's 1982 spring harvest. Respondent agreed to give such preference by not turning away any of those workers who came to the fields either in Marana

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[10/] The AERB joined in the motion to dismiss,

or Poston at the start of the harvest.

On November 8, 1982, Respondent began its lettuce harvest in Poston. Respondent had not mailed recall notices to employees on its seniority list to tell them when the harvest would begin as it had done in prior years pursuant to the collective bargaining agreement, nor did it notify the UFW of the starting date of the Poston harvest as was required by the expired contract. Instead, Respondent obtained workers for the Poston harvest by foremen, workers and El Comite telling other people that Respondent would be needing workers to harvest lettuce in Poston (and Marana),[11/] by hiring workers from the existing labor pool in the Poston area and by sending some workers to Poston from Marana to work. No employees hired for the fall 1982 Poston harvest had been sent recall notices.

In years prior to the 1982 fall Poston harvest, Respondent harvested between 350 and 400 acres and employed at least two lettuce crews. In fall 1982, Respondent employed no more than one crew and harvested approximately 150 acres.

All who applied for work on the first day of harvest in Poston were hired. Twelve of the alleged discriminatees went to look for work in Poston on either November 9 or November 10. Miguel Garcia, paid representative of the UFW in California, went to the field in Poston on November 11. Although Respondent hired additional employees during the harvest as needed, none of these 13 persons were given work.

[11/] The Marana harvest began on November 1, 1982.

Of the 51 employees who worked in Poston in the fall of 1982, 39 had seniority on the March 1982 seniority list which would have been used for recall of employees had the collective bargaining agreement been followed. Of the 116 persons named on the seniority list (excluding those listed as disabled or unavailable for work), 74 worked in Marana and/or in Poston, Arizona in November 1982.[12/] There were a total of 171 harvesting positions open in Marana and Poston in November 1982. A few persons worked for a short time in Marana and then worked in Poston, but most worked in one place or the other. The seniority list for southern California in effect at the time of the November 1982 harvest contained 129 names, 13 of whom are listed as unavailable.

Some 74 persons on the March 1982 southern seniority list were employed during the Arizona harvests. Of the 51 persons who worked in Poston in the fall 1982 harvest, 19 had not been working for Respondent at the time of the strike, and 10 worked throughout the strike, while 18 worked at least part of the time during the strike.[13/] Four persons who were hired in Poston had remained on strike throughout. One is Narciso Valdez, the

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[12/] There are 13 names on the list of persons who did not work either in Poston or in Marana and are not listed as discriminatees. There is no explanation in the record as to whether they were offered work in Arizona or not.

[13/] It is not clear from the record that all of the people who are alleged to have been on strike actually were. The Stipulation of Facts states that a person was on strike if his name did not appear on the company payroll. It is possible that there 'may have been reasons for failure to work during the strike period other than being a striker.

person with the highest seniority on the southern seniority list. He did not begin work in Poston until November 18 or 19, missing the days at the start of the season. He did not work in Marana, Arizona in April 1982. Another of the strikers who worked in Poston is Carlos Ornelas, who worked in Marana in April 1982 and signed the petition for El Comite while working there. The third person is Daniel Salinas, who worked as a sprayer. There are no alleged discriminatees from the sprayer list. Juan Romero is the fourth person who worked in Poston although he had supported the 1979 strike. He worked during part of the April harvest in Marana. None of Respondent's supervisors currently recalls seeing Romero on a picket line during the strike. Ornelas, Salinas and Romero were all hired on November 8.

Of the 29 alleged discriminatees, all were working for Respondent at the time of the strike and all but one supported the strike from beginning to end. Fifty-nine employees whose names appear on the seniority list and Arizona payroll went on strike against the company at some point during the 1979 strike. At the very minimum, sixteen out of the fifty-nine engaged in picket line activity in support of the UFW's strike.

In pleadings filed before his Motion to Withdraw the Complaint, General Counsel argued that Respondent discriminatorily refused to rehire 29 workers because of their union activity (participation in the 1979 strike) and their support of the UFW, and that these refusals to rehire constitute intereference, coercion and restraint of employees in the exercise of the rights guaranteed by section 1152. General Counsel also argued that

Respondent discriminatorily changed its past practice of mailing recall notices to workers on the seniority list because of its anti-UFW animus. Respondent argues that this Board does not have jurisdiction to decide this case. Respondent also argues that the evidence before us is insufficient to support the finding of a violation of section 1153(a) or (c).

Jurisdiction

Prior to his Motion to Withdraw the Complaint, General Counsel had consistently taken the position that this Agency has, by all applicable legal standards, jurisdiction over the matters alleged in the Complaint (subject matter jurisdiction) and personal jurisdiction over the parties. In his September 7 Motion to Withdraw Complaint, however, General Counsel argues that :

> ...any charges of discrimination against Respondent for acts occurring in Arizona involving employment in Arizona should be filed with the AERB in Arizona. The General Counsel of the ALRB has no more jurisdiction to prosecute Respondent for such acts than would the General Counsel of the Arizona AERB have to prosecute a Respondent in California for discrimination occurring in California under a California contract and involving California employment.

General Counsel argues that, in view of the ruling of the United States Court of Appeals for the Ninth Circuit in United Farm Workers v. Arizona Agricultural Employment Relations Board (UFW v. AERB) (1982) 669 F.2d 1249, "this Agency must defer to the laws and courts of the State of Arizona."

We disagree. UFW v. AERB concerned the certification by the AERB of a labor organization other than the UFW as the collective bargaining representative of Bruce Church, Inc.'s

agricultural employees in Arizona. Although many of the same workers were employed in California during parts of the year and were members of the UFW, their certified representative in this state, the Court of Appeals upheld the AERB's certification of Campesinos Independientes. The UFW had argued that, as the "full faith and credit" clause[14/] of the United States Constitution would prevent the AERB from certifying a different representative for those employees, the AERB should not have conducted an election among Bruce Church, Inc.'s Arizona employees. Rejecting that argument, the Court stated that:

> ...the full faith and credit clause neither requires the Arizona Board to abide by the California Board's certification decision, nor requires Arizona to apply California law and prevent the election." UFW v. AERB, supra, at p. 1255.

Further discussing the scope of the full faith and credit clause, the Court went on to state:

> The clause clearly does not 'enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.' (Citations omitted.) UFW v. AERB, supra, at p. 1256.

Despite the superficial resemblances of UFW v. AERB to the instant matter, the General Counsel's attempt to apply the Court of Appeals' language and reasoning to the facts in this case misses the mark.

First, no evidence has been brought to our attention that the AERB has in any way asserted jurisdiction over

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[14/] Article IV, section 1, of the United States Constitution provides, in relevant part: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state...."

Respondent's failure to hire the alleged discriminatees. Therefore, we know of no proceedings before Arizona authorities with which our proceeding here is in conflict. Second, UFW v. AERB, supra, dealt with the certification of a collective bargaining representative, not with the alleged commission of an unfair labor practice by an agricultural employer. Different legal and policy considerations apply to these different kinds of proceedings, as they affect different rights and interests of the parties involved. The right of employees freely to choose whether or not to have a collective bargaining representative, and to choose which representative that should be, is at issue in cases concerning elections and certifications. (Labor Code section 1156-1159.) In unfair labor practice cases, on the other hand, the focus is on the right of employees to engage in or refrain from organizing and other concerted activities without interference, coercion, intimidation or discrimination by employers or labor organizations, and the right of certified collective bargaining representatives to engage in meaningful negotiations on the employees' behalf about their terms and conditions of employment. (Labor Code sections 1152-1154.) The General Counsel's assumption that the standards the Court of Appeals applied in a certification context may be neatly transposed to an unfair labor practice context overlooks those fundamental differences. Third, the criteria we set forth in Mario Saikhon, Inc. (1978) 4 ALRB No. 72 for determining whether a sufficient jurisdictional basis exists for us to adjudicate an alleged unfair labor practice committed outside the borders

of California, which criteria no appellate court has ever upset, are fully satisfied in the instant matter.

In Saikhon, supra, relying on Alaska Packer's Association v. Industrial Accident Commission of California (1935) 294 U.S. 532, we stated the following view of the scope of this agency's jurisdiction:

> ...by the passage of the ALRA the Legislature has chosen to regulate the employment relations in California agriculture by providing for a system of collective bargaining with the attendant array of statutory rights, obligations, and prohibitions necessary to the proper functioning of such a system. Its authority to do so in connection with the purely intrastate activities of agricultural employers, unions, and employees is clear: That it has also the power to provide for relief in this state to an agricultural employee who has been injured, within the meaning of the Act, outside the state, as an incident to that regulation is clear on the basis of the above precedent. This exercise of power must, of course, be consistent with the demands of due process. The question for resolution then, is whether the Legislature intended to exercise this power. We believe that it did, and that the requirements of due process will be met on a case-by-case basis. (Mario Saikhon, Inc., supra, 4 ALRB No. 72, p. 6.)

Our position on the jurisdictional issue was fully in accord with what the United States Supreme Court stated in Alaska Packers, supra, in upholding an award of benefits by the California Industrial Accidents Commission to a non-resident hired in California to work exclusively in Alaska, where he was injured:

> Obviously, the power of the state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences. That it has power, through its own tribunals, to grant compensation to local employees, locally employed, for injuries received outside its borders, and likewise has power to forbid

> its own courts to give any other form of relief for such injury, was fully recognized by this court.... Objections which are founded upon the 14th Amendment must, therefore, be directed, not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process. 294 U.S. at 541.

We went on in Saikhon, supra, to cite standards which the California courts have developed for determining the reasonableness of the exercise of jurisdiction over non-resident defendants. In Belmont Industries, Inc. v. Superior Court (1973) 31 Cal.App.3d 281, 286, the following guidelines were set forth:

1. The interest of the State in providing a forum for its resident and in regulating the business involved;
2. the relative availability of evidence and the burden of defense and prosecution in one place rather than another;
3. the ease of access to an alternative forum;
4. the avoidance of a multiplicity of suits and conflicting adjudications; and
5. the extent to which the cause of action arose out of the defendant's activities in the forum state.

Applying these guidelines to the facts before us, which involve not a non-resident defendant, but an alleged unfair labor practice which occurred or had effects outside California's borders, we find that this agency's exercise of jurisdiction is proper, for the following reasons: Respondent is a California corporation, most of whose business is done in this state; its principal office is located and its records are all kept in this state; its employment relationships with the alleged discriminatees were established in this state and were governed

for many years, up to two weeks before the alleged violation took place, by a collective bargaining agreement it executed in this state with a labor organization certified by this Board pursuant to the California statute (the Act); in accordance with the terms of that agreement, Respondent in each year from 1977 to 1981 sent written notices, mailed in California, to eligible senior employees about the availability of work in its Arizona harvest operations; the allegedly discriminatory failure to rehire may have been based on protected activity, the 1979 strike, which took place in California, and could have an adverse impact on the willingness of Respondent's California employees to exercise organizational rights protected by the Act -- a result we are charged with preventing, if possible, by our responsibilities under the Act for regulating agricultural labor relations; and, finally, there can be no assurance that the Arizona authorities would resolve the issue in a manner, or according to standards, which would be appropriate under the Act.

It is clear from the above that our exercise of jurisdiction in this matter is proper unless the manner of its exercise would be "so arbitrary or unreasonable as to amount to a denial of due process." We are guided by the United States Supreme Court's decision in Allstate Insurance Co. v. Hague (1981) 449 U.S. 323 [101 S.Ct. 633] in concluding that no such violation of due process will result from asserting our jurisdiction here.

In Allstate, supra, the High Court had to determine whether one state properly applied its own law in a case involving an automobile accident which occurred in another state. The

Court provided a lengthy analysis of the principles applicable to choice-of-law questions, which, as it stated, have traditionally been regarded as arising under either the due process clause or the full faith and credit clause.

The Court emphasized that law in this area has evolved away from focusing on the jurisdiction where a particular event took place. The law now looks, said the Court, to "the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation," which contacts "create[] state interests, with the parties and the occurrence or transaction." (44.9 U.S. at 308.) The holding of the case is that:

> ...for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state 'interests, such that choice of its law is neither arbitrary nor fundamentally unfair. (449 U.S. at 313-314.)

One noteworthy aspect of this statement is that it does not require a finding that the state whose law is applied must have more, or more signficant, contacts and/or interests with the matter than another state has. Indeed, commenting on Alaska Packers, Cardillo v. Liberty Mutual Ins. Co. (1947) 330 U.S. 469 [67 S.Ct. 801], which upheld another application by California of its law involving injury in Alaska to an employee hired in California, the Court said, "While Alaska Packers balanced the interests of California and Alaska to determine the full faith and credit issue, such balancing is no longer required." (449 U.S. at 312 (fn. 15).) Similarly, the court elsewhere in

the opinion stated that "...the Court has... abandoned the weighing of interests requirement." (449 U.S. at 308 (fn. 10).)

In view of the Supreme Court's holding that the issue is not which state has the most or the greatest interests in a matter being adjudicated, but whether a state has such interest(s), based on "a significant contact or significant aggregation of contacts," General Counsel's argument that California must defer to Arizona in the instant matter is not persuasive. Our assertion of jurisdiction cannot be regarded as unreasonable, arbitrary or unfair. Therefore, it does not offend either the due process clause or the full faith and credit clause of the U.S. Constitution.

Alleged Violation of Section 1153(a) and (c)

In the pleadings and brief filed before General Counsel's September 7 Motion to Withdraw the Complaint, General Counsel argued that the evidence supports an inference that Respondent changed its method of notifying employees about available work in the Arizona harvests, and then implemented the new notification methods and effected the hiring of harvest employees, in a manner that discriminated against employees who had most staunchly supported the UFW during the 1979 strike. While the evidence in the record is not inconsistent with that view, we find that it is not sufficient to establish a violation of section 1153(a) or (c).

The statistical evidence suggests that employees who fully supported the 1979 strike were less likely to be hired for the Poston harvest. However, the causal link alleged between

strike support and loss of employment is weakened by the fact that among the employees who were hired were several who had also supported the strike, and by the unexplained failure of thirteen of the alleged discriminatees to apply for positions on November 8.

As to the twelve applicants who arrived at the harvest a day or two after the hiring was substantially completed, the evidence is consistent with Respondent's defense that it did not hire them simply because they were not needed at the time they applied. The record does not indicate any reason for their late arrival at the harvest site. We do not know whether or not it was caused by late receipt of actual notice about the starting date for work. The record is similarly silent as to whether those alleged discriminatees who did not go to Poston to apply for work ever received actual notice of the harvest.

In the absence of evidence about what notice, if any, the alleged discriminatees did receive, the record does not establish that they were treated differently from other employees as regards notice of the harvest. Nor does it establish that Respondent's change in notification methods was the cause of the alleged discriminatees' failure to make timely application for work in the harvest. We believe it is speculative to infer, as our dissenting colleagues apparently do, that the reason some of the alleged discriminatees went to Poston late and others did not go at all was that, due to the change in Respondent's notification methods, they either received late notice of the harvest, or none. If those were the facts, it was part of General

Counsel's burden of proof to establish them in the record. Having failed to do so, General Counsel has not provided the sort of evidentiary basis that is required to support the inferences General Counsel's theory calls on us to draw. The evidence before us is equally consistent with the inference that the alleged discriminatees either chose not to apply for work in the Arizona harvest, or arrived there late, for reasons unrelated to Respondent's change of notification methods, as with the inference that the change prevented them from making timely application. As we stated in Rod McClellan Company (1977) 3 ALRB No. 71, "...circumstances which merely raise a suspicion do not establish a violation." (Accord, NLRB v. Citizen News Company (9th Cir. 1943) 134 F.2d 970 [12 LRRM 637].)

In the absence of supporting evidence, we decline to infer that Respondent's change in methods of notification was the cause of the alleged discriminatees[1] failure to get jobs in the fall harvest. Therefore we do not find that Respondent's change in notification methods constituted either that restraint, coercion or intimidation of employees which section 1153(a) forbids, or that discrimination based on union support which section 1153(c) forbids. Accordingly, we shall dismiss the allegations that Respondent has, by the acts specified in the Stipulation of Facts here before us, violated those provisions of the Act.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Board hereby orders that the Complaint herein

be, and it hereby is, dismissed in its entirety.[15/]

Dated: March 2, 1984

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

[15/] The allegation that Respondent violated section Il53(e), which the General Counsel placed "in abeyance," on April 21, 1983, is not affected by our dismissal of the Complaint before us.

MEMBERS WALDIE and CARRILLO, concurring in part and dissenting in part:

We agree with the majority that we have jurisdiction in this case. We disagree with the majority's finding that General Counsel has failed to make a prima facie showing that Respondent violated Labor Code section 1153(c) and (a) of the Agricultural Labor Relations Act.

The majority states that the record is devoid of evidence regarding the alleged discriminatees' reason(s) for failing to show up in Poston on the starting date of Respondent's harvest. The majority even suggests that some of the alleged discriminatees may have even received actual notice of the harvest. The majority would require evidence concerning what notice the alleged discriminatees received in order to find that they were treated differently from other employees with regard to notice of the harvest. In our view, the burden of these evidentiary gaps should rest on Respondent and not

General Counsel.

In discrimination cases, General Counsel has the burden of establishing a prima facie case. Once a prima facie case is established, the burden shifts to Respondent to rebut General Counsel's prima facie case by proving that it would have taken the same action in the absence of the protected and/or union activity, in this case that the action taken was not motivated by antiunion animus but some legitimate business justification. (Royal Packing (1982) 8 ALRB No. 74.)

General Counsel has made a prima facie showing in this case. The alleged discriminatees engaged in union activity when they participated in the strike against Respondent in 1979. Respondent knew of their participation and kept a record of their strike activity. Twenty-eight of the twenty-nine alleged discriminatees had supported the United Farm Workers of America, AFL-CIO (UFW or Union) strike throughout the entire strike period.[1/]

Respondent discriminated against these UFW supporters by unilaterally and without notice to its employees changing its method of notification of the starting date of its harvest in Poston, Arizona. Respondent's change in its notification and hiring practice had a clear and foreseeable consequence of preventing UFW supporters from properly applying for work in

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[1/] The record shows that four workers who were on strike during the entire 1979 strike period were employed during the 1982 fall Poston harvest. A finding of discrimination as to a group of workers does not require a total exclusion of workers who may be members of the group. (J. R. Norton (1982) 8 ALRB No. 76 and 8 ALRB No. 89.)

Poston. Prior to November 1982, Respondent mailed recall notices to workers on the seniority list pursuant to its agreement with the UFW. Starting in November 1982, Respondent recruited workers by word of mouth from the Poston area. Respondent knew that the workers on the seniority list did not live in the Poston area[2/] and that unless they received recall notices they would not know the start date of the 1982 fall Poston harvest. Respondent did not notify the UFW or the workers on the seniority list of its change in the notification procedure; without notice of such a change the workers had a reasonable and continued expectation of receiving notice in the same manner. It is General Counsel's burden of proof to establish that the reason the alleged discriminatees did not apply in Poston or applied late was due to Respondent's failure to notify them and General Counsel has done so through statistical evidence, evidence which supports an inference of discrimination. The fact that twenty-nine UFW supporters did not obtain work in Poston shows that the change in the method of notification had the intended effect. (See Kawano, Inc. (1978) 4 ALRB No. 104.) The change without a notice to its seniority workers had a disparate impact on UFW supporters which was not only foreseeable but an entirely unavoidable consequence. National Labor Relations Board precedents have consistently held that in such cases Respondent must have intended to achieve the foreseeable consequences and such conduct therefore

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[2/] Most of the workers on the seniority list live in the Calexico-Mexicali area.

bears its own indicia of (unlawful) intent.[3/] (See National Labor Relations Board v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465]; National Labor Relations Board v. Erie Resistor Corp. (1963) 373 U.S. 221 [53 LRRM 2121].)

The majority contends that the evidence is equally consistent with the inference that the alleged discriminatees chose not to apply or arrived late for reasons unrelated to Respondent's change in notification methods. Such inferences are not supported by any evidence on the record. Such inferences cannot reasonably be made from Respondent's change and from the alleged discriminatees failure to receive a recall notice. Since General Counsel has made a prima facie case, the burden of these ambiguities falls on Respondent.

We would find that General Counsel made a prima facie case that Respondent violated Labor Code section 1153(c) and (a) when it failed to mail recall notices to workers on its seniority list as it had done in previous years.

Because Respondent has not had an adequate opportunity to litigate its business justification(s), Member Carrillo would remand this case to an Administrative Law Judge (ALJ) to take additional evidence of Respondent's defense(s), if any. Member Waldie would not remand this case to an ALJ for the taking of

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[3/] Disparate impact cases involve employment practices that appear to be neutral in their treatment of different groups but in fact adversely effect one group more than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate impact theory. (See International Brotherhood of Teamsters v. United States (1977) 431 U.S. 324, 97 S.Ct. 1843; Griggs v. Duke Power Co'0.971) 401 U.S. 424, 91 S.Ct. 849.)

evidence on Respondent's defenses because Respondent had an adequate opportunity to present its defense(s) pursuant to the stipulation of facts and failed to do so.

Dated: March 2, 1984

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

CASE SUMMARY

ADMIRAL PACKING COMPANY (UFW)

10 ALRB No. 9
Case No. 82-CE-192-EC

Based on a Stipulation of Facts submitted by General Counsel and Respondent, who waived an evidentiary hearing before an ALJ, the Board held that it was proper for it to assert jurisdiction over the matter alleged in the Complaint, but dismissed the Complaint because the evidence did not establish that Respondent had violated section Il53(a) or (c) as alleged. The Complaint was based on Respondent's failure to hire for its harvest operations in Arizona several employees who had supported a strike against Respondent by their labor organization three years earlier. Respondent had changed its methods of notifying employees of employment opportunities in its Arizona harvest without notifying their certified representative of the change, after its collective bargaining agreement with the representative expired. In view of the failure of the alleged discriminatees to apply for employment at a time when jobs were available, and the absence of evidence that the alleged discriminatees did not receive actual notice of the opportunity to work in the Arizona harvest, the Board found that the causal link between Respondent's change of notification methods and the alleged discriminatees' failure to be hired was too weak to support finding a violation of section 1153(a) or (c).

Members Carrillo and Waldie, concurring and dissenting, agreed with the majority that it is proper for this Board to assert jurisdiction in this case, but disagreed with the Board's dismissal of the alleged violation of section Il53(a) and (c). They would find that the evidence establishes, prima facie, such a violation, and that Respondent has not rebutted it. Member Carrillo would remand for the limited purpose of allowing Respondent to produce additional evidence in support of its defense(s).

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