

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS ' SONS, INC . ,)		
)		
Respondent,)	Case Nos.	83-CE-150-D
)		83-CE-169-D
and)		83-CE-187-D
)		83-CE-207-D ^{1/}
UNITED FARM WORKERS OF)		84-CE-234-D ^{1/}
AMERICA, AFL-CIO,)		
)		
Charging Party.)	12 ALRB No. 24	

DECISION AND ORDER

On June, 21, 1985, Administrative Law Judge (ALJ) Marvin J. Brenner issued the attached Decision in this matter. Thereafter, Respondent, Sam Andrews Sons, Inc., timely filed exceptions to the ALJ's Decision and a brief in support thereof, and General Counsel filed a reply brief.

Pursuant to the provisions of Labor Code 1146^{2/} the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.^{3/}

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

^{1/}On March 19, 1985, the Regional Director dismissed Charge Numbers 83-CE-148-D, 83-CE-236-D, 83-CE-264-D, 83-CE-265-D, 83-CE-318-D, and 84-CE-9-D.

^{2/}All section references herein are to the California Labor Code unless otherwise specified.

^{3/}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. Chairperson James-Massengale did not participate in this proceeding.

has decided to affirm the rulings, findings and conclusions^{4/} of the ALJ as modified and to adopt his proposed Order with modifications.

Respondent operates two large ranches in the Bakersfield area, Santiago and Lakeview. In July 1981, approximately 100-125 workers in all job classifications at both ranches went out on strike. In July 1982, the United Farm Workers of America, AFL-CIO (UFW or Union) made an unconditional offer to return to work on behalf of the strikers. The first irrigators were recalled in May 1983. In June 1983, Respondent recalled a large number of irrigators.^{5/} The unfair labor practices alleged in the instant case arose out of the recall of irrigators in 1983.^{6/}

Respondent takes exception to the ALJ's conclusion that it discriminatorily refused to rehire Juan Beltran in violation of sections 1153(c) and (a) of the Agricultural Labor Relations Act

^{4/}General Counsel alleged that Respondent unlawfully refused to reinstate Martin Godinez, Manuel Perez, and Fernando Franquez to night shift irrigation work because of their union activities. The ALJ concluded that there was no causal connection between the employees' union activities and Respondent's action. He therefore recommended dismissal of this allegation. As no exceptions were filed to the ALJ's findings and conclusions, we hereby adopt them and dismiss this allegation.

The complaint also alleged that Respondent unlawfully refused to rehire Ramon Navarro because of his union activities. The ALJ found this allegation not supported by the evidence as General Counsel failed to show a causal connection between Navarro's union activities and Respondent's failure to recall him. No exceptions were filed to the ALJ's findings and conclusions and we therefore adopt the ALJ's recommendation that this allegation be dismissed.

^{5/}The strikers were rehired pursuant to an order from the Kern County Superior Court.

^{6/}All dates hereinafter refer to 1983.

(ALRA or Act).

Respondent and General Counsel presented contradictory testimony of the operative facts leading to the refusal to rehire Beltran. The ALJ made crucial credibility resolutions in favor of General Counsel witnesses Beltran and Francisco Larios and against Respondent's personnel director Robert Garcia. The ALJ found Garcia's testimony to be either confused or contradictory and found him uncooperative and excessively assertive. In contrast, he found that Larios testified in a straight-forward manner and demonstrated good recollection for the details of the events in question.^{7/} Our review of the record herein indicates that the ALJ's credibility resolutions are well supported by the record as a whole.^{8/} We therefore adopt his findings of facts concerning the events leading up to the failure to rehire Juan Beltran.

Francisco Larios was the president of the UFW's Ranch Committee at Respondent's Bakersfield operations. Since June 10, when Respondent started recalling the irrigators by seniority, Larios and Beltran had several conversations pertaining to the

^{7/}To the extent that credibility resolutions are based upon the the demeanor of witnesses, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Standard Dry Wall Products, Inc. (1950) 91 NLRB 544, 545 [26 LRRM 15373; Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24.]

^{8/}Respondent correctly points out that Juan Beltran's declaration does not mention his conversation with Francisco Larios and states that he received his recall letter on July 1, rather than on June 30, as he testified. We note this omission and inconsistency but nonetheless conclude that the record as a whole supports the ALJ's findings. Beltran's testimony is well corroborated by Francisco Larios as to the crucial events.

recall.^{9/} On June 27, Beltran went to Los Angeles to visit a brother. On June 29, he called Larios to ask whether he had been recalled yet. Beltran asked Larios to notify Robert Garcia that he was available for work if recalled. Larios spoke to Garcia on June 30. Garcia told Larios to tell Beltran to report for work at 6:00 a.m. the following day. Beltran returned from Los Angeles on June 30. He contacted Larios who relayed the message that he was to report for work the next morning. Beltran reported for work at 6:00 a.m. the next morning, July 1. However, Garcia informed him that he would not be rehired as he had reported for work a day late. On July 4, Larios and Beltran both went to speak with Garcia. Larios reminded Garcia of their phone conversation on June 30. Garcia responded that it was Beltran's responsibility to contact him, not Larios'. When Larios stated that he belonged to the Ranch Committee, Garcia responded that "he didn't acknowledge them."

The ALJ found that Respondent discriminatorily refused to rehire Beltran because of Beltran's association with UFW activist

^{9/}In addition to the recall letters sent to the employees, Respondent also sent a letter to the UFW informing it of the strikers who were being recalled and requesting the Union's assistance in contacting those employees so that they could respond to the recall.

Beltran's recall letter instructed him to report for work no later than June 30, at 6:00 a.m. Beltran did not timely receive his recall letter since he had moved from the last address shown on Respondent's personnel records and had not informed Respondent of his current address.

Francisco Larios.^{10/} Larios was a major UFW activist at Sam Andrews. Two previous ALRB cases involved him: Sam Andrews' Sons (1982) 8 ALRB No. 69 and Sam Andrews' Sons (1980) 6 ALRB No. 44. In the 1982 case, Garcia was found to have deliberately blocked Larios¹ rehire. In the instant case, Garcia expressed dissatisfaction that Beltran had chosen to rely on Larios as an intermediary. Garcia testified that none of the other returning strikers had engaged Larios' assistance.

We agree with the ALJ that General Counsel established a prima facie case of discriminatory refusal to rehire by showing that Beltran engaged in protected activity, that Respondent had knowledge of that activity, and that there was a causal relationship between the protected activity and Respondent's refusal to rehire. Respondent's business justification for failing to rehire Beltran is not convincing. It argues that Beltran was refused rehire solely because he reported late for his recall. However, the credited testimony establishes that Garcia gave Beltran a one-day extension and that Beltran reported for work within that period. Garcia's own testimony also establishes that at the time Beltran reported for work, his position had not been filled by another worker.

We conclude that Respondent violated section 1153(c) and (a) of the Act by discriminatorily failing to rehire Juan Beltran,

^{10/}Taking adverse action against an employee because of his or her association with a union activist constitutes unlawful discrimination. (High & Mighty Farms (1980) 6 ALRB No. 34; Champion Parts Rebuilders, Inc. (1982) 260 NLRB 731 [109 LRRM 1220].)

Respondent's argument in its exceptions brief concerning the legitimacy of its recall letter to Beltran is not meritorious as it fails to take into account the one-day extension Garcia granted Beltran.

Respondent also excepts to the ALJ's conclusion that it unlawfully denied rehire to Demetrio Vasquez in June 1983.

Vasquez, an irrigator for Respondent since 1975, joined the 1981 strike and engaged in picketing activity. In addition, he was involved in other protected activity with other Sam Andrews' workers who lived in company housing. These workers were involved in superior court proceedings where the ALRB attempted to block their eviction from company housing by Respondent and to require Respondent to repair or replace the housing.

Vasquez was never sent a notice of recall. Respondent's position was that it had a policy whereby any worker known by it to have been picked up by the Immigration and Naturalization Service (INS) would not be rehired unless such worker could demonstrate proof of legal immigration status. Garcia testified that in a casual conversation with a representative of McKittrick Farms, it was related to him that Vasquez had been living there and had recently been picked up by the INS. Vasquez' name came up during the conversation when the two were talking about housing problems. Garcia testified that prior to this conversation, he had no reason to doubt Vasquez¹ legal immigration status. Having learned that he was not lawfully documented, Garcia did not send Vasquez a notice of recall.

After hearing that other irrigators had been recalled,

Vasquez went to Garcia's office to find out why he had not been recalled. Garcia responded that it was because he was not lawfully documented. Garcia told Vasquez he would rehire him if he could prove his legal status.

The ALJ found that Respondent's undocumented worker policy was enforced very inconsistently. Respondent's own attorney admitted this in her opening statement. The record also established other incidents involving workers who were picked up by the INS and subsequently rehired by Respondent. In addition, Vasquez¹ own employment history shows that he too was previously picked up by the INS and rehired thereafter.

The ALJ expressed doubt as to whether the phone conversation between Garcia and the McKittrick Farms' representative ever occurred. Garcia could not remember who the person was, when the conversation took place, or how it arose. There was no corroborating testimony from anyone from McKittrick Farms. However, even assuming it did take place, the ALJ concluded that the conversation was a pretext for Respondent's failure to recall Vasquez. We agree.

The inconsistent enforcement of the undocumented worker policy as well as the context in which Respondent became aware of Vasquez' undocumented status support the conclusion that the undocumented worker policy was a mere pretext for Respondent's unlawful refusal to rehire. Garcia testified that Vasquez¹ name came up in the context of the housing problems at McKittrick Farms. Respondent was well aware of Vasquez' involvement with the activity related to the housing "problem" on its own premises and

took the opportunity to discriminate against him for his involvement in that matter. Respondent's argument that its undocumented worker policy is consistent with applicable federal immigration policy is not persuasive as we are not passing on the merits of the Company's policy, but rather on whether Vasquez was denied rehire based on a legitimate application of that policy or for discriminatory reasons. (See Rigi Agricultural Services, Inc. (1983) 9 ALRB No. 31, where the Board concluded that the respondent therein discriminatorily discharged three workers even though the respondent claimed they were discharged pursuant to its policy of not hiring undocumented workers or discharging workers who it learned were undocumented.)

Respondent argues that the backpay and reinstatement order in the instant case should be limited to workers lawfully within the United States. The Board has already addressed the issues raised by Respondent's arguments in Rigi Agricultural Services, Inc. (1985) 11 ALRB No. 27, and we will not repeat that discussion here. Respondent's arguments on the propriety of backpay and reinstatement orders for the discriminatees in this case may be presented in the compliance stage of this proceeding.^{11/}

^{11/} Member Carrillo does not join in the Board's order of reinstatement and backpay for discriminatee Demetrio Vasquez since the Board has not had the opportunity to evaluate the impact of the immigration reform bill recently enacted by Congress. He believes it is inappropriate to order reinstatement or backpay for an admittedly undocumented worker without knowingly considering if and how the new legislation affects the very ability of the Board to order such remedies. By the time the Board's order reaches the compliance stage, the reinstatement and backpay order will already have become final and the only issue which will remain is how to seek compliance with the order.

A majority of the panel herein does not find sufficient reason for withholding the reinstatement and backpay remedy for one of the discriminatees in this case. If anything the new immigration reform bill enhances our ability to order such remedies by giving undocumented agricultural employees greater means by which they can establish legal residency in the United States. It thus becomes even more unlikely that the Board's Order would ever present an actual conflict with final action by the federal immigration authorities. Given these circumstances we should not rely on speculative questions concerning immigration status to deny the full protection of the Act to any of the discriminatees in this case.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Sam Andrews' Sons, Inc., its officers, agents, representatives, 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 refusing to hire or rehire, 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.

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

(a) Immediately offer to Juan Beltran and Demetrio Vasquez full reinstatement to their former jobs or equivalent

employment, without prejudice to their seniority or other rights or privileges.

(b) Make whole Juan Beltran and Demetrio Vasquez for any loss of pay and any other economic losses they have suffered as a result of the refusal to rehire them, reimbursement to be made according to established Board precedents, plus interest thereon in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination and 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 period and the amount 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 hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at its Bakersfield operations from June 30, 1983, until June 30, 1984.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises at its Bakersfield operations, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise

due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees of its Bakersfield operations 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 and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees 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: November 19 , 1986

JORGE CARRILLO, Member

PATRICK W. HENNING, 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 (Board) issued a complaint that alleged that we, Sam Andrews' Sons, Inc., had violated the law. After a hearing at which each side has an opportunity to present evidence, the Board found that we did violate the law by refusing to rehire Juan Beltran and Demetrio Vasquez. 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 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 offer Juan Beltran and Demetrio Vasquez their jobs back without loss of seniority and pay them any money they lost plus interest because of our refusal to rehire them.

DATED:

SAM ANDREWS' SONS, 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. 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

Sam Andrews' Sons, Inc.
(UFW)

12 ALRB No. 24
Case Nos. 83-CE-150-D
83-CE-169-D
83-CE-187-D
83-CE-207-D
83-CE-234-D

ALJ DECISION

The ALJ found that Sam Andrews' Sons, Inc. (Respondent) did not unlawfully refuse to reinstate employees Fernando Franquez, Martin Godinez, and Manuel Perez to night shift irrigation work because of their union activities, as alleged in the complaint. He concluded that there was no causal connection between the employees' union activities and Respondent's actions. Additionally, the ALJ found there was no causal connection between Ramon Navarro's union activities and Respondent's failure to rehire him. The ALJ thus recommended dismissing this allegation.

The ALJ also found that Respondent unlawfully refused to rehire Juan Beltran because of his union activities and his association with a strong union adherent. He also found that Respondent's refusal to rehire Demetrio Vasquez was discriminatory. The ALJ concluded that Respondent's reliance on its undocumented worker policy as the reason not to rehire Vasquez was pretextual and that the real reason was Vasquez' concerted and union activities.

BOARD DECISION

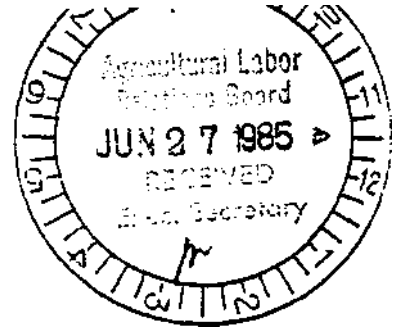
The Board affirmed the findings and conclusions of the ALJ and adopted his proposed Order with modifications.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
)
SAM ANDREWS' SON, INC.,)
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Respondent,)
)
and)
)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO,)
)
)
)
Charging Party.)
_____)

Case Nos. 83-CE-150-D
83-CE-169-D
83-CE-187-D
83-CE-207-D
83-CE-234-D

Appearances:

Miles Locker
ALRB Salinas Regional Office
112 Boronda Road
Salinas, CA 93907
for General Counsel

Patricia J. Rynn Rynn,
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Dove Street, #138 Newport
Beach, CA 92660 for
Respondent

Before: Marvin J. Brenner
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

This case was heard by me on March 18, 19, 20, 21, 22 and 25 1985 in Bakersfield, California. The Complaint was based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as "Union" or "UFW") between June 22 and July 22, 1983. The original Complaint was filed on December 4, 1983, followed by the First Amended Complaint, filed on January 29, 1985. Upon the entire record,^{1/} including my observation of the demeanor of the witnesses and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

FINDING OF FACT

I. Jurisdiction

Respondent was and is engaged in agriculture in the State of California within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereafter "Act"), as was admitted by Respondent in its Answer. Accordingly, I so find.

Respondent also admitted, and I find, that the UFW was and is a labor organization within the meaning of section 1140.4(f) of the Act and was and is the exclusive bargaining representative of Respondent's agricultural employees.

Respondent admitted the supervisory status of Robert Garcia, John Perez, Pete Espinoza, and Angel Gonzalez.

1. Hereafter, General Counsel's exhibits will be identified as "G.C. ___" Respondent's exhibits as "Resp'S ___". References to the Reporter's Transcript will be noted as (Volume: page).

II. The Alleged Unfair Labor Practices ^{2/}

The First Amended Complaint alleges that Respondent through its supervisory personnel violated sections 1153(a), (c), and (d) of the Act by refusing to rehire Juan Beltran, Demetrio Vasquez, and Ramon Navarro because of their union and protected concerted activities and for the same reasons changing the job assignments and reducing the wages of Martin Godines, Manuel Perez, and Fernando Franquez by refusing to transfer them to the night shift irrigation crew.

III. The Business Operation

In Bakersfield Respondent runs two ranches, Santiago and Lakeview, which are close in proximity to one another. Santiago has 9,000-10,000 acres while Lakeview contains around 3,500. Cotton, lettuce, carrots and melons are grown at both ranches. There are separate supervisors for each ranch, but they are administered as one. There is only one seniority list for both ranches. (I:11-14.)

Robert Garcia is the Director of Labor Relations and has been so since 1979. He reports directly to the three partners, Don, Fred and Bob Andrews. All supervisors report to him. (I:10-11.)

The irrigation department has two main supervisors, one for the Santiago Ranch, the other for Lakeview. John Perez heads up the Santaga operation. He has been a supervisor since approximately 1977. There are around 5 or 6 foremen under him. Pete Espinoza, the Lakeview supervisor, came to work for the partnership in March

^{2/}The General Counsel dismissed Charges 83-CE-318-D on the first day of the hearing (Paragraphs 10 and 11 of the First Amended Complaint). (I:1.)

of 1982 but worked with the tractor drivers. In April or May of 1983, he began working in irrigation. There are approximately 3 foremen under him. Frank Castro, who no longer works for Respondent, was an irrigation supervisor between 1977 and either 1982 or 1983. (I:11, 15-16.) Irrigators are not assigned to one ranch or the other indefinitely, but usually stay for long periods on just one particular ranch. (I:68-69.)

IV. The Strike

In July of 1981, approximately 100-125 workers in all job classifications at both ranches in Bakersfield participated in a strike. Of the irrigators, all but a very few did not participate. The strike lasted until July of 1982 when the UFW, on behalf of all the strikers, made an unconditional offer to return to work. A second offer was made in October of 1982. Respondent commenced reinstating strikers by order of seniority in September or October of 1982 and continued to do so as needed, gradually over a period of time. The first irrigators - just two workers - were called back in May of 1983. The rest of the irrigators were called back in June, beginning with a large recall on June 8. No strike replacements were laid off specifically to make room for the returning strikers. (I:36 .)

Recalled strikers were sent two letters, one by registered mail and in case the letter was not signed for, one by regular mail, (I:33-36; VI:2-6.) Robert Garcia testified that the response time was only seven days as it was a critical time of the year when the irrigation had to be started at once; and the UFW and ALRB had represented that the striking employees had made commitments that

they were ready immediately to respond to a recall. (VI:6-7.) Letters were sent to the last known address that Respondent had on file. Respondent's work manual provided that the employee had the responsibility to keep Respondent abreast of his/her most recent address. (VI:5.) (G.C. 2.) All striking irrigators had been recalled by December 27, 1983. (VI:107.)

V. The Alleged Refusals to Rehire

A. The Refusal to Rehire Juan Beltran Allegation

1. The Recall

Juan Beltran first started working for Respondent in December of 1979 as an irrigator at the Santiago Ranch. His first supervisor was John Perez, and he was later transferred to Frank Castro.

Beltran did not receive timely notice of his recall^{3/} as he had moved from the last address shown on Respondent's personnel records, to which the recall was sent, and had neglected to inform Respondent of his new address. (II:4-6, 15.) Instead, Beltran became aware that Respondent had begun to recall some strikers with higher seniority than he through chief UFW representative Francisco Larios. (II:15-16, 47-50.) Beltran testified that he travelled to Los Angeles on June 27, 1983 to visit a brother. On June 29, while in Los Angeles, he called Larios. He testified that he did this because he knew they were calling back strikers, and he wanted Larios to notify Personnel Director Robert Garcia that he was available for work should he be recalled at that time and that he

3. Beltran's letter of recall requested him to report "no later than Thursday, June 30, 1983 at 6:00 a.m." (G.C. 4.)

would return to Bakersfield to accept the job. Beltran testified that he did not call Respondent's offices himself because he didn't have the telephone number. Having spent 2-3 days in Los Angeles, Beltran returned to Bakersfield on June 30, arriving in the late afternoon, around 5:00 - 5:30 p.m. (II:6-8, 15-18, 24, 50.) Beltran testified he also spoke to Larios around this time and that Larios told him that he had been called back and for him to report for work the very next morning. (II:8, 24.)

Beltran testified that the next morning, July 1, at 6:00 a.m., he reported to work but was told by Garcia that he had missed the report date and would not be rehired. According to Beltran, he explained that he was not aware of the recall letter because he was no longer living at the address to which it was sent but that he had told Larios to notify him (Garcia) that he was ready to go back to work. Garcia is alleged to have said at that point that it was not Larios' responsibility but Beltran's to get in touch with him. (II:25.)

Beltran further testified that about 3 or 4 days later, July 3 or July 4, he went to see Garcia again, only this time accompanied by Larios, and that Larios reminded Garcia that he notified him that Beltran was available to come back to work. However, Garcia again commented that it had been Beltran's responsibility and refused to reinstate him. (II:26.)

Beltran testified that he thought it was May of 1984 when he called Garcia again and requested a job but was told there were

none.^{4/} when Beltran mentioned his seniority, Garcia told him he didn't have any and hung up.^{4/} (II:13.)

Francisco Larios has been the UFW's Ranch Committee President from 1977 to the present (II:43-44). Larios testified that between June 10 and June 30, 1983, he had had 5 or 6 conversations with Beltran concerning the possibility of Respondent's recall of the strikers. During one of those conversations, Larios told Beltran that those who had more seniority than he had already returned and that possibly, sometime in July, he would likely be called back to work. (II:50-52.) Larios testified that either on June 28 or 29 Beltran called him from Los Angeles to ask if he had been recalled and Larios told him he didn't know, at which point Beltran requested that he tell Garcia he would only be out of town for a short time, that he wanted his job back, and would come back to work. (II:34.)

Larios recalled the date of June 30 as being a day he was injured at work and that on that date he had the time to speak with Garcia about Beltran. (II:56.) Larios testified that in a telephone conversation at 9:00 or 10:00 a.m. he told Garcia that "Juan Beltran had called me and told me that if he called him that, yes, he did want this job, but upon his return he wanted to start" (sic) (II:35) and that:

Then Bob told me, 'Why didn't you call me before? I told him, 'Well, the thing is that I was working, I did not have a chance.' He said, 'Well, where are you right now, then?' I told him, 'Well, the thing is I've got, I was injured and

4. Garcia testified it was January 4, 1984 (VI:20-21.) Since the time Beltran filed unfair labor practice charges, July 12, 1983 (G.C. 1 (c)), there have been new hires (VI:103).

I'm calling you from my home.' Then he told me, 'Well, it's all right. Juan Beltran hasn't reported to work.' He said, 'Tell him to report tomorrow'." (II:35)

It was in this conversation, according to Larios, that he found out for the first time that Respondent wanted to recall Beltran to work. (II:52.) But he could not telephone Beltran in Los Angeles because his brother did not have a telephone there. (II:56.)

Late in the afternoon of that same day around 5:00 or 5:30, Larios was contacted by Beltran who had just arrived back from Los Angeles. Beltran asked him if he had heard anything about the job, and Larios replied that he had spoken to Garcia who had said that he (Beltran) should report tomorrow. (II:35, 56-57.)

After being informed by Beltran that he had not been allowed to work on July 1, Larios met with Garcia and Beltran on July 4. Larios testified that he reminded Garcia that he had spoken to him on the 30th and been reassured that Beltran would have a job when he came back and that there wouldn't be a problem at which point Garcia responded that it was not his (Larios') responsibility, that it was Beltran's responsibility to have notified him. Larios testified he pointed out to Garcia that he (Garcia) knew he was on the Ranch Committee and that Committee members had been the ones who were serving as conduits of information. According to Larios, Garcia said that "he did not acknowledge us." (II:36.)

Finally, Larios testified that there had been other situations in which individuals were allowed to return to work beyond the stated cutoff time. Toribio Reyes, a non striker, was laid off from his irrigation job on October 4, 1983 and was allowed

to report one week late for his recall on May 18, 1984 instead of May 11. (II:53-54.)

Robert Garcia testified that a June 23 recall notice to Beltran was sent both by registered and regular mail to the last known address appearing on Respondent's records and that there was never any indication from any other source that Beltran was living at another address. (VI:8-9.)

As an adverse witness for the General Counsel, Garcia could not recall whether it was July 1 or 4 that Beltran responded to the recall by meeting with him. (I:49.) One week later, however, as a witness for Respondent, Garcia testified that he was sure it was on July 4 when Beltran, accompanied by Francisco Larios,^{5/} met with him. (VI:88.) Garcia testified there was only one meeting with Beltran, not two."

As an adverse witness for General Counsel, Garcia testified that he refused Beltran's rehire because he arrived after the recall date despite the fact that no one had filled Beltran's job and that others were recalled subsequently. (I:50.) Once again, one week later, as a witness for Respondent, Garcia testified that there were no openings available when Beltran showed up with Larios and that he told them that "there was no work at this particular time" (VI:17, 9.) Garcia further testified that he never offered reinstatement to Beltran thereafter (VI:21-40.)

As regards Larios' testimony that Garcia had said it was

5. Garcia testified that Beltran was the only recalled striker of the 40-50 that returned in June of 1983 that utilized the services of Larios as a Union representative. (VI:90.)

okay for Beltran to report one day late, Garcia testified that it was possible that someone indicated that either Beltran or Larios called him about Beltran being one day late (VI:16). Next he admitted the possibility that such a notification may indeed have been made. ". . . He may have called us, but I can't remember who he called or notified that he was going to be - not going to be able to respond to the Company's recall" (VI:17-18.) But later his testimony suggested that Beltran did not notify Respondent that he would be late until one day after he was supposed to show up:

I think we discussed (at the July 4 meeting) that he did not report on time and that evidently he called one day late. I suppose, yeah, yes, that he reported or came by or advised us one day after the recall notice or the day that he was supposed to respond to recall, or be there, present himself. He was at least one day late. (VI:17.) (Parenthesis added.)

Then Garcia testified that Beltran admitted at the July 4 meeting that he called on July 1, one day late. (VI:18.)

Finally, Garcia testified that he had no recollection of either Larios or Beltran calling on July 1 or at anytime prior to notify him that Beltran would be unable to make the June 30 recall and also testified that no claim was ever made at the July 4 meeting that any such notification occurred prior to July 1. (VI:19, 90-91.)

According to Garcia, had Beltran notified Respondent prior to his "cutoff date", he would have been reinstated provided he had a valid reason for not being able to show up on time. (VI:40-41.) Garcia gave two examples of others who had been allowed to return to Respondent's employ even though they were late for their recalls,

e . g . , Isabel Campos, a striker, recalled on June 21, 1983 but unable to show up on time because of the hospitalization of his daughter (see Resp.'s 9, 10 and 11) and Toribio Reyes, a non-striker, who failed to show up for his January, 1984 seasonal recall because Respondent had sent his notice to the wrong address. (VI:40-45, 50-54, 72-73.)

2. Union Activities

Beltran was one of the strikers and engaged in picketing activity with others, sometimes as many as 160. While picketing Respondent's offices, he testified that he was observed by supervisors Castro, Perez, and Alvarez because they greeted him personally as they passed by. (II:3-4, 14-15.)

Garcia testified that he was aware that during the strike Beltran attended numerous court proceedings in Superior Court and other hearings as well in which the UFW and ALRB were involved. (VI:12.)

3. Analysis and Conclusions of Law

It is the general rule that to establish a prima facie case of discriminatory refusal to hire, the General Counsel must show by a preponderance of the evidence that the employees were engaged in protected concerted activity, that Respondent had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the subsequent failure or refusal to hire. (Anton Caratan & Sons (1982) 8 ALRB No. 83, citing Jackson and Perkins Rose Company (1979) 5 ALRB No. 20.)

In addition, the General Counsel must ordinarily show that

the alleged discriminatee(s) made a proper application for employment at a time when work was available and was not hired because of his/her protected concerted or union activity. (Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98, citing Prohoroff Poultry Farms (1979) 5 ALRB No. 9 and Giumarra Vineyards, Inc. (1981) 7 ALRB No. 17.) Once a prima face case has been established, the burden of producing evidence to show it would have reached the same decision absent the employee's protected activity shifts to the Respondent. (Nishi Greenhouse (1981) 7 ALRB No. 18; Wright Line, Inc. (1980) 251 NLRB 150, 105 LRRM 1169.) The burden on Respondent at this point is:

. . . to rebut the presumption of discrimination by producing evidence that plaintiff was rejected for a legitimate non-discriminatory reason. The defendant need not persuade this court that it was actually motivated by the proffered reasons. (Citation omitted.) It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. (Texas Department of Community Affairs v. Burdine (1981) 450 U.S. 248, 101 S.Ct. 1089, 1094, cited in Martori Brothers Distributors (1982) 8 ALRB No. 15, p. 4.)

Should the Respondent carry this burden, the General Counsel must then prove by a preponderance of the evidence that the reasons advanced by the Respondent were not true reasons, but were a pretext for discrimination.^{6/} Thus, the Respondent's burden is the burden of going forward with evidence, not the burden of proof, which always remains with the General Counsel. (Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d

6. The General Counsel will succeed in this: "[E]ither directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Burdine, supra, 101 S.Ct. at 1095.)

721, 175 Cal.Rptr. 626; Paul W. Bertuccio (1982) 8 ALRB No. 39.)

Essentially then, the standard approved by the ALRB is that the General Counsel must prove that the employer would not have taken the adverse action against the employee "but for" the employee's protected activities. (Merrill Farms (1982) 8 ALRB No. 4. The overall attitude of an employer towards a union and its members can prove a helpful backdrop against which specific conduct can be evaluated. (Abatti Farms, Inc. (1981) 7 ALRB No. 36; Paramount Cap Mfg. Co. v. N.L.R.B. (8th Cir. 1958) 260 p.2d 109, 113, 43 LRRM 2017.

The General Counsel made a prima facie case which was not rebutted by Respondent's evidence. To begin with, I have resolved crucial credibility questions in favor of General Counsel's witnesses. Such questions involve whether Larios, in fact, secured for Beltran an extension of one day in which to report for work, as Garcia's words, as reported by Larios, certainly infer, when Beltran did report, and how many meetings were held with Garcia. Larios testified that on June 30 he called Garcia and told him that if called, Beltran wanted his job back. (Neither Larios nor Beltran was aware that a recall notice from Beltran had been sent.) Garcia told him that Beltran had not yet shown up but that it was all right to have him report the next day, July 1. Beltran testified that Larios told him on June 30 to report for work the next day, which he did, and that after being denied employment by Garcia that day, met with him again around July 4, accompanied by Larios. Garcia, however, denied there was more than one meeting. He also denied he gave Beltran permission to report one day late and denied that

either Larios or Beltran even made such a claim at the meeting.

I credit Larios¹ and Beltran's versions. Larios testified in a straightforward manner, demonstrated a good recollection for the details of the event in question, and remained consistent throughout. He would have remembered that his conversation with Garcia occurred on June 30 as that was the date he got injured. Beltran was honest and convinced me of his sincerity. In contrast, Garcia's testimony was often either confused or contradictory. At times he was uncooperative and excessively assertive. Though superficially collected, a certain anger seethed under the surface.

Garcia at first testified the meeting occurred on July 1 or July 4, then said he was sure it was July 4. I believe meetings occurred on both days.^{7/} If there were but one meeting, why would it have been necessary for Larios to attend it since so far as he knew, Beltran had gone back to work on July 1 pursuant to the understanding he thought he had with Garcia? It was only when Garcia repudiated the deal – no doubt to embarrass Larios, infra, – that it became necessary for Larios to accompany Beltran to a meeting arranged a few days later, July 4, to try and find out what had gone wrong.

Garcia's testimony is confusing. He acknowledged that someone may have called to notify him that Beltran would be late, then stated only that such a claim was made, after previously testifying that no such claim was made. Later, he testified that

7. Beltran was not the only returning striker with whom Garcia met on both days. Garcia admits, infra, to meeting with another alleged discriminatee, Ramon Navarro, on both July 1 and July 4.

Beltran did notify Respondent he would be late but that was on July 1, one day after he was supposed to have presented himself for work.

Garcia's description of this whole event was inarticulate and makes very little sense. If Beltran (or Larios) had called Respondent on July 1 to announce that he was going to be "one day late," why did he wait until July 4 before showing up? Or did Garcia understand the "one day late" reference on July 1 to mean that Beltran would report for work on July 2? If so, why wasn't there any discussion of this date at the meeting?

On the other hand, if this testimony is seen in the context of the July 1 meeting between Beltran and Garcia (and not the July 4 one between Beltran, Garcia and Larios), it makes more sense and corroborates Beltran's version. Meeting with Garcia on July 1, it is very likely that Beltran would have used the expression "one day late" to indicate that he was told by Larios on the preceding day that it would be all right for him to report to work the following morning, July 1, one day late. (See Garcia's notes of the July 4 meeting, G.C. 24.)

Though at first glance it might be difficult to discern what Garcia was up to telling Larios that it would be all right if Beltran reported one day late only to change his mind the next day, the answer can be found not so much in the relationship between Garcia and Beltran but in the one between Garcia and Larios. Larios, as has been pointed out, was for a considerable period of time the major UFW activist on the property in his capacity of President of the Ranch Committee. In Sam Andrews' Sons (1982) 8 ALRB No. 69, the Board affirmed the ALJ and found that Respondent

violated sections 1153(a) , (c) and (d) of the Act by refusing, during the spring of 1981, to rehire Larios because of his UFW activity and his testimony at a prior ALRB hearing. Specifically, the ALJ had found that Garcia had intended and did, in fact, block Larios' rehire as an irrigator by telling him that there was no work available and by failing to point out to him the proper procedures available to secure employment. ALJD, pp. 11-12. After the Court of Appeal had affirmed the Board's decision regarding Larios' discriminatory 1979 layoff in another case (see footnote), Larios telephoned Garcia to ask about his reinstatement. But Larios was "reproached" by Garcia and informed there were no irrigation openings. ALJD, p. 13. The ALJ concluded that Respondent, through the actions of Garcia, showed that "it had no desire whatsoever to have Larios return to its employ in any capacity. The whole scenario surrounding the so-called offers of reinstatement indicates a design to make the offers difficult or impossible to accept."^{8/}

ALJD, p. 19.

8. Besides Garcia's unlawful acts against Larios, Respondent's animus against him and what he represented has been found to exist on at least three other occasions. In the same case as above (8 ALRB No. 69), Respondent's partner, Fred Andrews, was found to have followed Larios' car closely for a long distance in his own car as the latter departed the ranch. The ALJ found that Andrews' "long and persistent automobile pursuit of Larios create(d) a strong inference that Respondent was determined to discourage and restrain Larios from seeking rehire' and that such actions were clearly calculated to intimidate him. ALJD, pp. 20-22.) The ALJ concluded that the only logical basis for such discriminatory treatment was his UFW activity and his seeking redress from the ALRB against Respondent. In Sam Andrews' Sons (1980) 6 ALRB No. 44, the Board found that Respondent's failure to recall Larios was because of his strong Union support. (He had recorded for radio a pro-UFW campaign message in which he identified himself as an employee of

(Footnote continued----

Garcia's prior disdain for Larios (and workers' protected rights in general) was also shown to exist here by the testimony regarding Garcia's dissatisfaction that Beltran had decided to use Larios, the UFW representative, as a conduit of information to him regarding Beltran's availability for work. Larios was irked that Beltran had not gotten in touch with him personally and had chosen instead to use Larios, the only returning striker apparently to have done so.

Finally, even assuming arguendo that Garcia had not consented to Beltran's being one day late, Garcia's decision not to rehire him after he reapplied for work just one day after the cutoff date is highly suspect and suggests a discriminatory motive. In the first place, Garcia testified that at the time Beltran applied for work he had not yet filled that position with another worker.^{9/} This is understandable since Beltran reported for work at 6:00 a.m. the very next day. Was not the purpose of having a cutoff time by which to report to work, as Garcia so often reminded us, to insure an orderly return of employees so that Respondent would have some idea of how many people were going to be available for work? If this were so, then returning one day late and not being allowed to

(Footnote 8 continued-----)

Respondent.) Respondent's anti-union animus was said to help establish Respondent's motivation. And finally, in *Sam Andrews' Sons* (1979) 5 ALRB No. 68, Larios¹ two-week suspension for missing work to attend a UFW Constitutional Convention was found to be violative of the Act as "widely disproportionate to the punishment normally given when a worker misses work without permission." ALJD, p. 17.

9. Garcia's attempt one week later to deny this fact is not credited.

come back when no replacement had yet been hired indicates not so much a forfeiture of recall rights on the part of the employee as it does a vindictiveness and mean spiritedness on the part of Respondent's representatives.^{10/} This is particularly troublesome in view of Garcia's testimony that he observed Beltran attend the court proceedings leading up to the recall and that he heard the UFW make representations on his (and others) behalf that he was ready to return to work.

I find that there was a causal relationship between Beltran's protected activity, including his association with UFW representative Larios, and Garcia's refusal to rehire him. This conclusion is supported by Respondent's (and Garcia's) prior history of anti-union animus.^{11/} I also am not persuaded by Respondent's business justification for not rehiring Beltran because he showed up one day late. I recommend that Respondent be found in violation of section 1153(c) and (a) of the Act.

B. The Refusal to Rehire Demetrio Vasquez Allegation

1. The Undocumented Worker Policy

Garcia testified that ever since his employment with Respondent commenced in 1979, his intent has been to create a stable work force consisting of documented workers. To accomplish this

10. For example, Garcia's statement to Beltran on July 4 that "there was no work at this particular time" (VI:17) was obviously an untruth as Respondent was still in the process of calling back workers from the strike.

11. I have taken administrative notice of the following Board decisions finding anti-union animus on the part of Respondent: 11 ALRB No. 5, 10 ALRB No. 11, 9 ALRB No. 24, 9 ALRB No. 21, 8 ALRB No. 87, 8 ALRB No. 69, 6 ALRB No. 44, 5 ALRB No. 68 and 3 ALRB No. 45.

result, he embarked upon the enforcement of a policy under which a worker known by Respondent to have been picked up by the Immigration and Naturalization Service (hereafter "INS") would not be rehired unless legal proof of immigration status could be demonstrated. However, proof of status would only be required once Respondent received notice that an employee might not be in this country legally; Garcia testified that he would not go through each individual file to determine if any one employee were legal or not. (I:37-42; VI:69.)

Garcia at first testified that he was not familiar with Respondent's undocumented worker policy before he commenced working there, later testified that what he implemented had always been the policy, only that it had not been taken seriously nor enforced before he came on the scene. (I:37-42; VI:67.) In any event, Garcia testified that upon his arrival, he began instructing the supervisors about the policy and told them that he wanted to be informed if any employee were every picked up by the INS. (I:43; VI:67-68.)

In addition to the undocumented worker policy, Respondent for many years had required new hires to fill out an employee personnel form in which they were asked questions about their immigration status. (Resp's 7.) For example, each applicant was asked to state if he/she were a U.S Citizen and could produce proof of citizenship. Or applicants were asked for their green card number. Yet strangely, according to Garcia, no worker was actually asked to produce the requested documentation, as apparently the applicant's response on the personnel form was just taken at face

value.^{12/} And once someone was hired and working for Respondent, no further inquiries were made as to his/her legal status unless actually picked up by the INS. (I:37-42.)

2. Vasquez's Employment History

a. The Original Hiring

Demetrio Vasquez was employed by Respondent as an irrigator in 1975. As was the case with all new hires, he was asked to respond to questions and to sign a personnel form (G.C. 10). As Vasquez cannot read, supervisor Frank Castro asked him the questions from the form, and Vasquez answered. Though he recalled telling Castro his date of birth, age, and number of dependents and watching Castro write the information down, he denied that Castro asked him any questions about his citizenship or immigration status.^{13/}

(I:67-68, 88, 107.)

b. Previous INS Involvement

Vasquez testified that prior to Respondent's refusal to rehire him in June of 1983 allegedly because of his having been picked up by the INS during that same time frame, infra, he had two previous run-ins with that agency. Vasquez testified that towards the end of 1977 or the early part of 1978 in the

12. According to ex-irrigation supervisor Frank Castro, if an applicant indicated he had a green card, he (Castro) would just take down the information required on the back side of the application (Resp's 7), take the applicant's word for it, and conduct no further inquiries. (V:25-32.)

13. Castro testified that his practice was to ask the applicant all the information on the card, to write the responses down, and then to read back everything he had written down to the applicant to test its accuracy. (V:7-9.) Castro also testified that he could not recall any applicant ever indicating to him that he was not a citizen or did not have any papers. (V:25-32.)

presence of Castro and another foreman, Francisco Reyes, he was picked up by the INS at 7:00 a.m. while at work and missed about a week. Upon his return, Castro re-employed him. (I:90-92.) However, on February 6, 1978, Castro discharged him for having a "false I.D." (G.C. 11). Castro testified that he concluded that since Vasquez had been picked up by the INS, he must have submitted false information regarding his immigration status on his personnel form when he first applied for work in 1975 (V:10-11). But despite this termination, Vasquez was put back to work 3-4 weeks later after Castro visited him at Respondent's trailers, where he was still living, and rehired him. (I:95-96.) Vasquez testified that neither Castro nor any other supervisor ever asked him for proof of immigration status prior to the rehire.^{14/} Later that same year, October 6, 1978, Vasquez submitted to Respondent an updated address form (G.C. 12) in which he used as his social security number the identical number which he had used at the time of his February discharge. (G.C. 11.)

Vasquez also testified that in February of 1981 he was picked up again by the INS while working about 9:00 in the morning and missed work only for the rest of that day. When he returned to work, he notified Castro who indicated that he was already aware of the immigration trouble and that it was okay for him to report to work the following day. Vasquez was not paid for the work he missed

14. Castro testified that he was forced to rehire Vasquez by order of his supervisor, the superintendent of the ranch at that time, Dolores Alvarez, who, according to Castro was Vasquez's uncle. (V:12-13.)

during the time the INS had him in custody.^{15/} (I : 9 0 .)

3. The Application of the Policy to Demetrio Vasquez In 1981
Vasquez, along with the other irrigators, went out on strike. Later, following the unconditional offers to return, striking irrigators were recalled to work. Vasquez, however, was never sent a letter of recall. Garcia explained that this was because he had had a casual conversation with representatives from a company called "McKittrick Farms," and it was related to him that Vasquez had been working there and had been recently deported. Garcia could not remember to whom he was speaking, the date of the conversation, nor how the conversation arose except that it had something to do with housing. (I : 4 3 - 4 5 .) Garcia attempted to further clarify this by testifying that:

. . . he (Vasquez) was occupying a place, living on McKittrick Farms and working there, and he was deported . . . there was some portion about the housing on McKittrick. And we were having some housing problems of our own. That's how I found out that Mr. Vasquez was an undocumented worker. (sic) (I : 4 5 .) (Parenthesis added.)

. . . Then, it was related to me that we were having a problem on our housing situation. Our housing was being condemned and what we were doing about it. Then the question about their housing problems and the question of Vasquez came up. And that's how I found out about it. That they were closing . . . down some of their housing, too. They wanted to know where we were at that point. . . . (sic)" (I : 4 6 .)

Garcia testified that prior to this conversation with representatives of McKittrick Farms, he had no reason to doubt the legal status of Vasquez and that it was only the conversation that

15. Castro testified he knew Vasquez got picked up on 1978 because it would show on his time card. (V : 1 1 - 1 2 .) However, Castro could not recall if Vasquez were ever picked up again following the 1978 event. (V : 1 4 .)

caused him to change his opinion. (I : 4 7 .)

Garcia further testified that later Vasquez came to his office and wanted to know why he had not been sent a letter of recall and that he (Garcia) told him that his former employer had advised of the deportation and that if Vasquez could show him some kind of documentation that he could legally work, he would be put back to work. At that point, according to Garcia, Vasquez replied that he could not. (I : 4 6 - 4 7 ; VI : 5 9 - 6 0 .) Garcia testified that prior to this conversation with Vasquez, he was not aware that Vasquez had ever before been picked up by the INS. (VI : 6 6 .)

Vasquez testified that June of 1983, after hearing that others had been recalled to work, Vasquez attempted to regain employment by speaking with the new irrigation foreman, Pete Espinoza. Espinoza told him to speak to Garcia, which he did. According to Vasquez, Garcia told him that he had not been recalled because he didn't have any papers and there was no work for him. (I : 1 1 0 - 1 1 1 .) Vasquez further testified that he spoke to Garcia again about 8 days later and was told he could have his job back if he could provide proper papers. When Vasquez asked Garcia why he had to show documentation when he never was so required in the past, Garcia 'replied that he didn't know. (I : 1 1 2 - 1 1 3 .) Vasquez then pointed out that other workers with the same or less seniority were going back to work, and Garcia is alleged to have told him that it had been two years since he had worked there so how could he now be claiming seniority?

4. Was the Policy Consistently Applied?

a. The Case of Tony Lopez

Francisco Larios testified that at a meeting with Garcia on July 4, 1983, in which Vasquez's termination from employment was questioned, he (Larios) told Garcia that he knew of a worker that the INS had picked up, yet had returned four days later and been given his job back. Garcia wanted to know who the worker was, and Larios testified that he told him his first name was "Tony" but that he did not know his last name. Garcia wrote the name down.

(II:37.)

The evidence established that the worker's full name was Antonio (Tony) Lopez. (II:37.) Lopez did not join the strike. Lopez was listed as an irrigator of Respondent's on both the July, 1983 and January, 1984 seniority lists. (G.C. 3(B), 13, and 3(A).) Garcia testified that despite the fact that he had instructed his supervisors to report to him anytime any employee got picked up by the INS, no such information was forthcoming to him regarding Tony Lopez (II:67-68.) Garcia further testified that after his conversation with Larios in which a "Tony" was mentioned, he took no steps to discover the identity of that worker and did not speak to any supervisors to try to determine if they were aware of anyone recently being picked up by the INS. (II:76-77.)

Jesus Chavez, an irrigator, testified that he was working as a partner with Tony Lopez in June of 1983 when Lopez was picked up by the INS at the Lakeview Ranch. (Chavez was also detained but had papers and returned to work one-half hour later.) After Chavez's return, his supervisor (and Lopez's), Pete Espinoza, asked

him who it was that had just been picked up; and he told him that it had been Lopez. Assistant foreman Angel Gonzalez was also aware that it had been Lopez, as Lopez was forced to leave the motorcycle he had been performing his job duties on in place when the INS came, and Gonzalez had to instruct another worker to move it. (III:1-7.)

Pete Espinoza admitted that his assistant, Gonzalez, had told him that Lopez had been picked up, but testified he did nothing about it because he was unaware of Respondent's policy concerning undocumented workers at that time. When he became a supervisor, Garcia did not discuss any guidelines for hiring or rehiring undocumented workers. It was not until a month to 45 days later -- sometime in July or August of 1983 -- that he first learned about any such policy after speaking to John Perez and later with Bob Garcia. Espinoza testified he did not tell Garcia about Lopez getting picked up because he "didn't think it was necessary at the time." He has never told Garcia. Thereafter, Espinoza testified that he informed Gonzalez that if anyone in the future got picked up, he wanted to know about it immediately. Nothing further was done to Lopez. (V:55-58, 61-66.)

b. The Case of the Tractor Drivers

Garcia testified that there were others that had been refused reinstatement after they were picked up by the INS, naming Ismael Acosta, Jose Lopes, and Fausto Jimenez (Resp's 13, 14 and 15.) All three were tractor drivers under the supervisor of either Jose Cervantes or Lionel Terrazas; all three were or had been strike replacements. According to Garcia, each had been picked up by the INS (Acosta on May 27, 1983; Lopes and Jimenez on May 3, 1984) and

at some point later had requested that they be allowed to return to work; but after the foreman conferred with Garcia, they were refused reinstatement. (VI:62-64.) There is no credible evidence of how long after their detention by the INS they returned to reclaim their jobs. (VI:85-87.)

5. Union and Concerted Activities

a. The Problem over the House Trailers Located on Respondent's Property

Prior to the strike, Vasquez, alleged discriminatee Ramon Navarro, infra, and others (a total of 10-12 persons, 6-7 of them workers) paid rent to live in house trailers located on Respondent's property at the Lakeview Ranch. There were five trailers, some housing families, others only single men. (II:63-68, 102.) Some of the renters had been living on the property for a long period. Sometime in either 1980 or 1981 the Kern County Health Department had condemned the housing and as a result, at some point before the strike,^{16/} Respondent refused to accept any further rental payments and ordered the workers who were occupying the premises, including Vasquez and Navarro, to leave. But these workers did not leave and continue to live - rent free - in the trailers, even during the strike. Subsequently, Respondent commenced eviction proceedings against these workers. Both Vasquez and Navarro attended the evction proceedings in the Superior Court. (II:63-68, 102.)

According to Garcia, after the property was condemned,

16. Navarro testified it was 3-4 months before; Garcia said it occurred a year before or during the summer of 1980. (II:63-68; VI:109.)

Respondent attempted to find alternative housing for the persons living there when "these people were forced to stay on these premises by a state agency that wanted to keep them on the premises for whatever reason."^{17/} (II:77.) Garcia later explained that the state agency wanted Respondent to repair the existing housing or replace it. (II:109.)

Garcia further testified that Vasquez and Navarro did not vacate this housing until 6 months after the strike started so that they had remained without paying any rent in the housing for a year and a half. During some of this time, Respondent was involved in court proceedings with the ALRB over whether Vasquez, Navarro and the others should be evicted from or remain on the property. (VI:79-80; II:68, 90-91, 103.) The proceedings were finally terminated when an agreement between the parties was reached in the latter half of 1981. (VI:109.)

b. The Picketing

Vasquez participated in the 1981 strike and picketed in front of Respondent's office close to where Castro was located. As many as 25-30 others picketed with him." (I:110.)

6. Analysis and Conclusions of Law

The General Counsel established a prima facie case that Vasquez was treated differently from other workers and that the reason was his concerted activities in fighting his eviction from the house trailers and his strike activity. The burden then passed to Respondent that it would not have recalled Vasquez even absent

17. The "state agency" was the ALRB. (II:78.)

his protected activity. (Nishi Greenhouse, supra, (1981) 7 ALRB No. 18.)

Respondent never carried its burden. In the first place, there is some doubt as to whether the alleged conversation between Garcia and the representatives of McKittrick Farms ever occurred. This conversation was of great importance because Garcia testified that had it not occurred, Vasquez would have been recalled to work. Thus, this alleged conversation led directly to Garcia's failure to recall a very senior irrigator of eight years. Yet Garcia, who busily took notes of his conversations with many of the alleged discriminatees, took no such notes here, could remember virtually nothing of the conversation or why it was held in the first place, could not remember with whom he spoke, or the date it occurred. Nor did anyone from McKittrick Farms testify at the hearing.

Assuming arguendo that such a conversation did take place, it would not be difficult to conclude that it was a mere pretext for failing to recall Vasquez and that the real reason was retaliation for his role in contesting his eviction from Respondent's property where he had been paying no rent, as well as his strike activity. This is especially true since this supposedly startling news about Vasquez's immigration status was readily discoverable from a cursory review of Respondent's own personnel files. Garcia would have discovered, of course, that Respondent had fired Vasquez for being picked up by the INS in 1978 and submitting false information regarding his immigration status. But since Vasquez had been rehired by Respondent, despite such status, back in 1978, Garcia knew that under the undocumented worker policy, he could not just

discharge him at that point -- this would be inconsistent. Only coming up with "newly discovered evidence," i . e . . , the conversation with the unknown, unnamed person at McKittrick Farms, could Garcia claim he had no prior knowledge of Vasquez's immigration problems and therefore justify his action.

Even apart from the pretext, it is clear that Respondent violated its own policy and practice resulting in discrimination against Vasquez. Garcia testified that under the undocumented worker policy, if it came to the attention of Respondent that a worker was undocumented, he/she would not be rehired unless proof of legal immigration status could be shown. In practice this meant that an employee picked up by the INS would return to work and would then be interviewed by Garcia who would at least give said employee the opportunity to bring in any such proof of legal status. No such practice was extended to Vasquez. Rather than giving Vasquez a recall notice contingent upon his demonstrating such proof, e . g . . , sending him a recall letter and requesting that he first report to Garcia's office, Garcia chose instead -- or so he claims -- to take the word of the unnamed source at McKittrick Farms that Vasquez had been deported. Without giving Vasquez any chance to respond to the charges, Garcia just simply did not send him a recall notice at all. (See Ruline Nursery Co. v. A. L. R. B., Court of Appeal, Fourth Appellate District, Division One, 4 Civ. No. 28639, #D000721, June 5, 1985, p. 35.) If it hadn't been for the fact that Vasquez had somehow heard that other irrigators were being recalled at that time, he may never have learned that he had been discharged.

Moreover, Respondent's undocumented worker policy was

enforced so inconsistently that even its own counsel was forced to admit this in her Opening Statement. (IV:2-3.) The Tony Lopez situation is a case in point. Garcia testified that in order to create what he called a "stable work force", he decided, beginning in 1979, to enforce a policy by which anyone who got picked up by the INS would not be rehired. Accordingly, he instructed the workers' supervisors that he wanted to be informed immediately if anyone were ever so detained. However, supervisor Pete Espinoza, who was hired in March of 1982, was never told anything about any undocumented worker policy, either by Garcia or anyone else, until July or August of 1983, one year and 4-5 months later. As a result, Tony Lopez, a non-striker, was retained in Respondent's employ in June of 1983, as returning strikers were being recalled, even though he had been picked up by the INS. Assuming that Garcia and Espinosa are to be believed, from these facts Respondent would then argue that this whole episode is to be written off as the negligence of the Director of Personnel in forgetting -- for one year and four or five months -- to mention to Espinoza anything whatsoever about his program for the stabilization of the work force. And from this Respondent would also argue that though negligence or even inconsistency has been shown, discrimination has not.

This case is not so facile. Garcia was informed on July 4, 1983, by Larios of a worker named Tony who had been picked up by the INS yet returned to Respondent's employ just four days later. Larios' relationship with Garcia has been explained in the previous section. Garcia knew that Larios was an irrigator yet made no inquiries of any irrigation supervisors, including, of course,

Espinoza or Gonzalez, of the recent incident. Nor did he take any steps to discover the identity of the worker on his own. A simple check of the irrigators' "Days Worked List" (G.C. 13) or the irrigators¹ seniority list (G.C. 3(B)) for this period of time (e.g., January 1, 1983-July 31, 1983) would have revealed only one worker with the first name of Tony, Antonio Lopez.

Moreover, even had Larios been able to supply Garcia with Tony's last name on July 4, Garcia seems to suggest that had Lopez already been rehired and was back working (which he was), he would not have been touched as the policy would thus not apply to him at that stage. This certainly seems illogical if the aim of the policy really is the creation and maintenance of a stable work force, as Garcia represented. Such an interpretation emphasizes form over substance.

Several actions on the part of Respondent are very perplexing. Espinoza claims that he did not learn of the policy until after the Lopez event, but the same cannot be said about his assistant, Angel Gonzalez. Jesus Chavez testified without contradiction that Gonzalez was also aware that Lopez had been taken off by the INS, and there is no claim being made here that Gonzalez was not aware of the policy. Would not Gonzalez have explained the policy to Espinoza, if Espinoza were truly ignorant of what procedure to follow, prior to Lopez's rehire? Or at least, wouldn't Gonzalez have told Espinoza that he better go check with Garcia before rehiring Lopez?

In addition, one of the acts of Espinoza stands out like a sore thumb and was never explained away by Respondent. Espinoza

testified that even after he found out about the policy from Garcia, he did not tell him about the fact that Lopez was picked up by the INS just a short time before. Assuming arguendo that Garcia did not know that it was Lopez who had been picked up, why would Espinoza have been so intent on protecting him? Having just been given the guidelines for an important new policy which he was being charged to effectuate, would not Espinoza – if nothing else, to have at least covered his own trail – not have told Garcia that Lopez had been picked up and put back to work by him? I am inclined not to believe Espinoza would have kept this kind of information from Garcia. Espinoza's explanation that he didn't tell Garcia about Lopez because he "didn't think it was necessary at the time" was insincere and unworthy of belief.

Respondent makes much out of the fact that three employees who were picked up by the INS were not rehired, but this evidence is unpersuasive. In the first place, they were all tractor drivers, not irrigators, and supervised by different foremen than those who supervised Vasquez. Second, only one of the tractor drivers (Acosta on May 27, 1983) was picked up around the same time – more or less – as Vasquez would have been recalled, had he ever been recalled; and even this was prior to the first general recall of the strikers. The other two tractor drivers were picked up long after the strike ended. Third, though there was evidence of when these tractor drivers were picked up, there is no hard evidence of when they returned to reclaim their jobs. Thus the record is left in an uncertain state as to whether they were refused reinstatement because they could not show proof of a lawful status in the United

States or were refused reinstatement because there was no work for them when they finally showed up again.

The conclusion is inescapable that Vasquez was treated differently because of his concerted and Union activities.

Interestingly, this conclusion is bolstered, not only by Respondent's own known history of anti-Union animus, but by Garcia's own testimony, as a witness for the General Counsel, that the only reason Vasquez's name ever surfaced at all in the alleged conversation with McKittrick Farms personnel was in the context of the housing problem he (Vasquez) had supposedly created for Respondent. " . . . Our housing was being condemned Then the question about their housing problems and the question of Vasquez came up. And that's how I found out about it (meaning about his INS difficulty) " (I : 4 6 .) (Parenthesis added.)

I recommend that Respondent be found to have violated sections 1153(a) and (c) of the Act.

C. The Refusal to Rehire Ramon Navarro Allegation

1. The Recall

Navarro never received his recall letter. In June of 1983, he was living in Mexico. (II : 6 9 .) The recall notice was sent to an address in Maricopa, California, but Navarro testified that he never lived there and instead lived in one of Respondent's trailers from 1975 until December, 1981 (6 months after the strike started) and thereafter, in Mexico where he had gone to visit his mother who was ill. (II : 6 7 - 6 9 , 9 2 .) He remained in Mexico six months and then returned to the Salinas area to look for work. When his mother's condition worsened in 1984, he returned. (II : 9 0 - 9 1 ,

The evidence is that at no time was Respondent informed of any of these new locations where Navarro was residing. As to Maricopa, Navarro admitted that possibly Respondent had become aware that some of his friends had post office boxes there, that some mail would come addressed to him in these post office boxes, and they would then distribute the mail to him. (II:104-107.)

Garcia testified that Navarro's recall letter (G.C. 5) requested him to report to work on June 15, 1983 and was sent to the address in Maricopa (with a copy to the UFW) because Respondent had received two letters from the Unemployment Insurance Appeals Board listing that as Navarro's current address,^{18/} and Garcia assumed that if Navarro were receiving unemployment benefits at that address, he would most likely receive the recall letter there, as well. (VI:23, 25.) Garcia testified that the recall notice was not sent to the last address Navarro had provided Respondent — Route 3, Box 999, in Bakersfield -- because that address was on Respondent's property and Garcia knew there were no longer any tenants living there. Garcia also knew, as has been previously discussed, that this particular housing was that which had been condemned by the Kern County Health Department and that the tenants moved out, pursuant to an agreement, in the latter half of 1981. When Navarro moved out, he had failed to give Respondent a new address.

18. The parties stipulated that in fact, Respondent had received two such letters, one dated September 1, 1981 and the other, August 12, 1982 in which the address listed for Navarro was the same as that which appeared on his recall notice. (VI:25.) (See G.C. 5.)

(VI:24-25.)

Before leaving for Mexico, Navarro told two of his co-workers who were active in the Union about his whereabouts, Leonard Villanueva and Javier Ramirez. (II:70) His first discovery that Respondent was recalling workers was his receipt of two telegrams, one from Ramirez on June 10, 1983 (G.C. 16) and the other from ALRB attorney Nicholas Reyes (G.C. 17), received on the same date. The Ramirez telegram requested Navarro to call the office in Lament, and the ALRB telegram advised him that Respondent was recalling some strikers, that he and his family had work with Respondent, and that he should call the ALRB office in Delano collect. (II:73-74.)

Navarro testified that after he received these telegrams, he he tried to contact Respondent's office but did not have its telephone number so he talked with Ramirez who gave him the telephone number for supervisor John Perez.^{19/} Perez was not at home, but Navarro spoke to his wife, did not leave his name, and told her he would try to talk to Perez later. He testified he never asked her to have Perez return the call because he didn't have a phone where he was staying. Navarro testified he called back later, this time talking with a man who identified himself as John Perez's brother. Navarro testified he left his name and told him it was urgent for him to speak with Perez because it was regarding his job;

19. Perez was not Navarro's supervisor. But Navarro had been informed that his regular supervisor of many years, Frank Castro, no longer worked for Respondent and had been replaced by Perez. Navarro knew Perez as the latter had filled in as assistant from time to time when Castro was occupied. (II:98-99.)

once again he said he would call back later, but he did not state any particular time he would do so. (II:74-76.) In fact, no further calls were made to Perez.^{20/} Navarro testified it was too expensive calling from Mexico, and he did not have the money. (II:74-76, 95-97, 84.)

Navarro attempted to reach Ramirez again but "couldn't find him." (II:97.)

Navarro was able to speak with Villanueva and asked for the number of Respondent's office. Villanueva did not have it readily available and left to get it. As the cost of the phone call from Mexico was adding up, Navarro just hung up. He did not ask Villanueva to relay any message to Respondent for him. (II:97-98.)

Navarro was also able to speak to Reyes, calling him collect as his telegram had suggested. Reyes told him that a job was available and that it was necessary for him to return to Bakersfield. Navarro did not ask Reyes to relay any message for him to Respondent. (II:95.)

Navarro testified that he intended to leave for the United States as soon as possible except that he did not have any money to make travel arrangements, and it took him two weeks to borrow sufficient funds. (II:84, 86.) The parties stipulated that on June 27, 1983 Navarro purchased an airline ticket for a flight from Guadalajara to Tijuana, leaving on June 29, and that on June 30 he purchased a Greyhound bus ticket for transport from San Ysidro to

20. Perez testified that his brother was probably in his house around this time but did not relay to him any message concerning Navarro. Nor was he aware that anyone else in his household had been contacted. (IV:135, 164, 173.)

Bakersfield. (II:85.) Navarro testified it was urgent he take a plane because he needed his job. (II:95.) He did not contact Reyes upon his arrival from Mexico. (II:101.)

On June 30, Navarro testified he spoke with Garcia about his job and was told to come back on the following Monday. On that date, July 4, 1983, Navarro testified that Garcia told him that he was two weeks late and that there was no work for either him or anyone in his family.

Garcia testified that on June 8, 1983, the date of the first large recall of employees, he called the UFW, spoke to Ira Gottlieb, a UFW attorney, and asked for assistance in updating the addresses of the 15 or 16 workers that were being recalled. He also called the ALRB's Delano office. No one contacted him with a more current address for Navarro. (VI:28-34.)

Garcia testified that when Navarro sought rehire on June 30, he (Garcia) asked him why he was so late, and he merely replied that he had not received a recall letter and did not know of the recall. (VI:35-37.)

According to Garcia, the next time he saw Navarro was on July 4, when Navarro came in with his son, both seeking employment. Navarro explained that he had tried to contact John Perez, didn't have Respondent's phone number, and had been ill. (VI:38-39.)

Garcia testified that the reasons Navarro was not put back to work were because he felt the length of time that it took Navarro to contact Respondent was far too long -- almost three work weeks -- that Respondent was trying to implement an orderly recall, and that Navarro should have advised Respondent prior to the start-up date of

any difficulty he was encountering in getting back to work on time. (VI:39.) Garcia also acknowledged that he had never offered to reinstate Navarro to his job at any point since the recall letter of June, 1983. (II:51.)

2. Navarro's Strike and Union Activities

Navarro, his son, and his entire family joined the strike. During the strike Navarro was a "coordinator", meaning that he notified his co-workers about meetings that were going to take place. He participated in the strike by picketing in front of Respondent's offices for more than four weeks along with as many as 150 others. Navarro testified that supervisor Frank Castro observed him face to face at a distance of around 25 feet. (II:61-63, 88, 90.)

In a previous case, Sam Andrews' Sons (1983) 9 ALRB No. 21, the Board affirmed the ALJ's finding of an 1153(a) violation when Navarro was unlawfully interrogated by a company attorney who attempted to discover who the Union "captains" were. The ALJ had found that Navarro ". . . was a leader of the Union at Sam Andrews" and "served as ranch coordinator for the UFW during the work stoppages and was in charge of their execution." (ALJD, p. 38.)

Navarro was also one of the tenants, along with Beltran and others, involved in the eviction proceedings when Kern County condemned the property, and the ALRB intervened.

3. Analysis and Conclusions of Law

The General Counsel has failed to make out a prima facie case that discrimination was the motivating factor behind Respondent's decision not to rehire Navarro. Despite his strong

Union support, the knowledge of Respondent regarding it, and his active involvement in the effort to keep Respondent from evicting him from the condemned housing, there was simply no causal relationship between those activities and the refusal to rehire. Though it is true that Navarro never received his recall letter, it was through no fault of Respondent's as Navarro had failed since approximately December of 1981 to let his whereabouts be known despite the requirement to do so contained in Respondent's work manual. Navarro had even returned to the United States to seek work in the Salinas area, apparently during the middle part of 1982, but neglected to inform Respondent of any new address at that time. Respondent's decision to send the notice to Maricopa which Navarro, with the help of his friends, had used for unemployment matters, was certainly reasonable and must be considered a bona fide attempt to rehire him in accordance with proper procedures.^{21/}

Navarro also failed to make any kind of an effort to alert Respondent of his problems and to ask for permission to arrive beyond the time limit set forth in the recall notice. The UFW, as Navarro's exclusive bargaining agent, had made an offer to return to work on his behalf and represented that he was available to do so.

21. The General Counsel concedes that the recall letter was properly mailed to Navarro's last known address and that the UFW had some responsibility to assist Respondent in notifying the workers of the recall. The General Counsel also does not contend that Navarro was singled out for disparate treatment. Rather, General Counsel's only argument in support of Navarro's case seems to be that the recall notices contain an unreasonably short reporting time and as such, interfered with the right to strike. (G.C.'s Post Hearing Brief, pp. 8, 10-11.) Though such an argument might have some application to Beltran, it is severely weakened in Navarro's case where Respondent was not contacted about Navarro's intentions until 15 days after the report date.

Though UFW leaders Villanueva and Ramirez and ALRB attorney Reyes knew or learned that Navarro was out of the country and in Mexico, no one bothered to inform Respondent of this fact, let alone indicating Navarro's intentions to go back to work or requesting permission for him to return late. He did make an attempt to reach Perez but then abandoned the effort early on. Though it is understandable that he was concerned about the cost of any further international phone calls, it is not clear why he chose to leave no message whatsoever with either Perez's wife or brother.

Navarro was able to get in touch with Union activist Ramirez, pursuant to the latter's telegram, and secured from him Perez's telephone number. Why did he not at the same time ask Ramirez to pass on any messages from him to Perez regarding any difficulties he might be having in returning to work in a timely manner? The same is true of his call to another Union activist, Villanueva. Instead of leaving any message for Perez (or anyone else at Respondent's) through Villanueva, Navarro called only for the purpose of obtaining Respondent's office number, then hung up before receiving it.^{22/}

Likewise, even when he spoke to Reyes collect, he failed to ask Reyes to convey any message to Respondent for him, either at that time or at any time during the two weeks it took him to raise money for transportation back to the United States.

22. The General Counsel goes to great pains to explain how diligent Navarro was in attempting to find out Respondent's office number by contacting Villanueva and Ramirez in the United States. (He neglected, however, to ask Reyes for it.) No explanation was ever offered, however, why Navarro could not have simply called the information operator in Bakersfield for the number.

In short, Navarro arrived fifteen days late without having in any way previously indicated to Respondent that he desired to return to his old job but only needed a little more time to make the necessary arrangements. Respondent's refusal to rehire him was proper, justified for business reasons, and not a violation of the Act.

I recommend that this allegation be dismissed.

VI. The Alleged Refusals to Assign Night Irrigation Work

A. The Dispute Over the Alleged Differences Between Day and Night Irrigation

John Perez has been the irrigation supervisor at the Santiago Ranch for the past four years. Before that he was employed as an irrigation foreman for five years. Perez testified that the day irrigator's responsibility was to make sure that the water was running in the furrows, to check on the reservoirs, and also, when necessary, the sprinklers. The day irrigator could be in charge of up to four fields. On the other hand, the night irrigator was responsible for everything on the ranch. He had to make sure nothing overflowed or went dry and had to monitor the portable boosters to make sure that the filter system didn't get clogged up. He also had to make sure that the electric pumps were functioning. Perez considered night irrigation work to require greater skills than day, particularly that work performed during the busy summer season. Perez testified that a summer night irrigator was "just about a cut below becoming a foreman". (IV:131-132, 176.)

Alleged discriminatees Francisco Franquez and Manuel Perez both disputed the claim of any major differences between day and night irrigation. Franquez testified that the only difference was

that during the day, the foreman assigned the work while at night one worked alone over the entire ranch though he admitted that it was necessary to know the entire ranch. It was Franquez's opinion that any of the irrigators had sufficient information and experience to do the job. (III:14-15, 58-59.) Manuel Perez testified that during the night the main job was just checking the reservoirs to make sure they didn't overflow. (III:79.) Franquez testified that during the day it was the foreman that had that worry. (III:52.)

B. The Irrigation Seasons

John Perez testified that in the Bakersfield area there are two main irrigation cycles, pre-irrigation during the winter which lasts about three months and then summer irrigation which is the main crop irrigation which lasts from May through August. The summer is more labor intensive in terms of the number of irrigators.

During the summer there are normally between 60-70 day irrigators and 3-5 night irrigators. (5 in 1982,^{23/} 3 in 1983 and 4 in 1984 (G.C. 21).) During pre-irrigation there are 33-36 day irrigators and 2 at night sometimes increased to 3 to finish the season (3 in 1981-82, 2 in 1982-83 and 1983-84). (G.C. 21.) (IV:87-88.)

There are also times when no night irrigation work is being performed, mainly part of October, November, and a part of December. (IV:132-135, 141-142.)

23. Perez testified that having as many as 5 night irrigators in 1982 was a very unusual situation occasioned by the fact that several of those working during the strike were inexperienced and needed extra help. (IV:146-147.)

C. The Night Irrigators during the Strike

John Perez testified that in July, 1981, 95 irrigators went out on strike, including all of the night irrigators who at that time consisted of Octavio Villegas and Guadalupe Valdez at Santiago and Martin Godines and Francisco Franquez at Lakeview. The strikers stayed out until June of 1983. When the irrigators struck, summer irrigation duties were initially performed by the supervisors from July through August of 1981 when the irrigation for the large cotton crop caused a slackening of the work. Perez testified that because of the strike, he was required to work a full day shift plus half a night shift. (IV:106, 178-179, 181.)

When it was time to begin the pre-irrigation season (approximately December, 1981 - March 1982), the strike was still in progress. Respondent employed two brothers, Juan^{24/} and Margarito Palafox, to do the night irrigation. Neither had worked for Respondent previously, but Perez testified that both knew the basics, had worked for other farmers in the area, and enjoined a good reputation. As it was pre-irrigation, a favorable period for training, both were taken out during the evenings by supervisory personnel and shown the locations they need to become familiar with. Juan worked at Santaga under Perez and still works there; Margarito worked at Lakeview under Frank Castro and later Pete Espinoza and still works there also. Perez testified that since the strike, the Palafox brothers became the regular night irrigators and were given work whenever there was any. When the irrigation was slow, Juan

24. Juan Palafox actually worked two days as a night irrigator during July of 1981. (G.G. 21.)

took care of both Santaga and Lakeview, and Hargarito was laid off.

D. The Changes in the Irrigation System at Lakeview Since the Strike

1. The Origin of the New System

Respondent's partner, Fred Andrews, testified that Respondent was yearly having problems with perched water just below the land surface on about 1200 acres north of Corpus Road on its Lakeview Ranch. The water made it impossible to grow vegetables and some consideration was even being given to abandoning the land. in May of 1982, Andrews commissioned a study from an engineering company to see if the land could be saved, and the study recommended relieving the water table by the installation of a subsurface drainage system, i . e . , the installation of plastic perforated pipe as a leach line. The water would then flow through these lines and have to be accumulated in reservoirs for evaporation. The water flowing through the lines would allow the leaching program to flush salts and boron from the crop roots, thus helping to make the land productive once again. (IV:4-7.)

Andrews accepted the recommendation, and construction was started in late 1982 and completed in early 1983. (IV:4-5, 10.) The cost for the new drainage systems was \$574,484.51. (IV:70.)

Andrews testified that prior to this project, Lakeview was farmed by a surface irrigation system, i . e , water deliveries through miles of cement underground irrigation pipe. When the drainage system was installed for the first time, all these cement underground pipes had to be removed which changed the entire direction of the water flow on the ranch. According to Andrews, almost all of the pipe lines that were at Lakeview that delivered

water from one parcel to another and most of the previous roads do not exist today. Nor does the old master return system that used to collect the surface water from many parcels exist. During the construction of the drainage system and the change in the road direction and layout, all but one of the previously existing return reservoir systems were eliminated, and 8 or 9 new return systems were built. (IV:11-12, 21-22.)

2. The New System's Effect on the Work of the Irrigator

Andrews testified that the new system impacted on the work required of an irrigator because now the irrigator, whether irrigation was going on or not, would have to monitor the system at inspection stations to see that the underground lines were functioning and no gophers had plugged up the system. In addition, the electronic automatic sensor pumps would now have to be watched to see to it that no pipe malfunction or debris accumulation occurred, thereby allowing an overflow of saline water from the evaporating pond onto Respondent's own land or that of its neighbor. Thus, unlike before, the irrigator now had to maintain the water flow and observe the constantly changing levels. (IV:12-13, 18-22, 42-43.) Furthermore, there was more land to farm at Lakeview in 1983 than in 1981. (IV:23.) Andrews also testified that as a result of these changes, the margin for error was much less today than at the time of the strike because of the present potential for tremendous crop loss. As there was no drainage system anywhere on Respondent's property prior to 1983, Andrews believed that none of the irrigators from those days would have had any experience in this new system nor could the new system be learned overnight.

(IV-.27-28, 58-59.)

3. Qualifications of Irrigators for the New System

Andrews testified that the training for the new system began when the water first started to flow which would have been either late 1982 or January of 1983. (IV:71.) Andrews testified that when the system was installed, he didn't set up any criteria for the hiring or training of the irrigators for the night positions nor did he tell Espinoza what should be required. Andrews also testified that he didn't have anything to do with selection of irrigators that ended up doing night work after the new system was established. However, he added that the supervisors knew that he felt that a night irrigator had to be more competent than the average day irrigator because of all the different situations he might encounter and therefore, should be a known quantity (IV:62-64):

I would want my very best man to watch this particular project in light of the fact that it's new, it's very critical how it's done, that's the north of Copus Road part. The south of Copus Road part also is complicated and new and during a peak activity at night where there's not one supervisor living on the ranch, I would want my very -- my most experienced men to do that kind of work. It's not a time to take a risk or to have school. So I would pick my best quarterback to do that. (IV:30-31.)

Andrews testified that probably many people were capable of understanding the system. (IV:55.) However, he did not believe in training new people during the summer. Andrews testified that he preferred to train irrigators who wanted to work at night, particularly where there was a new system involved, during the winter pre-irrigation season. In this way, if a mistake were made, it would not be critical -- only lost water -- as no crops would be

growing and therefore, there would be no loss of the expenditure for part of or the entire crop. Also, pre-irrigation lasted for 3-4 months, whereas summer irrigation was a much more intense time, when fields had to be irrigated within a few days or sometimes even 24 hours. (IV:29-30, 55-56, 58, 46-48.)

John Perez testified that in order for a worker to qualify for night work after the installation of the new system, he would need to acquaint himself with the entire ranch, i. e. , not only the new fields but the old ones as well because changes had also been made there. A day irrigator could learn the geographic boundaries of a field in a day, but it would take him about a week to get acquainted with the flow of water, underground pipes, pumps, etc. (IV:173, 155, 162-163.)

Alleged discriminatees Fernando Franquez and Manuel Perez disagreed on the significance of any of the changes in the irrigation system. In fact, Franquez testified that the changes had no impact on how he carried out his job. Though he admitted that there had been changes in the reservoirs, he testified that its importance was only that some were made smaller and others were made bigger. One reservoir was even eliminated, new ponds were installed, and some roads were done away with without impact. Franquez acknowledged that there had been some new lines installed but contended that this did not affect his work because they were only placed in the old fields, and he was acquainted with them. (III:27-28.) As to the new leaching system, Franquez recognized that there were eight new lines but testified that Angel Gonzalez explained to him how the system worked in half an hour. (III:29,

51.) Finally, Franquez denied that there had been any changes in the pumps used though he admitted they were smaller at Lakeview. (III:27-28, 51.)

Manuel Perez testified that new pumps had been installed at Lakeview and agreed with Franquez that the only difference from the old ones was that they were smaller but that they were no more difficult to operate. (III:88-89.) Perez also testified that there was some new land and new pumps which were added to the Santiago Ranch but that it was not difficult to learn the system on the new land as it was not different from what had been used on the old land. When he was ordered to work on the new land in November or December of 1984, he received no special instructions.^{25/} (IV:99-100.)

E. The Case of Alleged Discriminatee Manuel Perez

Manuel Perez was hired by supervisor John Perea as an irrigator in March of 1978, and it was John Perea who also assigned him to the position of night irrigator in December of 1979 where he worked for approximately 3½ weeks to late February, 1980 when he requested to be taken off night as he said he was in need of a rest. He later worked at the Lakeview Ranch^{26/} when supervisor

25. Perez also testified that when he first started working on the night shift in 1979, he did not receive any special kind of training or instruction on how to operate any of the irrigation equipment. His supervisor, John Perea, did tell him initially that he must check the reservoirs so they wouldn't overflow or get too low and to check the fields that were being irrigated. (III:77-78.)

26. Manuel Perez testified that before the strike, he worked both days and nights at both ranches but was more familiar with Santiago. Since the strike, he has also worked at both ranches, but now has worked more at Lakeview. (III:97.)

Frank Castro put him on nights there from November 26, 1980, with some interruptions, until March 29, 1981, or almost 4 months, when, having been robbed at night while on duty, he told John Perez he wanted to stop night work. He never worked nights during any summer when the crops were in the ground but only during the pre-irrigation time of the winter when the fields were empty. (III:93.) (G.C. 21.) Perez testified that though at night there were no supervisors working, he knew where he was because he had a map and was acquainted with the entire ranch. (III:77-78.)

John Perez testified that in 1981 Manuel Perez fulfilled his criteria for night irrigation competence because he was dependable, had been working on Respondent's ranch for quite a few years, knew the ground, the systems, and the different types of irrigation. (IV:109-110.)

John Perez also testified that after Manuel Perez's robbery and request to cease doing night work, he put him back to days in March of 1981 and just kept Godines, infra, as the sole night irrigator. John Perez testified that since he was getting ready to lay off somebody from night irrigation work anyway, that position was just not filled after Manuel Perez's departure.^{27/} (IV:116-117.) At the time of the strike, Perez was on the day shift.

1. Perez's Requests for Night Irrigation Work

When Manuel Perez came back from the recall, he

27. John Perez testified that at the end of the pre-irrigation, usually one night irrigator was laid off and that night irrigation work wouldn't start up again until May, the beginning of summer irrigation. (IV:143.)

immediately asked John Perez for night work. John Perez told him that the position was filled but that he would call him if anything came up. He was never contacted. (III:80-81.) Perez also testified that at the time he came back to work, there were two night irrigators already working, Margarito and Juan Palafox. (III:94-95.) Perez testified that in March of 1984 he (and alleged discriminatee Fernando Franquez) asked John Perez for night work and was told he'd be notified whenever the chance came up. He was not notified.^{28/} (III:85-86.)

2. Perez's Union Activity

Manuel Perez was involved in the strike and picketed in front of Respondent's office. He testified he visited several of Respondent's fields telling workers not to work. While, at the fields, he observed two supervisors, Robert Garcia and John Perez, at a distance of 15 feet. (III:79.)

F. The Case of Alleged Discriminatee Martin Godines

Martin Godines did not testify, but the parties stipulated that Godines returned to work following the strike by the date which was specified on his recall letter and that within the first month of his having returned, he spoke to a supervisor concerning obtaining a position as a night irrigator. (III:107.)

28. John Perez testified that during the 1984 summer, there were two night irrigators at Santiago and two at Lakeview. At Santiago there was Juan Palafox and Jose Regalado. Lakeview had Margarito Palafox and Juan Chavez. (IV:143.) (G.C. 21.) Perez testified that both Chavez and Regalado asked him for night work in 1984, and he told both that they'd be hired as soon as they were needed. (IV:165, 174-175.) That winter during pre-irrigation, there were just two night irrigators for both ranches, Juan and Margarito Palafox. (IV:142.) (G.C. 21.)

Prior to the strike, Godines had worked as a night irrigator from December 5 - December 16 and on December 31 of 1980^{29/} and for the following dates in 1981: January 1 - January 27, March 30 - April 3, April 8 - May 31, and June 15 - July 5-(G.C. 21.)^{30/} At the time of the strike, he had been hired for summer irrigation at Lakeview by Frank Castro. (IV:180.) After the strike, Godines did not work again as a night irrigator. (G.C. 21.)

John Perez testified that he placed Godines in a night irrigator slot because in 1981 he too met all the requirements and was extremely reliable. (IV:102-103, 110.) In fact, Perez regarded both Godines and Manuel Perez as good workers who just needed some more experience and for that reason had placed them into winter pre-irrigation rather than summer. (III:153.)

Perez also testified that both Godines and Manuel Perez asked him for night irrigation work the first day they got back from the recall.^{31/} Perez testified that he told them that they weren't aware of all the changes that had taken place on Respondent's property but that after they became more familiar with it, they would talk again. (IV:103-105.) Perez also testified that those

29. There is a gap in the 1980 records for Godines between December 17 - December 30. (G.C. 21.)

30. There is also a gap between June 1 - June 14. (G.C. 21.)

31. Perez testified that only three persons asked him for night work, in 1983, Manuel Perez, Godines and Felipe Quintanilla. (Quintanilla, a striker, was hired in 1984, infra.) Perez testified Franquez never asked him for work. (IV:174-175.)

positions had already been filled at Santiago by Jose Regalado^{32/} and Juan Palafox. (IV:105-106.)

1. Godines' Union Activity

Franquez testified that he observed Godinez on the picket line. (III:53.)

G. The Case of Fernando Franquez

Hired in December of 1979 as an irrigator by Frank Castro, Fernando Franquez began working on the day shift and continued to do so until June 6, 1981 when Castro transferred him to the night shift for approximately 3 weeks until June 28^{33/} before the summer irrigation commenced. (III:10-12.) This was the only night irrigation work he ever did. (G.C. 21.) Franquez testified that he was selected to fill Manuel Perez's slot as Perez wanted to take a break from night duties and then come back later. (III:38.) According to Franquez, it only took Castro half an hour to explain what he was supposed to do and that he started the same night he was hired. His co-worker was Martin Godinez, and both of them were assigned half of the Santiago Ranch and all of Lakeview. (III:37-38.)

Immediately prior to the strike, on July 6, 1981, Franquez was required to take an emergency leave until August 6 because of a death in his family. When he returned, the strike was in progress.

32. Actually, Respondent's records show that it was Juan Mendoza, not Jose Regalado, who worked nights the summer of 1983 along with Juan and Margarito Palafox. (G.C. 21.) All three had also worked the summer of 1982. (G.C. 21.) (IV:162.)

33. There was a gap in Franquez' records from June 29 -July 6. (G.C. 21.)

Nevertheless, he went back to work as a daytime irrigator and told Robert Garcia he would continue to do so provided he could receive assurances that if the strikers returned, he would not be fired. As he never received these assurances, he joined the strike and picketed for 3-4 months. (III:19-21, 42.)

Franquez returned to work in July of 1983 and reported to supervisor John Perez at the Santiago Ranch where he was assigned to daytime irrigation work. Presently, he is working at the Lakeview Ranch. Franquez testified that since the strike, he has worked half the time at Santiago and the other half at Lakeview and that he has worked in all the fields at Lakeview, including the new ones and almost all of them at Santiago, including the new ones there also. (III:23-25.) Franquez also testified that in the past he has worked at night at all of Lakeview and about one-quarter of the fields of Santiago. (III:14-15.)

1. Franquez's Request for Night Irrigation Work

Franquez testified that he wanted to work nights because it paid more and sometimes relieved the boredom of day work. (III:55-57.) Franquez testified that his first request for night work after the strike came in October of 1983 when he asked his supervisor, Pete Espinoza, for work at the Lakeview Ranch where he had been working, explaining that he had been a night irrigator before the strike. According to Franquez, Espinoza told him that he was not aware of that and that he would talk to Garcia. Later, according to Franquez, Espinoza told him that Garcia had said that he was to remain a day irrigator. (III:30-31.)

Franquez acknowledged that he had no further discussions

with supervisory personnel about night irrigation work until March of 1984 while working at the Santiago Ranch under the supervision of John Perez.^{34/} At that time he, joined by Manuel Perez, asked John Perez for night work and Perez, according to Franquez, told them that if the opportunity arose, he would call them.^{35/} Eight days later Franquez again asked Perez about the work, and Perez is alleged to have told him that there was no change. Franquez testified he was never called by Perez to do the night work. (III:31-33.) In June of 1984, Franquez testified that he again asked Espinoza for night work at Lakeview. (At the time he was again working at Lakeview and being supervised by Espinoza.) According to Franquez, Espinoza told him that there was no chance. Frank Castro, formerly irrigation supervisor at Lakeview and part of Santiago, testified that he originally hired Franquez as a line mover^{36/} and placed him in a night irrigator position, owing to the fact that Juan Chavez had quit, been replaced by Manuel Perez and Godines, and that Perez had then quit. Castro testified that he thought, but was not sure, that he told Franquez that the

34. Neither Perez nor Espinoza had ever supervised Franquez before the strike. Castro was no longer working for Respondent. (III:42-43, 45.)

35. Perez testified that since the strike, Franquez had never asked him for a night irrigator position. (IV:118, 165.)

36. John Perez testified that Manuel Perez and Martin Godines were also line movers. There are two types of sprinkler irrigators, those who move the pipes across the field and others who check the lines to make sure the sprinklers are rotating correctly. Line moving is a task only performed during the day. The advantages are that a line mover, who works by piece rate, can make the same amount of money as an hourly paid day irrigator in a shorter amount of time. And if he were to stay the entire day, he could make more money. (IV:129-131.)

job would be temporary -- just for the summer -- because it was the peak of the season and there was a lot of work around. In any event, Castro regarded Franquez as an extra for the summer and testified that he had intended to stick with Godines during the following pre-irrigation season since he had more experience and had done pre-irrigation during the preceding season. (V:21.) (G.C-21.) Though Franquez had never done night work before, he had indicated to Castro that he had performed night duties for other employers. Castro had no problem with his work performance at Respondent's. (V:2-6, 20, 24.)

After Castro left, the supervisory duties at Lakeview were taken over by Espinoza. Though Espinoza did not become an irrigation supervisor until March of 1983, he had known Franquez from 1981 when both worked at the J.L. Capello Ranch, Franquez as an irrigator, mainly moving lines, and Espinoza as the superintendent for the whole ranch. Espinoza testified that Franquez had a specialty which was line moving, that Franquez preferred doing this and had, in fact, requested him to assign more of this type of work.^{37/} Espinoza acknowledged that he viewed Franquez as this kind of a specialist. (V:39, 53-54, 69-70, 88.)

Espinoza testified that when Franquez asked him in June of 1984 if he could do some night work, he told him that he was not aware that he had previously done night irrigation, that he already had a night man (Margarito Palafox), but that if such an opportunity

37. During his testimony, Franquez admitted that he told Espinoza that he was a line mover and had asked him on several occasions for more opportunities to move lines during his work day. (III:46-47.)

came up, he would let him know. However, Espinoza further testified that he did not think Franquez was really serious about this request and had just mentioned it in passing. This view was reinforced by the fact that he only mentioned it that one time so "(a)s far as I was concerned, it was a dead issue because he never did bring it up anymore." (V:48, 34-38, 88, 92-93.) Nevertheless, thereafter, Espinoza did ask his assistant or water foreman, Angel Gonzalez, if Franquez had ever done any night irrigation^{38/} and was told that he did night work temporarily but not on a full time basis. According to Espinoza, he then told Gonzalez that he would soon need another night man, to which Gonzalez is alleged to have said that Juan Chavez should be the man and that, in response to an inquiry from Espinoza, he had a good attendance record.^{39/} (V:85-87.)

Espinoza testified that he did not place Franquez in a night position because ever since March of 1983 when he became the supervisor, Franquez had a poor attendance record, particularly on

38. In another part of his testimony, Espinoza denied that Franquez had been mentioned. He testified that as he was just learning his way around the ranch, he asked Gonzalez who could be trusted, and Gonzalez recommended Chavez. Espinoza then testified that Gonzalez never mentioned Franquez and then stated: ". . . I f they would have brought up Fernando, I would have made an issue to put Fernando, but they didn't" (V:84.) (It is worthy of note that Espinoza used the pronoun "they" when describing who made the recommendation while steadfastly denying that anyone but Gonzalez was involved in this discussion. (V:84.)

39. At the time of this conversation, Chavez was not working for Respondent and had never worked for Espinoza as a night irrigator. Espinoza testified that in June of 1984, subsequent to the night work request of Franquez but prior to his conversation with Gonzalez, Chavez had called him and indicated he had worked at Lakeview at night and wanted to do so again that summer. Espinoza testified that he pointed out that there had been some changes in the system but that Chavez informed him he was aware of some of them as he had worked there in 1982. (V:85-86.)

Sundays when he often called in with excuses as to why he could not show up, even after he had indicated that he would be there. Espinoza testified that he was not disciplined because he always had an excuse. Espinoza felt confident that with a little explanation of the new system, Franquez could learn it, probably within a month, and that there would be no problem in his getting the job done. But Espinoza testified that because of poor attendance, he just wouldn't be at ease with Franquez working nights as he might call one evening and say he couldn't make it in which case Espinoza or Gonzalez would have to leave home and go to the ranch. ". . .A night man to me is like my quarterback. I can rely on him, I can go home and not completely forget about the ranch but be at ease. That's what I consider a good night man."^{40/} (V:43.) Moreover, there were no problems with Margarito Palafox that would have caused him to make a change. (V:43-44, 48-49, 102, 105-106.)

Espinoza denied that he told Robert Garcia that Franquez wanted a job as a night irrigator and did not speak to him about the

40. Franquez testified that when he was on night irrigation before the strike, the supervisors, Frank Castro, John Perez and Dolores Alvarez, all lived on the ranch but that this practice was not in effect after the strike. (III: 41-42.) Espinoza testified that he resides 34 miles from the ranch and never lived on it. (V:72-73.) John Perez testified that he presently lives 49 miles from the ranch (as of March of 1982) and that it was important to him that the present night irrigators, the Palafox brothers and Felipe Quintanilla, did not need to contact him during their shifts, thereby enabling him to remain at home.

request.^{41/} Nor did he talk to Frank Castro. (V:66, 83.)

At the time Franquez made his request, only one night irrigator was working at Lakeview,^{42/} Margarito Palafox. (Palafox was already working there nights when Espinoza began his duties in March of 1983.) Espinoza testified that he considered Palafox very reliable, an irrigator who rarely asked for assistance and one who knew the systems well because he had been there since the new drainage system started flowing. (V:46-47, 50-52.) Later on, Juan Chavez was put in as a second night irrigator. Espinoza testified that he did so because he relied on Gonzalez's recommendation concerning Chavez's past experience, competence, and dependability and became convinced that he could do the job. (V:102.) Espinoza testified that Palafox and Chavez were the only two night irrigators that ever worked for him since he began his duties at Lakeview in March of 1983. (V:66-69.) (G.C. 21.)

41. Garcia contradicted this and acknowledged that Espinoza had mentioned to him that Franquez had requested a night irrigator position and that he (Espinoza) had some doubts about his capabilities. Garcia testified on direct examination that Espinoza wanted his opinion of Franquez's competence but that he told him that he was not qualified to give it, and the decision was up to Espinoza. (VI:69:70.) However, just a few minutes later, testifying under the General Counsel's cross-examination, Garcia denied that his opinion was solicited at all and stated that Espinoza had mentioned Franquez's request as if in passing only. (VI:73-75.) A week earlier, Garcia had testified that he and Espinoza had mutually agreed not to employ Franquez as a night irrigator because he was unfamiliar with the new system and was not qualified to work without supervision. (I:64, 71.)

42. Espinoza testified that normally there was only one night irrigator assigned to Lakeview but at the peak of irrigation (by the end of June) there were two. (V:46-47.) However, there is a slow period for night irrigation, usually September, when one irrigator covers both ranches. (V:67-68.)

H. The Selection of Night. Irrigators Following the Recall

John Peraz testified that after the strike, in June of 1983, he was responsible for the hiring (and firing) of night irrigators at the Santiago Ranch. (IV:108.) (Pete Espinoza was responsible at Lakeview.) Perez denied that he needed to discuss with higher ups or with Espinoza whom to select for night work. He specifically denied having any discussions with Garcia on this subject matter. (IV:176-179 .)

Perez testified that the criteria for the selection of night irrigators was the same as in 1981, i . e . , the irrigators would have to be familiar with the whole ranch including the pumps, return systems, and underground lines and would have to be able to know all the connections from the fresh water to those underground lines. Irrigators would also have to have some mechanical knowledge. Furthermore, Perez stressed the importance of attendance and dependability. (IV:109.)

Though the job functions of the night irrigator in 1983 were the same as 1981, Garcia testified that Manuel Perez and Godines no longer met those job requirements in 1983 because there had been so many changes in the two years at Santiago -- new lines, pumps, underground pipes, reservoirs, the return system, land added, land taken back --- that they no longer knew the general system. Though the time it now took to learn some of these changes was not

all that great,^{43/} the consequence of the changes meant even more responsibility on the part of the night irrigator in the sense that he now had to watch the water level in the reservoir and turn the pump on when necessary (whereas before there was no pump) and he had to be more conservative with water so as not to overburden the return system for that area. In addition, Perez testified that Respondent was into the busiest season of the year -- summer irrigation when a lot of crops were growing -- which was not the time to be training personnel who had never participated in summer irrigation before. Overall, considering all these factors, Perez testified that he did not feel comfortable in placing basically newcomers into a night slot where they would be alone on the ranch and expected to know the land and the system. Finally, there were no vacancies at that moment. (IV:111-112, 120-121, 126-127, 88-101.) (Resp's 5 and 6 .)

I. The Filling of Night Irrigation Vacancies after the Recall

John Perez testified that the first Santiago vacancy since the strike occurred in January of 1985, a pre-irrigation period, when some extra help was needed at night. This vacancy was filled by Felipe Quintanilla. Perez testified that Godines was unavailable because he had quit in approximately November of 1984, and Manuel Perez was not given the work because he was no longer

43. Perez testified that when the changes such as pumps or lines were introduced at Santiago, no specific instructions were given to the irrigators. They were just shown where the equipment was and during the 2-3 days it took to install it, the irrigators would have been in a position to learn the operational features of it merely by observing. (IV:173, 155, 162-163.)

qualified, having mainly worked since his return from the strike not at Santiago but at Lakeview. Thus, it was John Perez's belief that Manuel Perez was no longer familiar with the Santiago Ranch. Furthermore, John Perez testified that neither Manuel Perez nor Godines had asked him for a night irrigator position since that one time back in June of 1983.^{44/} (IV: 122-123.)

John Perez testified that during the 1985 pre-irrigation season, the other night irrigators, in addition to Quintanilla, were Juan and Margarito Palafox. (The two summer night irrigators from 1984. Juan Chavez and Jose Regalado, had quit Respondent's employ. (VI:144-146.)

1. The Case of Felipe Quintanilla

Felipe Quintanilla has been employed by Respondent since 1976.^{45/} John Perez testified that around November or December of 1983 Quintanilla first requested night work and that he (Perez) told him that if a position came up, he would see if it could be his. Perez testified that Quintanilla had become familiar with the ground, the pumps and the lines. He was first selected as a night irrigator in July of 1984 (for 2 days) and again in January, 1985. As of the time of the hearing (March 21, 1985), he was still so employed, though Perez testified he was soon to be laid off after the conclusion of the pre-irrigation season. (IV:119-120, 144-145,

44. As earlier referred to, this is disputed by Manuel Perez who testified he asked John Perez for night work again in March of 1984.

45. Both Franquez and Manuel Perez testified that Quintanilla was senior to them. (III:61-62, 104-105.)

174.) (G.C. 21.) Quintanilla participated in the strike.^{46/}

(IV:132.) Franquez testified he served on the picket line with him.

(III:61-62.)

2. The Case of Jose Regalado

Jose Regalado became a summer night irrigator in 1982 during the strike working the night shift from June 3 -August 8. He worked at Santiago the summer of 1984, as well, from June 25 - August 19.

(IV:107.) (G.C. 21.)

3. The Case of Juan Chavez

Juan Chavez worked as a summer and winter irrigator in 1979, a summer irrigator in 1980, 1982 and 1984. (G.C. 21.) According to John Perez, he also worked the summer of 1978. Chavez quit Respondent in 1981 a few months before the strike to go to Mexico and thus lost all seniority. He returned in March of 1982 and worked nights during the strike. (IV:173-174.) (G.C. 21.) Frank Castro testified that Chavez's departure in early 1981 allowed more night irrigation time for Manuel Perez and Godines. (V:4-5, 18-20.)

J. Analysis and Conclusions of Law

What this case boils down to essentially is the competition after the strike between pre-strike and replacement irrigators for an extremely limited number of night positions, just three during the summer of 1983, four during the summer of 1984, and two pre-irrigation slots in 1982-83 and 1983-84. As General Counsel

46. The only striker ever offered a night position has been Quintanilla. Jose Regalado walked out in 1981 but returned in time for the summer irrigation. (IV:147.)

points out in his Brief, no strike replacements were discharged in order to create openings for workers who had gone out on strike-And the issue as to whether and when this strike became an unfair labor practice strike is presently before the Board. (General Counsel's Post Hearing Brief/ p. 7 .) Therefore, the issues herein will be analyzed as if the strike remained an economic one for its duration.

The Palafox brothers were hired as replacement workers and trained in night irrigation duties during the pre-irrigation season of 1981-82. Juan was assigned to Santiaga where he still works; Margarito went to Lakeview where he still works. They became the regular night irrigator for each ranch.

It cannot be said that any of the alleged discriminatees were Respondent's "regular" night irrigators before the strike. (G.C. 21.) Yet, part of General Counsel's case appears to rest upon the assumption that they were somehow entitled to priority placement as night irrigators upon their request following their return. But night irrigation work had always been a matter left to the sole discretion of the irrigation supervisor. Thus, a remedy under the Act herein will lie only if the General Counsel can prove a causal connection between Respondent's irrigation supervisors' decision not to assign Perez, Godines and Franquez night work and the fact that they participated in the strike. For reasons stated below, I do not believe General Counsel made out a case of discriminatory conduct as I cannot find the required causal connection. Quite the contrary, I find that Respondent had compelling business reasons for refusing to assign night work to the newly reinstated irrigators.

In the first place, I find that night irrigation work entails greater skill and experience than day work, particularly during the summer season when the crops are in the ground.

Second, I am persuaded that the new drainage system at Lakeview at a considerable cost to Respondent brought with it changes in the work duties of the night irrigator. Franquez tended to exaggerate the lack of impact of any of the changes on his job while Espinoza exaggerated the amount of time it would take to learn the new system. As is often the case, the truth lies somewhere in the middle. But I especially credit the testimony Fred Andrews on this subject who was articulate, knowledgeable, and straightforward. It seems entirely reasonable that given the introduction of the new leaching system with its attendant high cost and increased risk of damage if not monitored correctly, Respondent's management would want to rely on what it considered to be its most experienced and competent irrigators. This would not have included Franquez who had very limited experience but would have included Margarito Palofox and Juan Chavez.

This is not to say that a great number of people may not have been capable of understanding the new system in time, as Andrews honestly admitted, only that he didn't want to train them on this system as summer, the busiest season, approached. This was not a stragem designed to exclude the returning strikers from job opportunities but rather a perfectly justifiable business decision motivated by economic concerns.

Likewise, John Perez testified credibly about the changes at Santiago that were made in the two years the workers were on

strike. Though it might not take that much time to learn the system, as John Perez openly acknowledged, Manuel Perez and Godines couldn't do it immediately. Moreover, the night irrigators had more responsibility under the new system.

In short, I find that John Perez and Espinoza were entitled to look upon the returning strikers, who had done none or very little summer irrigation in the past, as unqualified to begin work immediately as night irrigators. Though they had done pre-irrigation before and though they many have even become aware of some of the changes after they started back to work during the days, they still were not that familiar with the ranches as a whole.

When Manuel Perez returned from the strike, he asked John Perez for a summer night irrigator position but was told that the job was filled. This appears to have been true in that there were only three night irrigators in all of 1983 for both ranches and two of them -- the Palafox brothers -- were working at the time. The third, Juan Mendoza, was given the job about a week later (G.C. 13 and 21), but there is no evidence of when such a commitment was made to him. All three had also worked the preceding summer; Manuel Perez never had. These same three irrigators served throughout the 1983 summer and did the 1983-84 pre-irrigation. For some unexplained reason, Perez never even asked for pre-irrigation work in 1983-84, or 1984-85, a job he had done in the past in 1979-80 and 1980-81. When he did again request night work, in March of 1984

from John Perez,^{47/} even though he had not been working that much at the Santiago Ranch, the Palafox brothers were the only night irrigators at that time. Manuel Perez apparently did not apply at Lakeview even though he was more familiar with it.

Martin Godines' case is a little different in that he had apparently actually been hired for summer irrigation at Lakeview in 1981, worked a part of the summer, and more than likely would have worked the entire summer but for the strike which he joined. Still, as has been just shown was the case with Manuel Perez, there were no vacancies when he applied in 1983 either. There is no evidence that Godines applied again.

There was no question about Perez's and Godines' ability. Their supervisor, John Perez, made it clear that each was dependable and competent, only that they needed more experience. And John Perez also admitted that the basic nature of night irrigation work had not changed since the strike, only that there was more of it and there was a need for a new irrigator to acquaint himself with the changes. Thus the fundamental question really comes down to whether Respondent had a business justification for hiring Juan Mendoza for the summer of 1983 and Jose Regalado for the summer of 1984. Mendoza was chosen in 1983 because he had also worked the summer of 1982 during the strike and had the requisite experience and knowledge of the land that Perez and Godines lacked. I find this to

47. I credit Manuel Perez and Fernando ranquez that such a request was made at that time. John Perez's denial is not credited in this case though generally, I found him to be a reliable witness who testified honestly and without malice. He displayed a sense of fair play. I also found him very knowledgeable about his work. This may just be a case of faulty memory.

be a convincing argument.

But as to 1984, the General Counsel argues that Jose Regalado managed to obtain a night irrigator slot the summer of 1984 despite the fact that he hadn't worked as an irrigator since 1982. But again, Regalado had summer irrigation experience, and John Perez was justified in giving the one slot to him. For me to conclude that Perez and Godines were denied the position solely because they participated in the strike would amount to speculation, particularly in view of their Union activities which are hard to differentiate from those of the other strikers.

The fact is that when a vacancy did occur in January of 1985, John Perez filled it with a striker, Felipe Quintanilla.^{48/} Godines had quit in November of 1984 and Manuel Perez had been working at Lakeview and was no longer completely familiar with Santiago.

Franquez has perhaps the weakest case. The only night shift duties he ever performed were for a 3 week period prior to the strike, mainly at Lakeview, and even that was as a replacement for

48. Quintanilla has been a Union supporter for some time. In *Sam Andrews' Sons* (1979) 5 ALRB No. 68, the ALJ concluded that Quintanilla had been discharged and refused rehire in violation of sections 1153(c) and (a) of the Act. The Board reversed, finding the General Counsel failed to prove Respondent's conduct was based on Union membership or activity as opposed to insubordination towards John Perez. However, the Board noted that Quintanilla had testified that he (1) openly advocated the UFW; (2) wore a Union button prior to the election; (3) spoke to co-workers in the presence of supervisors, including Perez; and (4) engaged in conversations with Perez in which he declared his Union support. The General Counsel's argument that the hiring of striker Quintanilla rather than showing a lack of animus demonstrates the lengths Respondent will go to punish strikers who file charges against it seems a little farfetched.

Manuel Perez who had asked to be relieved. At the time he first applied for Lakeview night work from Espinoza, October of 1983, a particularly slow period, only Juan Palafox was employed as a night irrigator, working at both ranches. During the 1983-84 pre-irrigation winter, Respondent only used, as has been pointed out, Margarito Palafox at Lakeview and Juan Palafox at Santiago. The next time Franquez applied for work was in March of 1984 when he asked John Perez. At that time only the Palafox brothers were working nights. Thereafter, in June of 1984, Franquez asked Espinoza for night work. Juan Chavez was selected instead and commenced work on June 14. The General Counsel argues that in 1984 Chavez had no more experience with the changes at Lakeview than Franquez and was hired only because he was a strike breaker. But Chavez had worked Lakeview during the summer of 1982 up to August 497 22, was recommended by Espinoza's assistant Gonzalez^{49/} upon whom Espinoza, being new as an irrigation supervisor, quite naturally relied, and Espinoza lacked confidence in Franquez's dependability and experience. Thus, discrimination was not shown. In Franquez we have an irrigator that had worked at night about three weeks in his career. He applied for night irrigation in March of 1984 with John Perez, but Perez knew little about him, having never supervised him. He asked Espinoza for the work that June, though he had never done summer irrigation before. Espinoza knew him from pre-Respondent days not as a night man but as a line mover who regularly asked him

49. Gonzalez was not called as a witness. I credit Espinoza¹'s testimony, in this instance, that Gonzalez's opinion was sought. There is no evidence that his recommendation of Juan Chavez was motivated by anti-union motivation.

for more line moving work while employed by Respondent during the daytime. Therefore, it was not surprising that Espinoza might not have expected such a request from Franquez and maybe even thought he was not really serious, though he did follow through by asking others about his ability. In any event, the real reason Espinoza didn't hire Franquez for summer irrigation was that being a new irrigation supervisor and after seeking advice from his assistant, Gonzalez, he felt more secure in sticking with those night irrigators that had previous experience in the summer at Lakeview. Moreover, he was looking for dependability so he wouldn't have to drive out to the ranch in the middle of the night, and he was less than satisfied with Franquez's attendance record, particularly on Sundays.^{50/}

Finally, the case for discrimination against Franquez for his UFW activities is weakened by the lack of support he himself showed for the strike when, returning from a leave of absence in August of 1981, he crossed the picket line and returned to work as a day irrigator. The only reason he joined the strike was that he failed to receive guarantees from Robert Garcia that he would not be fired should the strike end and the strikers return to work. Obviously, Respondent was aware of his willingness to work during the strike.

Overall, I do not find that Franquez was discriminated

50. This evidence is undisputed. Franquez did not rebut the evidence concerning his lack of attendance.

VII. REMEDY

Having found that Respondent violated section 1153(a) and (c) of the Act by refusing to rehire Juan Beltran and Demetrio Vasquez, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.^{52/}

I recommend the dismissal of those portions of the Compliant in which the Respondent has been found not to have violated the Act.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent Sam Andrews' Sons, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to hire or rehire, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any union activity or other concerted activity protected by section 1152 of the Agricultural

52. Respondent argues that the ALRB may not reinstate or pay backpay to Vasquez on the ground that he may not be lawfully present in this country, citing *Sure-Tan, Inc. v. N.L.R.B.* (1984) 81 L.Ed.2d 732. (Resp's Post Hearing Brief, p. 6, ft. 5.) This issue is better left to the compliance stage of this proceeding where Respondent may present whatever evidence it has that bears on this issue. See *Caamano Brothers, Inc. d/b/a Ethnic Produce* (1985) 275 NLRB No. 38.

Labor Relations Act (Act).

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

(a) Immediately offer to Juan Beltran and Demetrio Vasquez full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

(b) Make whole Juan Beltran and Demetrio Vasquez for any loss of pay and any other economic losses they have suffered as a result of the refusal to rehire them, reimbursement to be made according to established Board precedents, plus interest thereon in accordance with out Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination and 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 period and the amount 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 appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

said Notice is mailed.

(f) Provide a copy of the attached Notice in the appropriate language, to each employee hired within the 12 month period following the date of this Order.

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

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to 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 of employees' 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.

(i) Notify the Regional Director in writing, within 30 days after the issuance of this Order, of the steps Respondent has taken to comply therewith and continue to report periodically thereafter, at the Regional Director's request, until full

compliance is achieved.

Dated: June 27, 1985


Marvin J. Brenner

MARVIN J. BRENNER
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative of our employees, the General Counsel of the ALRB issued a complaint which alleged that we, Sam Andrews' Sons, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we had violated the law by refusing to rehire Juan Beltran and Demetrio Vasquez.

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 and you have these rights, we promise that:

WE WILL offer Juan Beltran and Demetrio Vasquez their jobs back without loss of seniority and pay them any money they lost plus interest because of our refusal to rehire them.

SAM ANDREWS' SONS

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.