El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARCO SEED COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 82-CE-191-EC 11 ALRB No. 1

DECISION AND ORDER

On June 29, 1984, Administrative Law Judge (ALJ) Arie Schoorl issued the attached Decision. Thereafter, Respondent Arco Seed Company timely filed exceptions and a supporting brief to the ALJ's Decision.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the ALJ as modified herein, and issue his recommended Order.

Respondent has excepted to various findings and conclusions of the ALJ which were based upon his discrediting the testimony of foreman John Preece. The ALJ found Preece's

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

testimony not credible based on the direct contradictions between Preece's testimony and that of his immediate supervisor, George Luce, and on contradictions within Preece's own testimony. Based on our review of the record herein, we affirm the ALJ's credibility resolution.

Respondent argues that employee Gabriel Diaz did not engage in protected concerted activity as defined by the National Labor Relations Board (NLRB) in Meyers Industries, Inc. (1984) 268 NLRB No. 73 [115 LRRM 1025]. We disagree. The credited testimony establishes that Diaz met with his fellow workers on two occasions in August and September 1982 and discussed the question of overtime pay. Most of the workers present at the first meeting, and at least one in the second meeting, authorized and supported Diaz' efforts to secure payment of overtime pay that was being unlawfully withheld by Respondent. We find that this activity, along with Diaz' subsequent efforts to secure the overtime payments, was unquestionably concerted in nature.[2/]

We uphold the ALJ's finding that Respondent had knowledge of Diaz' concerted activity. The credited testimony establishes that John Preece had knowledge of Diaz' concerted activity, that he recommended which employees should be laid off, and that George Luce relied on his recommendations in laying off workers. Furthermore, credited testimony establishes that

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[2/] We do not rely on the ultimate success of Diaz' overtime claim with the Labor Commissioner, which resulted in 173 employees receiving overtime checks, for our conclusion that Diaz engaged in concerted activity.

supervisor Javier Ponce[3/] was present at the second employee meeting. We reject Respondent's contention that Ponce's knowledge of Diaz' concerted activity cannot be imputed to Respondent. In the limited situation where a respondent can establish that the supervisor who learned of an employee's protected concerted activity did not pass on that information to the personnel who decided to discharge the employee, the NLRB will not impute knowledge to the employer. (Dr. Philip Megdal (1983) 267 NLRB No. 24 [113 LRRM 1138].) In the instant case, Respondent did not meet that affirmative burden. In fact, Respondent did not even call Javier Ponce as a witness.

Finally, we agree with the ALJ that Respondent failed to establish a legitimate reason for laying off Gabriel Diaz. George Luce testified that Respondent's layoff policy was to lay off temporary[4/] or seasonal employees first and then to give preference among the remaining workers to those who could perform the work that still needed to be done. He further testified that after the general layoff in October 1982, when Diaz was laid off, some temporary workers were kept on. Respondent argues that it needed to keep balers and stackers and that Diaz had no experience in these areas. However, the record, specifically the citations to the transcript proffered by Respondent, does

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[3/] Respondent admitted in its answer that Javier Ponce was a supervisor but now argues that he is not. We have previously held that in these circumstances, Respondent is estopped from arguing about the previously admitted supervisory status of an individual. (Sam Andrews' Sons (1980) 6 ALRB No. 44.)

[4/] There is conflicting testimony as to whether Gabriel Diaz was a temporary or a permanent employee.

not support this contention. John Preece, whose testimony was repeatedly discredited by the ALJ, did testify that he needed to keep balers and stackers. However, he did not testify that Gabriel Diaz could not perform these functions or that the seasonal employees who were not laid off could perform them.

Based on the ALJ's Decision and our discussion herein, we conclude that Respondent unlawfully laid off Gabriel Diaz in violation of section Il53(a) of the Act.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Arco Seed Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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

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

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

(a) Offer to Gabriel Diaz immediate and full reinstatement to his former or substantially equivalent position

and make him whole for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

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

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

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from the beginning of the 1982 season (February 1, 1982) to February 1, 1983.

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

removed.

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

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

Dated: January 11, 1985

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Arco Seed Company, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by laying off Gabriel Diaz because he protested that Respondent had incorrectly calculated overtime pay so that we paid less than our employees were entitled to under the laws of the State of California. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge or layoff any employees for engaging in protests over wages or other working conditions.

WE WILL reimburse Gabriel Diaz for all losses of pay and other economic losses he has suffered as a result of our discriminating against him plus interest and in addition offer him immediate and full reinstatement to his former or substantially equivalent position.

Dated: ARCO SEED 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 9224.3. 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

Arco Seed Company
(UFW)

11 ALRB No. 1
Case No. 82-CE-191-EC

ALJ DECISION

The ALJ found that Respondent violated the Act by discriminatorily laying off employee Gabriel Diaz because of his protected concerted activities. Diaz was instrumental in notifying the other workers that Respondent was improperly withholding their overtime payments and discussed this issue with them on two occasions. With the support of his co-workers, Diaz pursued a wage claim with the State Labor Commissioner. The ALJ also rejected Respondent's contention that the Board's jurisdiction in this case was preempted by Labor Code section 98.6(a) which prohibits retaliation against persons who invoke labor commission procedures.

BOARD DECISION

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ARCO SEED COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 82-CE-191-EC

Appearances:

Eugene E. Cardenas, Esq.
for the General Counsel

Joseph E. Herman, Esq.
for Respondent

Before: Arie Schoorl
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARIE SCHOORL, Administrative Law Judge:

This case was heard by me on May 7 and 8, 1984, in El Centro, California. The complaint issued on June 16, 1983, based on a charge filed by the United Farm Workers of America, AFL-CIO (hereinafter called the UFW) and duly served on Arco Seed Company[1/] on November 9, 1982, alleged that Respondent had committed a violation of the Agricultural Labor Relations Act (hereinafter referred to as the ALRA or the Act). Respondent filed an answer on June 17, 1983, denying any such violation.

The General Counsel and the Respondent were represented at the hearing. The General Counsel and Respondent timely filed briefs after the close of the hearing. Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs submitted by the parties, I make the following findings of fact:

I. Jurisdiction

Respondent has admitted in its answer and I find that Respondent is an agricultural employer within the meaning of section 1140.4(c) of the Act, and that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practice

Respondent laid off Gabriel Diaz, a tractor driver, along with 11 other employees on October 5, 1982. General Counsel has alleged in the complaint Respondent laid off Diaz because of his

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1. Arco Seed Company was previously known as Dessert Seed Company. On July 1, 1983, after the Atlantic Richfield Company had purchased Dessert Seed Company, it changed its name to the Arco Seed Company.

protected concerted activities, that is, on two occasions his discussing with his coworkers Respondent's liability to pay full overtime pay as required by the laws of the State of California and on one occasion his mentioning to his foreman, John Preece, about such overtime pay.

III. Summary of the Facts

Respondent's main operation in the Imperial Valley is the cultivation of grain and vegetable seeds. As a side operation it grows and harvests alfalfa hay. In 1982 the general equipment manager was George Luce. The three supervisors, directly below him, were John Preece (alfalfa harvest), Hector Garcia (equipment) and Albert Martinez (thrashing machine).

In 1978, 1979 and 1980 Gabriel Diaz worked as a tractor driver under the supervisor John Preece for the John Wiest firm. Diaz drove a windrower machine in the hay harvest and also caterpillars in a variety of tasks i.e., discing, land planing, subsoiling, plowing, etc. Preece testified that Diaz had been drunk on the job on several occasions and because of this drinking problem Preece recommended that he be discharged and the firm followed his suggestion and discharged Diaz in the summer of 1981.

While Diaz was employed at the John Wiest firm, he noticed that management miscalculated the overtime for the employees and was paying them less than was mandated by state law. After his discharge, he filed a claim for the accrued back overtime pay with the Labor Commissioner. Subsequently, the Wiest firm entered into a settlement agreement with the Labor Commissioner and paid the employees the back overtime pay. Preece actually went to the home

of Diaz and delivered the check to him in person. However, Preece testified that even though he personally delivered the back pay check to Diaz, he never learned that Diaz had made a claim for overtime pay with the Labor Commissioner which resulted in the payments of accrued overtime to the employees.

In October 1981, Respondent bought out the Wiest firm and hired all of the Wiest employees including John Preece. The latter went to work for Respondent as the supervisor of the alfalfa harvesting operation. A few days after the takeover, Gabriel Diaz applied for work at Respondent's. He filled out an employment application with his work history from October 1980 to July 1981. He did not list his employment with the Wiest firm which he claimed ended in the summer of 1980[2/] but he did mention it to Respondent's equipment manager George Luce on the day the latter interviewed him for the job. Diaz testified that he knew that Preece was working at Respondent's before applying for employemnt there and Preece corroborated Diaz in his own testimony on this point. Preece informed George Luce of his experience with Diaz and his drinking problem while in Wiest's employ and recommended that Respondent not hire Diaz. Luce proceeded to hire Diaz and commented to Preece that Diaz should have another chance.

Diaz started working as a windrow operator in the alfalfa harvest department under the supervision of John Preece. After the harvest season ended several weeks later, Diaz worked six weeks repairing the alfalfa harvest equipment and later went to work

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2. Preece testified that Diaz worked at Wiest's until July 1981.

demolishing corrals, sprinkling systems, etc. on some cattle raising land that Respondent had acquired and was converting to use for raising field crops. Diaz returned to the alfalfa harvesting department in February 1982 and drove the windrower under foreman Preece until October 1982 when he was laid off with eleven other employees.

In September 1982 Diaz and a number of co-workers, including Florentine Soto, Estanislao Mares, Israel Ponce, and Pedro Munoz were conversing in the shop during the noon break and Diaz brought up the subject of overtime pay and pointed out that Respondent was not calculating overtime compensation correctly, that is, in compliance with the state law. Some of the employees expressed their agreement with Diaz while others expressed their disagreement. However, all of them told him to look into the matter since it seemed he knew how to go about it.

A few days later at a store a mile or two away from Respondent's premises, a group of employees, including employees Diaz, Florentine Soto, Israel Ponce, and supervisor Javier Ponce were partaking of cool drinks and conversing. Diaz brought up the subject of overtime once again. Diaz insisted that Respondent was underpaying overtime and Javier Ponce insisted Respondent was paying overtime correctly. This time Soto was the only one who told Diaz to look into the matter.[3/]

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3. Diaz testified that later many of the employees who were present at the store told him that they did not join with Soto in urging him to proceed because they were afraid management would retaliate against them. However, no witness corroborated this testimony.

A few days later Diaz asked Preece about Respondent's overtime payments to the employees. Preece reacted in an angry manner and said, "Once again you're bringing up that damn thing". Diaz responded that it was only a question.

A week or two later Respondent laid off Gabriel Diaz and 11 other employees including Juan Aguilar and Guillermo Castillo, the latter two also from Preece's department. Diaz asked Preece the reason for his layoff[4/] and Preece replied that he did not know and that Diaz would have to ask Luce about it. Diaz went to the office forthwith and inquired with Luce about the reason for the layoff, but Luce ignored Diaz' question and walked away without answering him.

Luce testified that he had received orders from higher management to cut down on the number of employees. He conferred with supervisors John Preece, Hector Garcia and Albert Martinez and instructed them to make some recommendations as to whom to lay off and whom to keep on. Luce testified that he did not go by seniority or permanent or temporary status but rather by matching qualified employees with the type of work to be done.[5/] According to Luce's testimony Preece recommended that he let go 5 (Luce was not positive of this exact number as it could have been either 4 or 6), including

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4. Diaz testified that there was still reseeding to be done at that time but did not testify whether he mentioned this to Preece.

5. Luce testified that usually the criteria for layoffs was permanent versus temporary employees but, in respect to this October 1982 layoff, he testified in effect that that criteria was not utilized.

Diaz but he only laid off three of the ones that Preece had recommended.

Preece denied that he had had any input into the selection of the employees to be laid off because according to him the criteria utilized by management was to keep on the permanent employees and lay off the temporary ones. He denied discussing with Luce any details about which employees would be included in the layoff.

Luce and general manager Arthur Dessert testified that by October 1982 most of the work in converting the newly acquired cattle raising land into row crop land (tearing down of corrals, sprinkler systems, etc.) had been completed but the work was not completely finished until the summer of 1983. Preece testified that all of the work had been completed by October 1932 and no such work was performed in the winter of 1982-83 or thereafter.

In January 1983 Diaz began to return to Respondent to inquire about work on an average of three times a month. In February 1983, Preece began the alfalfa harvest without recalling Diaz. Preece testified that they (management) sent over Jose Solano and Emiliano Retano from Hector Garcia's department for the windrow work since there was a surplus of employees there. In April he needed a third windrow operator so they sent him Israel Ponce. In February 1983, Preece began the alfalfa harvesting operation without reemploying Diaz. Preece assigned Israel Ponce to operate the third windrow machine. Diaz testified that he had taught Ponce to do such work at the behest of Preece while the latter testified that J.J. Sanchez had done so. It was uncontroverted that Israel Ponce lacked

training and experience to operate the windrow machine in February 1983.

Respondent rehired Diaz in July 1983 and assigned him to Hector Garcia's crew as a caterpillar driver. Diaz testified that after working 5 months Garcia told him that Preece had said that he did not want Diaz in his department. Hector Garcia testified that Preece had never said any such thing to him. Preece testified that he did not know that Diaz had filed a claim for backpay with the State and in fact did not learn of it until he overheard employees talking about it when they receive their backpay checks in October 1933.

2. Analysis and Conclusion

General Counsel contends that the actual motive for Respondent's layoff of Gabriel Diaz was his participation in protected concerted activities in August and September 1932 in respect to his discussion with employees about overtime pay and his questioning of Preece on the same subject. According to ALRA precedent, General Counsel must prove by a preponderance of the evidence that there is a causal connection between the discriminatory action and the concerted activities. The legal principles applicable to discriminatory action based on union activity and concerted activity are identical. (Lawrence Scarrone (1981) 7 ALRB No. 13.)

In discrimination cases there is often no direct evidence that the employer discriminated against an employee because of his union or concerted activities. With respect to the connection between such activities and the subsequent treatment, the Board

stated in S. Kuramura, Inc., "It is rarely possible to prove this by direct evidence. Discriminatory intent when discharging an employee is 'normally supported only by the circumstances and circumstantial evidence[1]. Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B., 302 F.2d 186, 190 (C.A. D.C. 1962)."

Considering the circumstantial evidence, a preliminary factor in finding that an employer discharged an employee for union or concerted activity is the determination that the employee engaged in such activities and that the employer had knowledge of such activities.

I find that Gabriel Diaz engaged in protected concerted activities in August and September 1982. On two occasions he met with his co-workers and discussed the question of overtime pay and his initiating steps to secure the payment of any extra ovetime pay due them according to the correct application of state law. Diaz and Florentine Soto credibly testified about the contents of the conversation on those two occasions.[6/] Since one of Respondent's supervisors, Javier Ponce[7/] was present at the second meeting, his knowledge of the meeting is imputed to the employer.

I further find that Diaz mentioned the question of overtime to Preece in respect to the reason Respondent was not paying the correct overtime to him and his fellow employees and Preece reacted in an angry manner and chastised Diaz for bringing up to the

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6. Respondent failed to call Javier Ponce as a witness, so it must be inferred that if he had been called his testimony would have been the same as Diaz' and Soto's.

7. Respondent admitted in its answer that Javier Ponce was a supervisor.

subject "again". This constitutes knowledge on the part of Respondent of the concerted nature of Diaz' conduct in this instance since it was obvious to Preece that Diaz was inquiring not just for himself but for his co-workers as he used the tern "us". Moreover, despite Preece's denial, Preece's use of the word "again" and his angry manner in his response to Diaz' inquiry clearly indicates that he had knowledge of Diaz' having filed a claim for overtime back pay at Wiest's, which resulted in the payment of accrued overtime backpay to Diaz[1] co-workers at Wiest's, and his fear that the same result could occur at Respondent's if Diaz continued along an identical course.

The third element in the circumstantial evidence generally involved in discrimination cases is the timing. In the instant case, Respondent learned of the alleged discriminatee's concerted activities and in a matter of a Week or two Respondent laid him off. Accordingly, General Counsel has proven a prima facie case.

Respondent argues that even if General Counsel has proven a prima facie case, Respondent has proven that it would have laid off Diaz regardless of his participation in concerted activities and therefore committed no unfair labor practice. Regarding Respondent's argument, a review of the "but for" and "dual motive" situation as set forth in the NLRB's Wright Line [8/] case is in order. In this leading case, the NLRB stated that it would require the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the

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8. Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB 1083 (105 LRRM 1169).

employer's decision. Once established, the burden will shift, to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct.[9/]

Respondent alleges that the legitimate business reason was that Respondent had to reduce personnel because of a reduction in work and therefore laid off the temporary employees in foreman available Preece's crew and retained the permanent ones.

It is true that Preece testified to that effect but Respondent's own witness, the former equipment manager George Luce, credibly testified that he conferred with his three supervisors (including Preece) about which employees they would recommend to lay off. Luce testified that the criteria utilized was not seniority, or permanent or temporary status, but the matching of skills and abilities of a certain employee with the kind of work to be done-In fact, Luce went into much detail about the process of how each foreman recommended who should be laid off and that Preece had recommended the lay off of 5 employees and later there was more discussion on each employee. On the other hand, Preece denied that he had any imput whatsoever into Luce's decision to lay off Diaz or any of the other members of his crew nor any discussions with Luce about which employees to be laid off.[10/] Preece insisted in his testimony that it was simply a question of laying off the temporary employees and retaining the permanent ones.

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9. The Board confirmed this interpretation of Wright Line in Royal Packing Company (1982) 8 ALRB No. 74.

10. He admitted he mentioned he needed some stackers and balers in order to complete the harvest but no input on individual employees.

It is highly significant that Preece denied that any such process took place when at the same time his immediate superior, George Luce, said the opposite. As stated elsewher3 in this decision, I found Preece not to be a credible witness, while I find that Luce testified in a candid and direct manner and there was no reason to doubt that the selective process of deciding the layoffs was as he described it.

Accordingly, the only logical inference to be made from Preece's denial of participating in the selective process is that he was attempting to cover up the circumstances surrounding the input that he made into the decision of whom to lay off and whom to retain and the reason for the cover up was due to the fact that he gave a lower evaluation of Diaz' work performance (than merited by Diaz' actual endeavors and abilities) in his discussion with Luce due to his animosity toward Diaz because the latter had spoken out about overtime pay.

I find that the criteria for lay off was as Luce described it but Respondent has failed to prove that such a criteria was applied in a nondiscriminatory manner in the case of Diaz[1] layoff. Their principal argument is that they had a legitimate business reason to lay off Diaz and it was that they chose to lay off temporary employees and he was laid off because he fell into that category. If Respondent had proceeded to prove that by applying the criteria of matching the retained workers with the jobs to be done that Diaz would have been laid off, then in essence they would have proved that Diaz would have been laid off regardless of his concerted activities. For example, Jose Solano was also a windrow

operator who had started to work at Respondent's in October 1931 at the same time as Diaz. In October 1982 Respondent laid off Diaz but not Solano. In February 1983, Solano, Who worked through the winter for Respondent, returned to work operating a windrow machine and later two additional windrow operators joined the Preece crew while Diaz continued on lay off. Respondent's general foreman testified that the criteria used for such lay off and recall decisions was matching abilities with the work to be done. However, Respondent did not provide any details about how this criteria was implemented in respect to differentiating Diaz from any other employee, including Solano[11/] but rather argued that the criteria was permanent versus temporary status. So we are left with the state of the record, which indicates that Luce, in applying the criteria of matching workers with jobs, based his decision in respect to laying off Diaz on input from Preece which included information purposely distorted by Preece due to Diaz's querying Preece about overtime pay.

Respondent further argues that General Counsel has failed to prove that Diaz ever made a statement to Preece about back overtime pay. The major aspect of Respondent's argument in this respect is that Diaz was not a reliable witness because he lied, and on the other hand, Preece was a reliable witness because he told the truth. I find the situation to be just the opposite.

Respondent has accused Diaz of lying on two occasions. One

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11. There was some evidence that Preece had no say so in respect to who operated the windrow machines after Diaz was laid off as they were sent over to him from Garcia's crew but it still does not explain why Diaz was laid off while other employees were retained.

was that he lied in making out his overtime claim with the Labor Commissioner when he checked "no" in response to the question "Have you asked for your wages?". Secondly he lied when he made out his job application at Respondent's when he failed to mention his employment at the Wiest Ranch.

Respondent's arguments in this respect clearly lack validity. Respondent argues that Diaz testified that he had asked Preece for his overtime wages and-therefore his checking "no" on the claim form was inconsistent with such testimony. First the question on the form was not "Have you asked for overtime wages" but just "wages". It is true that Diaz was making a claim for overtime wages and so the question could be interpreted as an inquiry whether he had requested the wages for which he was filing a claim. But it is still a question that could be interpreted both ways. Secondly, there is a question whether Diaz' inquiry about the reasons Respondent had not paid the correct overtime can reasonably be interpreted to mean a request for payment. It could also be interpreted to mean either a request for payment or a request for an explanation. Finally, what reason would Diaz have to purposely check "no" to that question if by chance he thought the truthful answer should by "yes"? I fail to see one, nor has Respondent in its argument provided one. Accordingly, I conclude that there is no reasonable basis to assume that Diaz lied when he checked "no" in response to the question "Have you asked for your wages" on the claim form.

In respect to the question of whether Diaz lied in not filling in information about his employment with Wiest on the job

application form, Respondent argues that Diaz worked for Wiest until July 1981 (based only on Preece's testimony) and in his job application he listed employment at another employer during the months proceeding and including July 1981 and, therefore, according to Respondent's argument, he purposely withheld information about his Wiest employment from Respondent because of his having been discharged for drunkenness on the job.

One of the two defects in this argument is that the entire evidence with the exception of one statement by Preece, was that Diaz was discharged at Wiest's in the summer of 1980 not 1981. So the information he filled in on the job application about the identity of his employer in 1981 was accurate. It is interesting to note that not only did Diaz testify to having left Wiest in 1980, but that his testimony was indirectly corroborated by Preece's own testimony. Preece testified that he had delivered a check for overtime pay in compliance with an agreement with the Labor Commissioner to Gabriel Diaz at his residence, and Diaz testified that he had not received the check until after the had left Wiest's employ. Also the fact that Preece delivered the check to Diaz' residence would indicate that Diaz was no longer in Wiest's employ.

The second defect is that the most likely explanation for Diaz not to go back further than 1980 in his work history and include his experience at Wiest's was because he knew that Preece was working as a foreman at Respondent's and would in all probability provide Respondent with the details of Diaz' work

history at Wiest's.[12/] Moreover, when Luce interview Diaz for employment at Respondent's, Diaz informed him that he had worked at Wiest's under Preece. So it is very difficult to infer that Diaz intended to conceal such employment when he made out his application form. It is true that Diaz did not testify that the reason he failed to include his Wiest employment in his job application form was because he knew that Preece was working at Respondent's and would in all probability provide information about his work history at Wiest's and, in fact, in reply to Respondent's attorney's question of why he failed to include the fact of his employ with Wiest in his job application form, he replied that he and his wife had filled out the form and he did not know why he had not listed the name of his former employer and foremen e.g., Wiest and Preece, but that "it had just escaped them". However, the- inflection in Respondent's attorney's voice in asking the question implied that Diaz was guilty of some "dark deed" in omitting such imformation and in his nervousness Diaz did not think of the logical reason and answered in such a manner. In my judgment of Diaz' demeanor, I noticed that he was nervous throughout his testimony but that he made a sincere effort to remember and recount all the facts of the case as accurately as possible. On the other hand, Preece did not impress me as a reliable witness. At first he denied any knowledge of delivering the overtime check to Diaz in 1980 and then later admitted it. He also testified that the corral work ended

12. Both Diaz and Preece, himself, testified that Diaz knew before he applied for work at Respondent's that he knew Preece was working as a foreman there.

completely by October 1982 so there was no extra work to keep his crew members occupied during the winter months as had occurred the previous year. However, the testimony of Luce and owner Dessert indicated that the work continued at the former cattle ranches, although in a diminished degree, and that members of Preece's crew worked there as the work wound down. It is true that in answer to a question put to him by Respondent's attorney that he was not the supervisor for such work, the fact remains that it would be very likely for him to know when members of his crew continued to work there. Of course, the most significant aspect of Preece's testimony in respect to his lack of credibility was his assertion that the only criteria employed in determining the employees to be laid off in October 1982 was permanent versus temporary while at the same time his immediate superior testified that another criteria was utilized.

Respondent also contends that General Counsel failed to establish that Diaz' activity was concerted within the meaning of section 1152 of the Labor Code. Respondent bases his argument on the unreliability of Diaz[1] testimony and therefore, its argument goes, there is insufficient evidence to show that the employees discussed a claim for overtime pay with Diaz and that they authorized him to proceed in its collection on their behalf. Additionally, Respondent relies on an alleged counterdiction between Diaz' testimony and Soto's in that Diaz testified that Soto told him to talk to Preece (or someone) and Soto testified that he told Diaz to go to the Labor Commissioner about the overtime pay claim, that the conversation never took place, or that if it did, neither Soto

nor any other employee made any such authorization of Diaz to act on their behalf.

I discount Respondent's argument because: (1) Diaz testified that Soto told him to talk to Preece or someone about it (Respondent left this word out in quoting Diaz in its brief). (2) The important aspect is that the employees authorized (all of the employees at the first meeting and Soto at the second) Diaz to proceed in general to secure payment of overtime pay as he had done it before so he should know how to go about it again.

Respondent further argues that Diaz did not engage in concerted activity in filing a wage claim. It is true that he just filed it in his name but as a result 173 employees received approximately $12,000 in total in overtime checks. (See General Counsel's Exhibit 2 and Respondent's Exhibits 2 and 3.) Diaz' overtime claim number was 4474 and so were Respondent's letters, the settlement agreement and checks with this number. So it indicates that the settlement of the overtime claim for 173 employees was brought about by Diaz' filing his individual claim. That fact coupled with the testimony regarding the employees' authorization of him to initiate action on an overtime claim infers that in his filing of the claim he was acting in concert with his co-workers.

Accordingly, I find that Gabriel Diaz engaged in concerted activities in August and September 1932 and that Respondent laid off Gabriel Diaz for such concerted activities and in so doing violated Section 1153(a) of the Act.

Respondent contends that the Board's jurisdiction is preempted by Labor Code section 98.6(a). The argument is that the

sole basis of an unfair labor practice in the instant case is the allegation that Respondent discriminated against Diaz for challenging Respondent's practice of paying overtime. Respondent points out that these allegations fall squarely within the scope of Labor Code section 98.6(a):

> No person shall discharge or in any manner discriminate against any employee because such employee has filed a bona fide complaint or claim . . . relating to his rights, which are under the jurisdiction of the Labor Commissioner, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any rights afforded him.

Under section 98.7, the Labor Commissioner must investigate the claim, decide whether to hold a hearing, and decide whether to bring a court action on behalf of the complaining employee, and the court may order "any appropriate relief" including reinstatement and backpay.

Respondent further argues that since sections 93.6 and 98.7 of the Labor Code were passed subsequent to the ALRA, they thereby displaced the ALRA as a remedy for retaliation against the invocation of the labor commission procedures. However, section 1166.3(b) states: "If any other act of the Legislature shall conflict with the provisions of this part, this part shall prevail." This provision coupled with section 1160.9 (which makes ALRB procedures the exclusive method of redressing unfair labor practices) clearly indicates the legislature's intent to provide the ALRB with exclusive jurisdiction over all unfair labor practices in California agricultural employer-employee relations. Respondent further argues that section 1160.9 of the Labor Code would completely vitiate the language of section 98.6 which prohibits

retaliation against an employee for exercising labor code rights for himself or others. Therefore, Respondent argues, to avoid this absurd result, it should be recognized that section 98.6 replaced the unfair labor practice jurisdiction of the ALRA over the activity section 98.6 describes.

Section 1160.9 of the Labor Code only applies to agricultural employer-employee relations in California so section 98.6 of the Labor Code still applies to non-agricultural employees in California and therefore Respondent's argument along these lines is without merit.

In Newport News Shipbuilding and Dry Dock Company (1981) 254 NLRB No. 43, 107 LRRM 1113, Respondent contended that the NLRB lacked jurisdiction as the discrimination was allegedly caused by two employees protesting about safety conditions and OSHA had exclusive jurisdiction over such protests. The Board disagreed with Respondent's contention and gave numerous reasons for the Board to assert jurisdiction in such cases, two of which are present in the instant case: (1) remedies under the labor relations act are broader since it provides in addition to backpay and reinstatement, a notice to be mailed and posted advising employees of the violation and order; and (2) the Board's procedures provide a most expedient mechanism for resolution of the discharge issue (in the instant case, the layoff issue) and the entire industrial relations relationship involved is susceptible of early stabilization.

ORDER

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

SEED COMPANY, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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

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

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

(a) Offer to Gabriel Diaz immediate and full reinstatement to his former or substantially equivalent position and make him whole for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

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

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

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from the beginning of the 1982 season (February 1, 1982) to the date of issuance of this Order.

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

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

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps

Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: June 29, 1984

ARIE SCHOORL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board-) issued a complaint which alleged that we, ARCO SEED COMPANY, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by laying off Gabriel Diaz because he protested that Respondent had incorrectly calculated overtime pay so that we paid less than our employees were entitled to under the laws of the State of California. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge or layoff any employees for engaging in protests over wages or other working conditions.

WE WILL reimburse Gabriel Diaz for all losses of pay and other economic losses he has suffered as a result of our discriminating against him plus interest and in addition offer him immediate and full reinstatement to his former or substantially equivalent position.

ARCO SEED 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, SI Centro, California 92243. The telephone number is (619) 353-2130.