Arvin, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Ranch No. I Inc. ,	)	
	)	
Respondent,	)	Case No. 83-CE-227-D
	)	
and	)	12 ALRB No. 21
	)	
Hector Felix,	)	
	)	
Charging Party.	)	

ERRATUM

In the caption in the above referenced matter the United Farm Workers of America, AFL-CIO, was erroneously named as the Charging Party.

That error is therefore corrected by substituting Hector Felix as the Charging Party. The correction is reflected in the caption on this document.

Dated: December 12, 1986

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RANCH NO . 1, INC. , Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 83-CE-227-D 12 ALRB No. 21

DECISION AND ORDER

On December 19, 1985, Administrative Law Judge (ALJ) James Wolpman issued the attached Decision in this matter. Thereafter, General Counsel timely filed exceptions to the ALJ's Decision with a supporting brief, and Respondent, Ranch No. 1, Inc. (Ranch No. 1 or Respondent) filed a reply brief.

Pursuant to the provisions of Labor Code section 1146[1/] the Agricultural Labor Relations Board (Board) has delegated authority in this matter to a three-member panel.[2/]

The Board has considered the record and the attached Decision in light of the exceptions and -briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ only to the extent consistent herewith. General Counsel excepts to the

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

[2/] The signatures of Board Members in all Board Decisions appear with the signature of the chairperson first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

ALJ's finding that Respondent did not violate Labor Code section 1153(c) or section 1153(a) by its refusal to rehire certain workers. We conclude that the exception has merit.

Hector Felix (Felix) and his wife, Juanita, had worked at Ranch No. 1 during the 1970's. In May 1981, Felix asked Luis Rangel (Rangel), a foreman for Respondent, for work for himself, his wife, and their son, Hector Felix, Jr.[3/] Rangel was able to hire Hector and Juanita Felix for about two weeks of vine tipping. Felix asked for future work and Rangel agreed to leave a message with Felix's in-laws if a work opportunity were to arise. The Felixes left for work in Arizona, but returned when a message was received from Rangel several weeks later. Hector, Juanita, Hector Felix, Jr. and Leticia Melendez (Juanita's sister) were hired as a harvesting group for four weeks in the summer of 1981.

In July 1982, Juanita Felix learned from her parents that Rangel had again called. The three Felixes and Melendez worked again as a harvesting group for three weeks. Felix testified that he told Rangel that he was looking forward to returning the next year.

During the summer of 1982, there had been an increase in union activity at Ranch No. 1. Felix joined the Ranch Committee, attended a negotiation session, and assisted the United Farm Workers of America, AFL-CIO (DFW) representative by making a seniority list of workers at Ranch No. 1. Felix testified that

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[3/] Hector Felix knew Rangel as they had been active together in the UFW several years earlier.

a conversation with Rangel regarding union negotiations. Rangel told him: " . . . Mr. Beretta said he'll never sign a contract." Felix responded, "I'm going to fight until we have a contract at this company." Felix testified that after this discussion Rangel " . . . never talked to me again, never." Rangel denied seeing Felix organizing or making a list for the Union and stated that he did not discuss negotiations with him.

Rangel testified that in the last week of the 1982 harvest an irrigation hose was vandalized in a row in which the Felix group had worked. Both Rangel and his wife testified that Juan Trevino, a Union representative in the crew, told them that Felix had cut the hose. Rangel in turn told Bruce Beretta, the general manager of Ranch No. 1, about the incident.

Beretta testified that Rangel told him about the cut hose during the last day of the harvest and that Rangel had been told that Felix was responsible. Rangel told Beretta that he did not believe his informant would come forth or sign a statement. Beretta testified that he went to the site and saw that one row had been cut. He said that although he believed Felix had cut the hose, he "didn't have enough hard evidence..." to justify discipline.

Trevino testified that he never saw Felix cut a drip hose and that he never told either of the Rangels that he had seen such an incident. Trevino further stated that during the 1983 harvest Rangel had told him that he was not going to give any more work to Felix.

On April 2, 1982, the Felixes returned to Arvin. The

next day Felix asked Rangel for work and Rangel replied "I'll let you know." Felix testified that he again requested work on April 6, 10, and 15. Rangel's crew had begun tipping vines on April 4.

Respondent's practice is to hire first from a preferential list of those workers who had worked in the same operation the previous season.[4/] After the list is exhausted a foreman will next seek workers with prior experience at Ranch No. 1. Hiring was complicated by the settlement of a pending unfair labor practice'complaint (82-CE-128-D) which required preferential hiring of 84 employees. Rangel testified that, after Felix asked him for work, he relayed the request to Beretta. Rangel stated:

> . . . he told me no. He said there was no work for [Felix]. Perhaps he was angry because of what he had done in the previous year.

Rangel said that he asked Beretta because he thought he might lose his own job if he hired Felix. Beretta confirmed that Rangel had asked him about hiring Felix, but stated that he said no because "we weren't hiring that day."

The names of the Felix group were on the preferential hiring list for the ensuing summer harvest. Rangel testified that he called Felix's father-in-law and was told that the Felixes were in Arizona. Both of Juanita Felix's parents testified that they received no such call in 1983.

[4/] The Felixes had not worked in the tipping operation in 1982.

On all major points, the testimony of Rangel clashes with the testimony adduced from witnesses called by the General Counsel The ALJ stated:

> I do not believe him (Rangel) to be a credible witness.. . . [H]is obfsucation about what is, after all, a minor point leaves the overall impression that he was looking for a way out, for a technicality to justify his conduct. This, taken together with his demeanor, which I found to be guarded and unconvincing, leads me to doubt his candor....' therefore find that Rangel's account is not to be trusted and that no such call was made.

In addition to finding that Rangel made no phone call in 1983 to Hector's in-laws, the ALJ found that Rangel was well aware of Felix's union activities and that he did discuss pending negotiations with Felix during 1982.

To the extent that an ALJ's credibility resolutions are based on demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24, Standard Dry Wall Products, Inc. (1950) 91 NLRB 544 [26 LRRM 15313. Our review of the record herein, outlined above, indicates that the ALJ's credibility resolutions are supported by the record as a whole.

We affirm the ALJ's findings and conclusion that the General Counsel established a prima facie case of discriminatory failure to rehire.[5/] Felix participated in union activity during the 1982 harvest and his activities were known to his foreman

[5/]The ALJ set forth the relevant legal principles which guide our analysis of this case (ALJD pp. 17-18).

(Rangel) and/or Respondent's general manager (Beretta). A causal connection between Felix's union activity and the failure to recall him for work is evidenced by several factors: Felix's unsuccessful attempt to obtain reemployment in his first contact with Respondent since his union activity; Rangel's reaction to Felix's comments about obtaining a union contract; the deviation from the Company's normal hiring procedures; and Rangel's false statement that he had attempted to contact the Felixes for the summer harvest. Finally, as the ALJ noted, the belated introduction of a new justification is yet another factor suggesting the existence of a concealed and improper motive.[6/] (S. Kuramura, Inc. (1977) 3 ALRB No. 49, pp. 12-13.)

We also affirm the ALJ's finding that the Felixes made proper application for work at a time when work was available. Thus, the General Counsel established a prima facie case of discriminatory failure to rehire the three Felixes for the spring,

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[6/] The General Counsel objected to the testimony regarding the cut hose on the basis that this defense was a surprise and had not been asserted during the investigation of the charge or at the prehearing conference. The record of the prehearing conference reflects no mention of the cut hose defense. Respondent indicated that defenses would include: (1) preferential hiring which resulted from an earlier complaint settlement, (2) no allegations of other union activists being discriminated against and, (3) that by leaving a message with his in-laws Respondent had offered Felix work in the summer harvest.

To insure fairness to litigants and to prevent "trial by surprise" we have long required that issues and positions of the parties be set forth at a prehearing conference to be held no later than the first day of the hearing. (Giumarra Vineyards Corporation (1977) 3 ALRB No. 21, Cal. Admin. Code, tit. 8, § 20249, subd. (c) (1).) The inference drawn by the ALJ, that the "belated introduction of a new justification is yet another factor suggesting the existence of a concealed and improper motive," is appropriate.

1983, tipping operation and discriminatory failure to recall the three Felixes and Leticia Melendez for the summer, 1983, harvest.[7/]

Respondent contends that Felix's union activities were not the true motivation for the failure to rehire. Respondent asserts two business justifications as the real motives for the disciplinary action taken: a settlement agreement and a belief that Felix engaged in certain misconduct.

Once the General Counsel has established a prima facie case that Respondent was acting on the basis of an unlawful motive, the burden of proof shifts to the employer. A violation of the Act will be found unless the employer proves by a preponderance of the evidence that it would have taken the adverse action even in the absence of the employee's protected activity. (Royal Packing Co. (1982) 8 ALRB No. 74.) We find that Respondent has failed to meet its burden.

We agree with the ALJ, that the first explanation offered by Respondent -- the need to hold positions open for workers entitled to preference under the settlement agreement -- lacks merit because it leaves unexplained the hiring of other employees who lacked preferential rights. Additionally, this justification does not address the failure to recall the Felixes for the July harvest.

The ALJ found Respondent's belated second justification, based on a "true belief" of serious misconduct by Felix, to be more persuasive. We disagree.

[7/] As the ALJ noted, Melendez had not been included in Felix's prior request for spring tipping work.

Our review of the record reveals that Respondent failed to prove that Rangel held such a belief, let alone that he relied on it in order to justify his actions. Rangel testified that he formed his belief that Felix cut the hose based on information from Trevino. While Rangel's wife supported his account, Trevino denied implicating Felix. Felix denied involvement in the vandalism. The ALJ found Rangel to be an unreliable and untrustworthy witness. Testimony of a witness found to be unreliable as to one issue may be disregarded as to other issues. (San Clemente Ranch, Ltd. (1982) 8 ALRB No. 50.) We affirm the ALJ's conclusion that the record does not establish that Trevino implicated Felix or that Felix cut the hose. In view of Rangel's apparent lack of veracity, we are not persuaded by what amounts to a mere belated assertion of a belief of wrongdoing.[8/]

Even assuming, arguendo, that the belief existed, Respondent fails to show reliance on the belief in denying rehire. Beretta testified that he took no action against Felix because he did not have enough evidence to justify discipline. The harvest hiring list, prepared in part by Beretta, contained Felix's name. He testified that he had even inquired as to Felix's absence from the summer harvest.

Also absent from Rangel's testimony is any indication that he relied on Felix's supposed wrongdoing when deciding not

[8/] Rangel offered no other factual basis for the belief and the ALJ relates no underlying factual basis for his finding that Rangel held such a belief. Additionally, the ALJ does not state why Rangel's credibility has been restored for this facet of his testimony.

to rehire him. He says nothing of feeling betrayed or angry at Felix over the hose cutting.[9/] Rangel testified that he did not hire Felix because he thought Beretta was angry at Felix. Further, he was denied permission the one time he asked if he could hire Felix. The reason Rangel gave to Felix for not rehiring him was that no jobs were available. As for the summer harvest, Rangel gave no reason for failing to recall Felix but instead appears to have falsely claimed that he called Felix's in-laws with a message.

Respondent failed to establish that Rangel denied Felix reemployment because of a true belief of wrongdoing. Accordingly, Respondent has failed to meet its burden of proving by a preponderance of the evidence that the alleged discriminatees would have been denied rehire or recall even in the absence of Felix's participation in protected activities. We conclude that Respondent violated 1153(c) and (a) by its failure to rehire Hector Felix, Juanita Felix, Hector Felix, Jr., and Leticia Melendez.[10/]

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[9/] The ALJ inferred a strong sense of personal betrayal and anger by Rangel toward his former friend, Felix. As stated, Rangel's testimony provides little support for this conclusion. In fact, Rangel's action of going to Beretta and asking if he could hire Felix for the spring tipping undercuts the ALJ's reasoning. Additionally we note that Rangel never mentioned the cut hose to Felix.

[10/] In view of our conclusion that Respondent's failure to rehire violated section 1153(c) of the Act, we find it unnecessary to rule on the alternate grounds of liability – an independent 1153(a) violation – and the "honest belief" line of cases cited by the ALJ.

ORDER

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

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO, or any labor organization by unlawfully failing to rehire, recall, refusing to employ, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized by section 1153(c) of the Act.

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

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

(a) Offer to Hector Felix, Juanita Felix, Hector Felix, Jr., and Leticia Melendez immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Hector Felix, Juanita Felix and Hector Felix, Jr. for all losses of pay and other economic losses they have suffered as a result of failure to rehire for spring, 1983, tipping and make whole Hector Felix, Juanita Felix, Hector Felix, Jr., and Leticia Melendez for all losses of pay and other

economic losses they have suffered as a result of failure to rehire for the summer, 1983 harvest, and thereafter, such amounts to be computed in accordance with established Board precedents plus interest thereon computed in accordance with the decision in Lu-Btte Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll and 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 period and the amounts of backpay due under the terms of this Order.

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from April 2, 1983, until April 2, 1984.

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

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

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

Dated: October 31, 1986

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board 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 failing to rehire four workers because of the union activities of one of them.

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 reimburse Hector Felix, Juanita Felix, Hector Felix, Jr. and Leticia Melendez for all losses of pay and other economic losses they have suffered as a result of our unlawful refusal to employ them from April 1983 through the summer harvest of that year, plus interest, and in addition offer them immediate and full reinstatement to their former or substantially equivalent positions.

Dated: RANCH NO. 1, INC.

By: _____
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Ranch No. 1, Inc. (UFW)

12 ALRB No. 21
Case No. 83-CE-227-D

ALJ Decision

The ALJ concluded that Respondent had not violated the Act by its failure to rehire a union activist and members of his family. The ALJ determined that the General Counsel had established a prima facie case of a violation of section 1153(c). However, the ALJ found that Respondent, by establishing that a supervisor had based his actions on a belief of wrongdoing by the union activist, rebutted the prima facie case. The ALJ proceeded to analyze the case for a possible "independent" violation of 1153(a). He determined that one of the major elements of an independent section 1153(a) violation - a close relationship between the alleged wrongdoing and the protected activity of the discriminatee - was lacking. The ALJ dismissed the complaint in its entirety.

Board Decision

The Board affirmed the ALJ's finding that the General Counsel had established a prima facie case of a violation of section 1153(c). However, the Board was not persuaded that Respondent had met its burden of establishing that the alleged discriminatees would have been denied rehire even in the absence of participation in protected activities. The timing of the failure to rehire, the belated nature of the belief-of-wrongdoing defense, and the testimony of Respondent's primary witnesses were all factors cited by the Board in overturning the ALJ and finding a violation of section 1153(c) of the Act.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case No. 83-CE-227-D
RANCH NO. 1, INC.,	
Respondent,	
and	
HECTOR FELIX,	
Charging Party,	

Appearances:

Susan Adams
El Centro, California
for General Counsel

Laurie A. Laws-Coats
Phoenix, Arizona Marc
D. Roberts Fresno,
California for
Respondent

Before: JAMES WOLPMAN
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN, Administrative Law Judge: This case was heard by me in Bakersfield, California on June 18, 19 & 20, 1985. It arose out of charges filed by Hector Felix claiming that he and his family had been discriminated against by Ranch No. 1, Inc. because of his union activities. (G.C. Ex 1-A.)

A complaint issued May 6, 1985, and was amended June 7, 1985. (G.C. Ex. 1-B.) In its final form, it alleges that in April 1983 and thereafter, Respondent refused to rehire or recall Hector, his wife, Juanita, and his son Hector, Jr., because of Hector's union activities. It also alleges that his sister-in-law, Leticia Melendez, was twice refused recall in July 1983, because of Hector's union activities. Respondent answered the original complaint, denying any violation and setting forth several affirmative defenses. (G.C. Ex. 1-C.) At the hearing respondent's counsel was advised that, pursuant to section 20230 of the Regulations, the new allegations of the Amended Complaint were deemed denied. (I:3.)

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is an agricultural employer. The named discriminatees are all agricultural employees. The instant charge was filed and served in a timely manner. (See Transcript of Prehearing Conference, page 1.)

The United Farm Workers of America, AFL-CIO ("UFW") is a labor organization and, since January 3, 1979, has been the collective bargaining representative of Respondent's agricultural employees. (5 ALRB No. 1.)

II. BACKGROUND

A. Respondent's Operation

Ranch No. 1 is a farming operation of substantial size which grows and harvests grapes in the vicinity of Arvin, California. The annual work cycle begins in January when vines are pruned and tied; then, as they bud in late March or early April, suckering begins; followed in April or May by various forms of thinning -- or "tipping" as it is termed --an operation which extends into early June. The harvest itself starts around July 4th and lasts a month or so.

The size of the work complement varies from operation to operation and, within each operation, fluctuates with the weather and the amount of work on hand. All totaled Ranch No. 1, employs about a thousand workers each year. (II:34.)

Overall supervision is the responsibility of General Manager Bruce Baretta. (II:32.) Working under him are a number of supervisors and managerial employees. Below them are the crew foremen.

B. Hiring Procedures

Actual hiring is done by the crew foremen.[1] (II:33-

[1]Supervisors will at times recommend workers to their foremen and occasionally workers will go directly to the office to seek work. (II:34, 55.)

34.) The system works this way: Shortly before an operation is to begin, General Manager Baretta meets with another managerial employee (Gary Ogilvie) to determine the number of employees needed, whether a preferential list will be used in hiring, and, if so, the scope of the list. (II:38, 61.) In most instances the list will consist of those who worked the same operation during the preceding season. (II:3, 60.)

A few days before work is to begin, Baretta and Ogilvie meet with their foremen, provided them with lists, and set an limit on the number of workers each can hire. (II:34.) The limit is flexible. According to Baretta, "[A]s long as he is within 3, 4, 5 of that I don't bother." (II:61.) Should a foreman exhaust his list without obtaining a full complement of employees, he may hire as he sees fit. (II:3.) Normally, he will begin by looking for workers who are not on the list, but who have had prior experience at Ranch No. 1. (II:60.) Failing that, he will seek out other experienced workers. (II:9, 38, 60.)

The crew foreman involved in this case, Luis Rangel, explained that the need for experience varies from job to job: None is required for suckering, some is helpful in thinning, and during harvest, the packers, at least, should be experienced. (II:9-10.) Family members frequently work side by side in a crew. (II:84.)

Overall, the system is a flexible one. Seniority and

experience are taken into account, but they are loosely applied. (II:33.)

C. The Status of the UFW at Ranch No. 1

There have been two union certification elections at Ranch No, 1. (I:65.) Both involved the UFW. The first was held in 1975, but was- later invalidated by the Board. (I:65.) The second, held in August 1977, was won by the union and resulted in its the eventual Certification on January 3, 1979 (5 ALRB No. 1).

The Respondent sought to test the certification by refusing to bargain. (6 ALRB No. 37.) Its challenge was rejected by the Board and appealed into the courts. It was not until June 1982, after the California Supreme Court denied Respondent's Petition for Hearing, that negotiations began.[2] (II:39.)

During the period in which the instant violations were alleged to have occurred, negotiations were continuing without agreement being reached. (II:39.) There was, however, a provisional understanding that the Respondent would continue to abide by the existing hiring procedure. (II:34,42.)

III. THE WORK HISTORY AND UNION ACTIVITIES OF HECTOR FELIX AND HIS FAMILY

A. Prior to 1981

Hector Felix and his wife both worked, off and on, at Ranch No. 1 during the 1970's. (I:9,55.) In 1973, while working

[2]See Attachment A to General Counsel's Brief; administrative notice thereof is taken pursuant to the understanding stated at I:65.

as a foreman, Hector and his crew went out on strike. (I:56, 75.) In 1975, during the first UFW election, he was active in securing authorization cards for the Union; in 1977 he was likewise active in the second election campaign. (I:75-77.)

Away from the job, he served as a delegate to the 1973 UFW Convention and participated in 1976 grape boycott. (I:77; 11:73.) In 1977 he was a strike captain. (I:72.) That year he also served as a guard for Cesar Chavez during trips to Mexicali, Los Angeles and San Francisco, and he received training at the Union's La Paz headquarters. (I:72-73.)

He and Luis Rangel were friends. (I:101.) Both had participated in strikes during 1973, and both had attended the 1973 UFW Convention. (II:73.) Later on—in the early 1980's -- Rangel became a foreman at Ranch No. 1 (II:67), and it was he who rehired Hector and his wife in 1981, when they returned from New .Mexico looking for work. Because of their earlier friendship and later contacts, Rangel was aware of most, if not all, of Hector's pre-1978 union activities.[3]

B. 1981

In January 1981, the Felixes found work with a labor contractor in the Arvin area. They worked until mid-February, and then moved to Demming, New Mexico. In May they returned to Arvin, and Hector learned from an acquaintance that Rangel was looking for workers for his crew. (I:11, 56.) He went to the

[3]There is no indication that Juanita Felix or her sister Leticia Melendez were involved in any of these activities.

foreman's home and asked for work for himself, his wife and his 14 year old son.[4] Because there were just two openings, only Hector and his wife were hired. (I:57.) They worked for approximately two weeks tipping and deleafing. (Resp. Ex 9.) When they finished, Hector asked Rangel for work, during the harvest. (I:57.) The two agreed that if work were available Rangel would telephone Hector's in-laws, Martha and Tomas Medina, with whom he would keep in touch. (I:57.) He and his family then left to work in Arizona. (I:57-58.) Three or four weeks later they learned from the Medinas that Rangel had called with a job offer. (I:58.) They immediately returned to California where they stayed with the Medinas, and Hector went to see Rangel. (I:13, 58.) This time he asked for work for himself, his wife, his son, and his sister-in-law;[5] (I:58) Rangel said that would be fine because he needed a "group".[6] (1:58.) All four were hired.[7] (I:39.)

The harvest lasted a four weeks. (Resp. Ex 9.) The Felixes then found another month's work in Lament, California;

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[4]Rangel's denial that Hector ever asked for work for other members *of* his family is dealt with at pp. 15-16, infra.

[5]See footnote 4 supra.

[6]Grape harvest crews are divided into groups which vary in size from 3 to 5. (II:62.) Generally, three people will pick and the fourth will pack. (I:10-11, 47-48, 59.)

[7]Leticia Melendez' name does not appear on the 1981 payroll; however, I accept her testimony and that of the Felixes that she did work that year in their four member group. (I:50.)

and, after that, returned to their home in New Mexico where they stayed a short while, and then went on to Arizona to work for a grower named Macaroli from November 1981 until mid-January 1982. (I:33-35.)

Throughout 1981, the UFW's certification was tied up in the courts, and there appears to have been little or no union activity at the Ranch. (I:100.)

C. 1982

Work History. After completing work for Macaroli in mid-January, the Felixes returned to their home in New Mexico, hoping to hear from Rangel. (I:34-35.) They waited until March and then accepted employment with Macaroli in Arizona. (I:35.) Finally, in July, Mrs. Felix learned from her parents that Rangel had just called to say that harvest work was available. (I:36.)

The Felixes returned to Arvin at once, and shortly thereafter, Hector, his wife, his son, and his sister-in-law began working as a group in Rangel's harvest crew. (I:13-14,59.) The harvest lasted 3 weeks. (Resp. Ex 9.) When it ended, Hector told Rangel that, "I was looking forward to coming back the next year to pick." (I:99.)

The family then returned to New Mexico where they stayed until November, and then travelled to Arizona to work the balance of the year for Macaroli. (I:37.)

Union activities. 1982 saw a resumption of union activity at the ranch. Respondent's Petition for Hearing in the California Supreme Court was denied on May 26, 1982, and

bargaining began June 23rd. (Attachment A to G.c. Brief; Resp. Ex 2.)

Hector became a member of the Ranch Committee. (G.C. Ex 2.) The UFW Representative at the time was David Villarino. (I:63.) Hector had known Villarino in 1977, when both had served as guards for Cesar Chavez. (I:71.) Hector agreed to help him to obtain seniority information for use in negotiations. (I:61.) During lunch breaks, he approached crew members (I:80-81), including Rangel's wife, with some sort of list for them to sign.[8] Rangel was eating lunch with her at the time and so was aware of what Hector was doing.[9] (I:61.)

On another occasion -- about half way through the harvest -- Hector testified that he was handing out union leaflets to workers as they passed in their vehicles. (I:62.) A truck driven by Rangel, carrying workers, came by but was travelling too fast for Hector to get closer than 15 feet. (I:62.) Rangel's testimony on this point not very clear, but he seems to deny being aware of Hector's involvement in the leafletting. (I:74.)

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[8]Hector's confusion over the information he was asked to gather does not persuade me that he fabricated his involvement. (I:95, 97.) What is more likely is that, by the time he testified, he had forgotten the details of his instructions from Villarino. Much the same can be said of Filimon Bedolla's confusion over the document presented to him by Respondent's counsel. (III:32; Resp. Ex. 12.) I am therefore satisfied that Hector did circulate a seniority questionnaire among his fellow crew members.

[9]For the reasons explained in Section III(E), infra, I do not accept Rangel's claim that he was unaware of Hector's activities.

Hector also testified to a conversation with Rangel during the harvest:

> We met. I said, "Luis," I still wasn't aware of anything, "I wonder how the negotiations between the union and the company are going on or going along?" And he said, "Oh shit, Mr. Beretta said that he'll never sign a contract." Then I told him, "Mr. Beretta is not the one to decide." I said, "Here, we will win an election. The ALRB certified it. I know that it is being negotiated. This is now a decision of the ALRB not Mr. Beretta nor of the union. This is a legal matter.," And I said, "The company is not going to take this away very easily. It should last ten, fifteen, twenty years, but I'm going to fight until we have a contract at this company." And he said, "Well, *I* don't believe it," and he turn around and left." (I:64.)

After that, according to Hector, Rangel never spoke to him again. (I:66.) Rangel denied that the conversation occurred. (II:80.)[10]

Shortly after the harvest had ended, Hector, in the company of two other members of the Ranch Committee, attended one negotiating session as an observer. (Resp. Ex. 3; I:87-89.)

There is no indication that any other member of Hector's family was involved in Union activities during this period.

The cutting of the irrigation hose. Grape vines at the ranch are irrigated by means of a drip system made up of hoses running along each row. (II:51.) At the end of the 1982 harvest, Rangel learned that a 20 to 30 foot segment of hose in a row harvested by the Felix group had been cut intermittently with

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[10]I likewise do not accept this denial. (See section III(E), infra.)

clippers. (11:57-58, 75-76.)

Rangel and his wife both claimed that another worker -- Juan Trevino —- told them at the time that Hector was responsible. (II:76; III:9-10.) Trevino denied it. (III:17-18:) Rangel informed Baretta of what had occurred and of his belief that Hector was the culprit. Baretta was angry about the vandalism, but felt that Hector's involvement could not be proven. (II:53.)

It is not possible, on this record, to determine whether Hector cut the hose or whether Trevino implicated him. What is clear, however, is that Rangel and Baretta both believed Hector to be guilty of sabotaging the irrigation system. It is that belief which must be taken into account in judging their later conduct.

D. 1983

The family's unsuccessful attempts to obtain work at the Ranch in the Spring. After finishing work with Macaroli in December, the Felixes returned to their home in New Mexico and stayed until March 1983, when work again became available at the Macaroli ranch in Arizona. (I:37.) They worked there for a few weeks, but then the ranch was sold. (I:38.) Without the company housing which Macaroli had provided (I:38), it was no longer was worthwhile for them to stay, and so they left for California where wages are generally higher. (I:58.)

They arrived in Arvin on April 2nd (I:38); on the following day (Easter Sunday) Hector went to Rangel's home to ask

for work. Rangel said he would Let him know. (I:67.) On April 6, Hector and his wife went to the Ranch No. 1 office to inquire about work, but were told to contact Rangel. (I:19-20; Resp. Ex. 4.) That afternoon Hector again went to the foreman's home, but was told that Baretta had not yet authorized any hirings. (I:69.) Hector returned on the 10th and again on the 15th.[11] On each occasion, he was told that Rangel had not yet received hiring authorization. (I:69-70.)

Rangel's crew had begun tipping on April 4. (Resp. Ex 4.) A few days before that, he had been given a preferential hiring list made up of workers who had been employed during the week ending May 30th of the previous year (II:70; Resp. Ex. 7).[12] A comparison of that list with the payroll records for the week ending April 10 (Resp. Ex. 5) -– the first week of the 1983 operation –- discloses that a number of workers whose names were not on the list were hired during that week, some as late as April 6th.[13]

The preferential list was confined to one week of the previous season. (Resp. Ex. 7.) But even if one goes beyond that week and compares the payroll records for the entire April-

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[11]After April 6, Hector, believing that he was being discriminated against, began keeping a record of his efforts to obtain work. (I:85-87.) His unfair labor practice charge was filed and served April 10. (G.C. Ex 1-C.)

[12]None of the Felixes appeared on that list because they had not worked in the 1982 tipping operation.

[13]Entries on the payroll sheets are not necessarily in chronological order. The manner in which they are to be read is described at II:4-5.

June 1982 operation with the first payroll of 1983 operation, one finds workers who began April 6, without having worked at all during the previous season.

The Respondent correctly points out that hiring in April was complicated by the settlement of a pending ALRB complaint. (Resp. Ex. 1.) The Formal Settlement in Case No. 82-CE-128-D required Ranch No. 1 to give preference to approximately 84 former employees whom had been refused rehired for alleged discriminatory reasons. The settlement was entered into on April 7 and approved 'on April 13. (Resp. Ex. 2; II:18.) Mailgrams informing the 84 of their rehire rights were dispatched April 14, and names from the Settlement began to appear on the payroll on April 19. (Resp. Ex. 5; G.C. Ex. 5.) Of the 84 former employees, no more than 20 sought and obtained reinstatement in Rangel's crew. (II:57.) (G.C. Ex 5; Resp. Ex. 6.) Rangel himself was unaware of the settlement until workers began showing up with their mailgrams. (II:19.) Their rehire did not prevent him from continuing to hire new workers; during the week ending April 23, a number of names appear on the payroll which are to be found neither on the preferential hiring list or on the preferential settlement list.

One other event -- the importance of which will become clear when Rangel's credibility is discussed —- occurred during this period: The Felixes decided to make Arvin their home. (I:67.) On April 20, they moved from the Medinas' where they had been staying, to a new house which they purchased across the

street. (I:71.) Their home in New Mexico was put up for sale. (I:43.)

The failure to hire the Felixes or Leticia Melendez to work in the 1983 Harvest. The Felixes remained in Arvin from April through August. (I:24.) During that time, they were able to find occasional employment for periods of a week or two. (I:24.) Mrs. Felix remained in close contact with her father and mother, speaking with them daily. (I:24.) The Felixes made no further efforts to obtain work at the Ranch; and, according to Juanita, at no time did her father or mother tell her that Rangel had called with an offer of work. (I:23, 70.)

Rangel claimed that he did call. Hector's name, along with his wife's, his son's and his sister-in-law's, appeared on the preferential list for the harvest (Resp. Ex. 8, II:71-72), and Rangel testified that sometime before it began on or about July 14, he telephoned to offer them work and spoke with Hector's father-in-law, Tomas, who told him that Hector was in Arizona. (II:78-79.)[14] Tomas testified that, to the best of his recollection, he had received no such call. (I:106-107.) Martha Medina testified that she was the one who took the calls from Rangel, and there had been only two, both of them prior to the time that the Felixes had moved across the way. (I:111.J[15]

[14]Baretta also testified that, when he inquired after the Felixes during the harvest, Rangel explained that he had called the father-in-law and been told that Hector was in Arizona.

[15]Her testimony would account for the calls for the Harvest of 1981 and for the Harvest of 1982.

In July, Leticia Melendez made an attempt on her own to obtain work for herself and for the Felixes. (I:50.) Her husband Mike has his own trucking operation and was, at the time, hauling for Ranch No. 1. (I:47-48; II:54.) She asked him to see if anything could be done. (I:48.) He telephoned Albert Aragon, a supervisor at the Ranch, and Aragon told him to call Rangel. He did so, and Rangel said that, "[H]e would let us know." (I:48.) After that, Leticia found other work for herself and was unable to say whether anything further came of her husband's efforts. (I:49.)

The Harvest ended without either her or the Felixes returning to work. (Resp. Ex. 5.)

E. Luis Rangel's Credibility.

At each critical juncture, Rangel's testimony is at odds with the testimony and evidence presented by the General Counsel. He denied awareness of any union activity on Hector's part during 1982; he claimed that Hector had never told him that he was seeking work for anyone but himself; he maintained that Juan Trevino had implicated Hector in the hose cutting incident; and he claimed that he had in fact telephoned Hector's in-laws to offer work in the 1983 Harvest.

I do not believe him to be a credible witness. To begin with, he went out of his way to emphasize that Hector had never told him that he was seeking work for anyone but himself. (II:79, 86.) Yet, on each of the three occasions when Hector came to him for work, Rangel hired members of his family. (Resp.

Ex. 9 .) And that was typical; both the testimony and the payroll records reveal that it is commonplace for family members to be hired into the crew. (II:84, and see 11:86; G.C. Exs. 3, 4, and 5 .) Yet, confronted with this, he obfuscated, and his obfuscation about what is, after all, a minor point leaves the overall impression that he was looking for a way out, for a "technicality" to justify his conduct. This, taken together with his demeanor, which I found to be guarded and unconvincing, leads me to doubt his candor.

Of greater significance is his claim to have telephoned Hector's in-laws in July 1983 with an offer of work. By then, the Felixes were living across the street and were in daily contact with the Medinas. I cannot believe that, had Rangel spoken with either Tomas or Martha, he would not have learned this. Furthermore, the Medinas had handled similar calls in the past when the Felixes were out of state and had proven themselves to be quite reliable. Had a call been made, the Medinas surely would have passed the word along. And, in view of the Felixes obvious desire for work, they would certainly have followed up. I therefore find that Rangel's account is not to be trusted and that no such call was made.[16]

A witness whose testimony is disbelieved in one area is to be distrusted in others. (San Clemente Ranch Ltd. (1982) 8

[16]finding is further supported by Juan Trevino's testimony that Rangel told him, "that he was not going to give [Hector] any work." (III:19.) (In 1983, Trevino was employed only during the weeks ending 5/28, 6/4 and 7/16 (Resp. Ex. 5) so the comment would have been made during one of those periods.)

ALRB No. 50, p. 3.) For that reason, I do not accept Rangel's claim that he was unaware of Hector's union activity in 1982. While it is possible that he did not notice Hector handing out leaflets the day he drove hurriedly by, I am persuaded that in the course of gathering seniority information, Hector had an encounter with Rangel's wife while she was eating lunch with her husband. In that respect, I note that, when Mrs. Rangel was called as a witness, she failed to deny that the encounter had occurred. (III:8-11.)

Because I doubt Rangel's overall veracity and because I find Hector's testimony about the incident to be both detailed and convincing, I accept his account of the conversation he had with Rangel during the 1982 Harvest concerning the pending negotiations.

As for the hose cutting incident, I am uncertain whether Rangel or Trevino is to be believed; I do find, however, that -- regardless of whether he got it from Trevino or not -- Rangel was convinced that Hector was the culprit.

IV. ANALYSIS, CONCLUDING FINDINGS AND CONCLUSIONS OF LAW

Labor Code section 1153(c) makes it an unfair labor practice for an agricultural employer "to discriminate in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." In order to establish a prima facie case of unlawful discrimination, the General Counsel must ordinarily prove: (1) that the worker engaged in protected activity, (2)

that the employer knew it, and (3) that a causal relationship or connection exists between the protected activity and adverse treatment suffered by the worker. (Jackson & Perkins Rose Co. (1979) 5 ALRB No. 20.) This last requirement can also be met by proof that the adverse action was due to the protected activity of a member of the worker's family. (C. Mondavi & Sons (1979) 5 ALRB No. 53, pp. 3-4 and ALOD, p. 44; Anton Caratan & Sons (1982) 8 ALRB No. 83.)

Where the adverse action takes the form of a failure or refusal to rehire (see Nishi Greenhouse (1981) 7 ALRB No. 18), there is a fourth requirement: The General Counsel must prove that the worker made a proper application for work at a time when it was available. (Verde Produce Company (1982) 7 ALRB No. 27.) However, in situations where the employer has a practice or policy of contacting former employees to offer them re-employment, this requirement may be satisfied by proof of the employer's failure to do so at a time when work was available. (Kyutoku Nursery, Inc., 8 ALRB No. 98; Mission Packing Company (1982) 8 ALRB No. 47.)

A. Union Activity and Employer Knowledge

I have already found that Hector participated in union activity during the 1982 Harvest: He served as a member of the Ranch Committee; he circulated a seniority questionnaire for the union; he passed out UFW leaflets; and he attended a bargaining session.

Most, if not all, of his activities were known to Crew

Foreman Rangel and/or General Manager Barretta. The foreman also knew – both from their friendship in the 1970's and from the conversation they had had with about prospects for the pending negotiations –- that Hector was a staunch union supporter.

In its brief, Respondent sought to minimize the significance of Hector's Union activities by pointing out that most of them occurred before 1981 and by demonstrating that other workers suffered no adverse action although they served as union representatives, attended more negotiation sessions, and were generally more active than Hector.

The evidence on this point is equivocal. While some of those workers were rehired; some were not, and the reasons why cannot be determined. With others, it is impossible to know what happened, let alone whether it had anything to do with their union activities. Then, too, the finding of a causal connection between a worker's union activity and his or her adverse treatment is not foreclosed by the fact that other union supporters were spared. (Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14, p. 3; George Lucas & Sons (1985) 11 ALRB No. 11, p. 8 .) About all that can be said of Respondent's effort to downplay Hector's union activities is that Rangel knew of those which occurred in the 1970's when he hired Hector in 1981, yet he went ahead with the hiring. That being so, those earlier activities are not likely to have played much of a role later on when he decided not to rehire Hector and his family.

B. The Causal Connection between Union Activity and the Failure to Recall

A number of factors point circumstantially to a link between Hector's union activity and Respondent's failure to rehire him and the members of his family to work during 1983 in the tipping operation and in the harvest.

First of all, there was Rangel's reaction to the comments Hector made in their conversation during the 1982 Harvest about the likelihood of the union obtaining a contract. Following the conversation, Rangel's attitude changed to the point where he ceased speaking to his old friend.

Secondly, there is the element of timing. The first contact Hector had with the Ranch after his union activity and sympathy became apparent occurred when he sought work for himself and his family in the 1983 tipping operation. Rangel's refusal to rehire them to work in that – very next operation for which they applied – is a circumstance which, taken together with others, tends to indicate the existence of an improper motive on the Respondent's part. (See Sahara Packing Company (1978) 4 ALRB No. 40.)

Third, Rangel told Hector on four occasions during April 1983, that he was not authorized to hire additional workers when, in fact, he had hired persons who had no preferential rights and he continued to do so. His false claim coupled with his deviation from normal hiring procedure both point to the existence of undisclosed and impermissible motive. (See Bruce Church, Inc. (1982) 8 ALRB No. 81, ALJD p. 30.)

A similar inference may be drawn from his conduct in July 1983, in failing to follow normal recall procedure by contacting the Felixes (whose names were on the preferential list at the time), and then falsely claiming to have done so.

Finally, there is Respondent's shifting justification for its conduct. At the prehearing conference Respondent sought to rationalize the failure to rehire by pointing to the obligation it had to accord preference to workers involved in the settlement in Case No. 82-CE-128-D. (Tr. of Prehearing, pp. 4-5, 10.) The hose cutting incident did not emerge as an asserted explanation until Barretta testified on the second day of the hearing. (II:51-52.) The belated introduction of a new justification is yet another factor suggesting the existence of a concealed and improper motive. (S. Kuramura, Inc. (1977) 3 ALRB No. 49, pp. 12-13.)

Rangel's failure to rehire or recall Hector necessarily involved him in adverse action against the members of his family. They all worked together as a group, and Hector was their point of contact with management. That being so, if he was discriminated against, so were they. (Mondavi & Sons, supra; Anton Caratan & Sons, supra.)

C. Proper Application and Work Availability

Because the Felixes had not worked in the 1982 tipping operation, their names were not on the preferential hiring list in April 1983.[17] It was therefore incumbent on the

[17]Hector and his wife had last worked in tipping in 1981.

General Counsel to prove that proper application had been made at a time when work was available. Hector's credited testimony that he went to Rangel's home on April 3, 1983 and, "asked if it would be possible that he could place us there with him right from the beginning," and his subsequent requests on April 6, 10 and 15, fully satisfy this burden. His request for work for "us" was enough to put Rangel on notice that he was requesting work for the available members of his family. That would include himself, his wife and his son, but not Leticia Melendez. There is nothing to suggest that she was seeking work at the time, and she had not been included in Hector's 1981 request for tipping work, whereas Hector's son had. Furthermore, Hector Jr. was no longer in school in April 1983, and his parents obviously desired that he work along with them.[8]

Nor can it be argued that no jobs were available at the time of application. Hector's first request on April 4 preceded the hiring on April 6 of a number of workers who were not on the preferential list; this and his three subsequent requests, taken together, amount to continuing request for work at any point in the operation when positions became available. In spite of this, employees who had no preferential rights were hired on April 19 without any attempt to contact the Felixes.

In July, Rangel was working with a preferential hiring

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[18]I do not accept Respondent's contention that he was legally "unavailable" because he had no work permit. There was no showing that, had Rangel offered work, a permit would not have been sought and obtained.

list which included Hector, Juanita, Hector Jr. and Leticia Melendez.[19] His failure to call to offer them positions in his initial crew was contrary to established policy and is enough to satisfy the General Counsel's burden under Kyutoku Nursery, Inc., supra , and Mission Packing Company, supra.[20]

I therefore conclude that General Counsel has established a prima facie case that Hector, Juanita and Hector Jr. were denied rehire during the 1983 tipping operation because of Hector's union activity and that they, along with Leticia Melendez, were not recalled in the 1982 Harvest for the same reason.[21]

D. The Existence of Alternative Motives for the Adverse Action

The determination that the General Counsel has established a prima facie case does not, however, end the inquiry because the Respondent has presented evidence that Rangel and

[19]He also knew that Hector desired work because at the end of the 1982 harvest Hector told him so. (I:99.)

[20]Leticia Melendez's efforts to obtain work for herself and the Felixes by having her husband telephone Aragon and Rangel is inconclusive because she found other work and allowed the matter to drop without getting a definite response.

[21]In reaching this conclusion, I have not relied on the settlement in Case No. 82-CE-128-D as indicative of background animus on Respondent's part based on the NLRB's policy of refusing to consider settlement documents as competent evidence of unlawful conduct or animus. (Poray, Inc. (1963) 143 NLRB 617.) Because the General Counsel did not seek to litigate the conduct which led to the settlement, I need not consider the NLRB policy which makes it, but not the settlement itself, admissible to establish motive or animus. (Northern California District Council of Hod Carriers and Common Laborers (1965) 154 NLRB 1384, fn. 1, enf'd 389 F.2d 721 (9th Cir. 1968.)

Barretta had other, non-discriminatory motives for refusing to rehire and recall the Felixes in the Spring and Summer of 1983.

If those alleged motives were more than simply pretextual, then the case is one of "dual motivation" and the proper legal test is that fashioned by the NLRB in Wright Line, Inc. (1980) 251 NLRB 1083, 1086-89, approved by the Supreme Court in N.L.R.B. v. Transportation Management Company (1983) 462 U.S. 393, and adopted by our Board in Royal Packing Company (1982) 8 ALRB No. 74. Under it, once the General Counsel has carried its burden of proof as to the prima facie case, the burden of production and persuasion shifts to the employer, and a violation will be found, unless the employer proves by a preponderance of the evidence that the adverse action would have been taken even absent the employee's protected activity.

One of the explanations offered by the Respondent -- the need to hold positions open for the workers entitled to preference under the settlement agreement -- has already been considered and found wanting because it leaves unexplained Rangel's conduct -- both before and after learning of the settlement -- in hiring employees who had no preferential rights. Besides, this justification does not explain the failure to recall Hector and his family to work in the harvest when they were entitled to preference.

Respondent's other explanation is of more consequence —- Rangel and Barretta both believed that Hector had deliberately and repeatedly cut an irrigation hose in a row of grape vines at

the conclusion of the 1982 Harvest.

At the time, Barretta decided that without an eyewitness willing to implicate him there was insufficient proof to justify adverse action against Hector, and he so informed Rangel. Because of this, it is difficult to say that Baretta's belief was a motivating factor in his subsequent conduct.

But what of Rangel? He continued to believe Hector to blame, and he must have felt strongly about it. The question, then, is whether he was angry enough to take matters into his own hands and punish Hector and his family for something which he knew could not be proven.

I find that he was and that his belief that Hector had cut the hose was a substantial motivating factor in his denial of work to the Felixes in the tipping operation and in the harvest. Hector had been a friend, and Rangel had given him and his family work when they returned to California in 1981. This would naturally have led to a strong sense of personal betrayal -- and to considerable anger -- when he concluded that Hector had ignored his friendship and considerations, and deliberately destroyed company property while working in his crew. And Rangel, as the prevarications in his sworn testimony attest, was willing to go to considerable length to avenge himself on his former friend.

That his belief could not be proven does not, in itself, render it invalid as a defense. So long as it was his true belief -- and it was -- and so long as it did not depend on

Hector's involvement in protected activity -- and sabotage is not protected -- then Rangel's reliance on it would not constitute a violation of section 1153(c). (See O.P. Murphy Produce Co., Inc. (1981) 7 ALRB No. 37, p. 27.) That being so, the finding of a violation turns on whether Respondent has carried its burden of proof that the foreman would have acted as he did even if Hector had not been involved in union activity.

I conclude that he would have. To begin with, the emergence of sabotage as a motive undercuts, to a considerable extent, the force of General Counsel's prima facie case. It' accounts for the element of timing -- April and July were also Rangel's first opportunities to retaliate for the hose cutting. Then, too, Rangel's false statement to Hector that he was not authorized to hire can as easily be ascribed to the desire to conceal a motive which could not be substantiated as it can to one which is discriminatory. (See: C.J. Maggio (1980) 6 ALRB No. 62, p. 4.) The same is true of his false claim to have called Hector's father-in-law with an offer of work. As for Respondent's shifting explanation, it could just as easily have arisen out of counsel's uneasiness in relying on a belief which could not be proven. As such, it appears to have had more to do with legal strategy than with the reality of the situation.[22]

[22]Given the extent to which Rangel's belief explains away most elements of the prima facie case, it is fair to ask whether enough remains to require the burden shifting called for by the Wright Line test. Suffice it to say that, regardless of the analytical approach chosen, the outcome would be the same: Rangel's belief that Hector had sabotaged an irrigation hose was determinative.

That leaves only one unequivocal link between Hector's union activity and his adverse treatment -- the change in Rangel's attitude toward him after their conversation about union negotiations. When that change in attitude -- plus whatever force is left to the equivocal behavior described above -- is set against the anger and hostility which must have accompanied Rangel's belief that Hector had sabotaged the irrigation system, there can be little doubt that that belief, and not Hector's union activity, was the motivating force behind Rangel's conduct. I, therefore, conclude that, without it, there would have been no refusal to rehire in the Spring of 1983 and no failure to recall in the Summer of 1983.

E. The Possibility of an Independent Section 1153(a) Violation

In analyzing allegations of discriminatory treatment directed at individuals, it is seldom necessary to go beyond the strictures of section 1153(c) to consider the possibility of an independent section 1153(a) violation. In most instances, the 1153(a) allegation in a complaint can be characterized as "derivative", with its outcome entirely determined by the disposition of the 1153(c) allegation. There is, however, a limited set of cases where in 1153(a) violation may be found independently of 1153(c) .

The best known N.L.R.B. v. Burnup S Sims, Inc. (1964) 379 U.S. 21. There an employee was discharged based upon the employer's honest but mistaken belief that he had told a fellow employee whom he was soliciting for union membership that the

union would, if necessary, use dynamite to get in. In finding the discharge illegal, the Court held that:

> [Section] 8(a)(l) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. Id. at 23.

Thus, even without the anti-union motivation normally required under section 8(a)(3),[23] a section 8(a)(l) violation will be found where an employer acts in the mistaken belief that an employee committed a dischargeable offense while engaging in protected activity.[24]

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[23]Even under section 8(a)(3), certain conduct, often characterized as "inherently destructive of important employee rights", may be found discriminatory without proof of anti-union motivation. N.L.R.B. v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 33-34. (Special benefits to non-strikers); N.L.R.B. v. Erie Resistor Corp. (1963) 373 U.S. 221 (superseniority for non-strikers); N.L.R.B. v. Fleetwood Trailer Co. (1967) 389 U.S. 375. But Hector's treatment does not meet this test.

[24]In cases involving strikers who are discharged or refused reinstatement for alleged misconduct during the strike, a more elaborate test, rooted in Burnup & Sims, is applied:

> Where . . . Respondent Employer . . . discharged [an employee] for engaging in misconduct during the course of an economic strike and the misconduct was related to the strike activity, the General Counsel has established a prima facie violation of Section 8(a)(l) of the Act (NLRB v. Burnup & Sims, supra; General Telephone Co. of Michigan, 251 NLRB 737 (1980)), and the burden shifts to Respondent Employer to prove that it discharged [the employee] because of an honest belief that he engaged in strike misconduct sufficiently serious to justify his discharge. If the Respondent Employer fails to establish such an honest belief, the prima facie 8(a)(l) violation established by the General Counsel stands unrebutted . . . . On the other hand, if Respondent Employer establishes such an honest belief, the burden shifts to the General Counsel of proving that [the employee] in fact did not

The present case has two elements which entitle it to a Burnup & Sims type analysis. First of all, although Rangel acted in the honest belief that Hector had destroyed company property, there is a distinct possibility that he was mistaken. Secondly, while not nearly so closely tied together as they were in Burnup & Sims, a relationship does exist between Hector's union activity and the misconduct he was believed to have engaged in: Not only did Rangel think that Hector cut the hose, he also thought that he had done so to protest or retaliate against the Ranch for its failure to come to terms with the UFW. In other words, he viewed the incident as an extension of Hector's other union activities into the arena of union sabotage.

The issue thus arises of whether that is close enough, or whether a more intimate connection must exist between protected activity and alleged misconduct.

The NLRB has been called upon to decide that issue on several occasions. In Loggins Meat Co., Inc. (1973) 206 NLRB

> engage in the alleged misconduct or that the alleged misconduct was not sufficiently serious to place [him] beyond the protection of the Act. Crown Zellerbach Corp. (1983) 266 NLRB 1231, 1237.

(See California Coastal Farms (1980) 6 ALRB No. 25.) Recently, the NLRB broadened its definition of "serious misconduct" (Clear Pine Mouldings (1984) 268 NLRB 1044), and it appears to be in the process of reassessing the "honest belief" requirement (See Corhart Refactories Company (1983) 267 NLRB 1247, and Coca Cola Bottling Company of Buffalo, Inc. (1985) 274 NLRB No. 195.) Because of this and because Hector was not a striker, I shall ignore the General Telephone burden shifting analysis and require the General Counsel to prove each element of the Burnup & Sims test by a preponderance of the evidence. ('See Fayette Manufacturing Co. (1971) 187 NLRB 775, 777.)

303, an employee was discharged in the mistaken belief that she had engaged in a work slowdown. The Board found that her only union activity had occurred 5 months earlier when she passed out authorization cards; other employees had subsequently discussed and rejected the idea of a slowdown, but there was no indication that she was aware of it. On those facts, the Board held that:

> The connection between [the employee's] earlier union activities and Respondent's subsequent belief that she had slowed down in her work is missing. Under Burnup & Sims there must coexist a potential activity and an employer's mistaken belief that the discharged employee had engaged in misconduct 'in the course of that activity'. Id. at 304.

The requirement that the protected activity "coexist" with the alleged misconduct was further explored in General Motors Corporation (1975) 218 NLRB 472. There, two union committeemen were discharged in the mistaken belief that they had instigated an illegal walkout. The Board affirmed the ALJ's conclusion that, although neither was engaged in overt union activity, "in occupying the office of committeeman, Stevens and Towell were engaged in protected concerted activity" which "coexisted" with their alleged misconduct. (Id. at 477.) Finally, in International Packings Corporation (1975) 221 NLRB 479, aff'd 604 F.2d 451 (6th Cir. 1979), the Board affirmed its ALJ's expansion of the coexistence requirement to include situations where, "there is a clear and direct connection between [the employee's] earlier protected activity and Respondent's belief that [later

on, the employee] had engaged in misconduct." (Id. at 484.)[25]

Here the misconduct attributed to Hector occurred while he was working, not while he was engaged in union activity, so there is not the coincidence of activity with misconduct which existed in Burnup & Sims. Yet, because the 1982 Harvest lasted less than four weeks (Resp. Ex. 9) and because Hector was involved in protected activity both before and after the alleged sabotage (supra, pp. 7 - 9), his union activity was not as remote as that in Loggins Meat Co. Still, there was nothing like the "clear and direct connection" between protected activity and alleged misconduct that was present in International Packings, where the discriminatee was alleged to have harassed an employee whose favored treatment she had earlier protested as a contractual violation. Finally, Hector, like the discriminatees in General Motors Corporation, was a committeeman, but the alleged misconduct in General Motors -- the instigation of a walkout -- had a much more direct relationship to the committeeman position than did the sabotage of which Hector was accused.

These distinctions and differences lead me to conclude that Hector's alleged sabotage was not closely enough connected to his protected activity to invoke Burnup & Sims and find an independent section 1153(a) violation. That being so, it is unnecessary to go further and determine whether the General

[25]This may well be dicta because the *ALJ* went on to find Burnup & Sims inapplicable because the Respondent's mistaken belief was one of law, not of fact. (Id. at 484.)

Counsel established, by a preponderance of the evidence, that Hector, "was not, in fact, guilty of that misconduct." (Burnup & Sims, supra, 379 U.S. at 23.)[26]

RECOMMENDED ORDER

Because General Counsel has failed to prove by a preponderance of the evidence that Respondent violated Labor Code section 1153(c) or section 1153(a), as alleged, I recommend that the complaint be dismissed in its entirety.[27]

DATED: December 19, 1985

James Wolfman
Adminstrative Law Judge

[26]That issue, if reached, would turn on whether Hector's denial (I:101) and Barretta's concession that he "didn't have enough hard evidence" (II:53) suffice to exonerate him.

[27]The finding that Rangel deviated from established hiring practice in refusing to rehire or recall the Felixes could conceivably be characterized as a unilateral change in a working condition violative of section 1153(e). However, in D'Arrigo Brothers Company, Inc. (1983) 9 ALRB No. 30, p. 14, the Board refused to apply 1153(e) to the discharge of an individual, presumably on the theory that a deviation from an acknowledged policy does not, in itself, constitute a repudiation of that policy. Nor is the argument for an 1153(e) violation enhanced by the fact that Respondent had agreed with the UFW to abide by existing hiring practice. The ALRB does not enforce contracts, oral, written or implied, unless the breach thereof is also an unfair labor practice." (O.P. Murphy Produce Co., Inc., supra, p. 27. It is possible, I suppose, to argue that the provisional agreement on hiring was part and parcel of the bargaining process such that its repudiation was evidence of bad faith bargaining. However, the problem with such a contention is that the repudiation was not "across the board"; it was confined to one small group and was carried out by a foreman acting independently of, and probably contrary to, the wishes of his superiors who carried on the negotiations.