STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	Case Nos. 82-CE-75-D 82-CE-112-D 12 ALRB No. 30

DECISION AND ORDER

On March 18, 1983,[1/] Administrative Law Judge (ALJ) Thomas Patrick Burns issued the attached Decision in this matter. Thereafter, Respondent, Charging Party, and General Counsel each timely filed exceptions to the ALJ's Decision with supporting briefs. Respondent and Charging Party each filed a reply brief. The Agricultural Labor Relations Board[2/] (ALRB or Board) has considered the record and the attached Decision of the ALJ in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions, but only to the extent consistent herewith, and to adopt his recommended Order, as modified herein.

Nature of Strike at its Inception

On July 9, 1981, the United Farm Workers of America, AFL-CIO (UFW) called a strike against Respondent. General Counsel

[1/]The Administrative Law Judge's Decision was inadvertently dated 1982 instead of 1983.

[2/]Chairperson James-Massengale took no part in the consideration of this matter.

and the UFW except to the ALJ's finding that it began as an economic/ rather than an unfair labor practice, strike. For the reasons discussed below, we affirm the ALJ's finding on this issue.

On July 9, 1982, the UFW filed a single unfair labor practice charge, in which it alleged that beginning on or about that date, Respondent had refused to hire unfair labor practice strikers who had offered to abandon their strike and return to work. Pursuant to an investigation by the General Counsel, a complaint issued on September 16, 1982, alleging only the conduct described in the charge.

Both General Counsel and the Union contend that employees resorted to the strike mechanism in immediate and direct response to two acts of Respondent which were in violation of the Act and that the strike was therefore an unfair labor practice strike. The first of the acts is Respondent's undisputed discharge of an eight-person irrigation crew after the crew had refused to accept Respondent's provision of an intra-farm means of transportation because it allegedly was unsafe. The incident occurred on the day immediately preceding the strike. The second act concerns Respondent's failure to rehire Francisco Larios upon his application for work, also on the day before the strike.

Both of the acts described above, as well as the onset of the strike, were the subjects of an unfair labor practice proceeding and Decision in Sam Andrews' Sons (1982) 8 ALRB No. 69. The Board's Decision in 8 ALRB No. 69 issued on September 28, 1982, one month prior to the opening of the hearing in the present proceeding. In that case, the Board dismissed an allegation that the irrigators had

been discharged, finding instead that they had quit their jobs. With respect to Larios, however, the Board found that Respondent failed to rehire him for discriminatory reasons, in violation of section 1153(c) and (a) of the Act.[3/] Thus, on the basis of 8 ALRB No. 69, the first of the alleged unfair labor practices cited as a precipitating cause of the strike did not exist. The dispute herein arises over whether Respondent's failure to rehire Larios on July 8, 1981,[4/] although unquestionably a violation of the Act, served as a motivating factor in the employees' decision to strike one day later. The ALJ found that it did not and we agree.

A strike is not automatically deemed an unfair labor practice strike merely because the employer is also guilty of an unfair labor practice (see, for example, Walker Die Casting, Inc. (1981) 255 NLRB 212, 216 [107 LRRM 1154]); rather, it must be shown that a strike was caused or prolonged in whole or in part by employer unfair labor practices. (Burlington Homes, Inc. (1979) 246 NLRB 1029 [103 LRRM 11161; Walker Die Casting, Inc., supra, 255 NLRB 212.) Thus, unfair labor practices which occur contemporaneously with an economic strike will not convert it into an unfair labor practice strike based on timing alone. As explained in Tufts

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

[4/]The Board affirmed the ALJ's finding that Lario's repeated applications for work throughout the Spring of 1981 were similarly rebuffed for reasons proscribed by the Act.

Brothers, Inc. (1978) 235 NLRB 808 [98 LRRM 1204]:

> The requirement of a causal connection between the unfair labor practice and the strike is not satisfied merely because the two coincide in time. It is necessary for the Board to find that Respondent's unlawful conduct in fact constituted a contributing cause to the strike that followed. (235 NLRB at 810; footnote omitted).

As requested by General Counsel, the ALJ took judicial notice of the entire 23-volume hearing record in 8 ALRB No. 69. He found that employees Ramon Navarro and Leonardo Villanueva had testified in that case that the work force walked out in order to protest the discharge of the irrigators. Neither witness made mention of Larios. In the present proceeding, both Navarro and Villanueva were extensively cross-examined about their prior testimony and each confirmed the excerpts read to him from the transcripts of the earlier hearing and stated that they had testified truthfully. Also in the present proceeding, but for the first time, Navarro and Villanueva testified that the Larios incident had in fact been a cause of the strike. As Villanueva explained, he had not discussed that factor before because "They didn't ask me about that."

The ALJ found it disingenuous that the same witnesses who testified in 8 ALRB No. 69, and who had mentioned only the plight of the irrigators as the cause of the strike, should now testify that that was but a secondary issue eclipsed by the Company's refusal to reinstate Larios, who was not mentioned at

all in the prior proceeding.[5/] As General Counsel and the UFW correctly observe, the cause of the strike was not a factual issue litigated in 8 ALRB No. 69.[6/] However, that does not satisfactorily explain the complete shift in emphasis regarding the two incidents, especially since the change in theory occurred only after issuance of the Board's Decision in 8 ALRB No. 69. This transformation of the Larios incident from omission to preeminence, particularly when coupled with the minimal testimonial evidence offered in support of the revised theory in General Counsel's case-in-chief,[7/] persuades us that General Counsel failed to prove by a preponderance of the credible testimony that the strike was an unfair labor practice strike from its inception.[8/] "[T]he present theory . . . that unfair labor

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[5/]Because the ALJ's credibility resolutions on this critical issue were based upon the objective review of perceived conflicts in testimony rather than on the demeanor of the witnesses while testifying, we do not review such assessments by the same standards as demeanor-based credibility resolutions. (Kelco Roofing, Inc. (1983) 268 NLRB 456 [115 LRRM 1037]; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 153].) However, we have carefully scrutinized the ALJ's credibility resolutions here and find them supported by all the record evidence.

[6/]Indeed, the ALJ in that case sustained Respondent's objection as to the relevancy of General Counsel's question regarding the cause of the strike. (See 8 ALRB No. 69; RT IX, pp. 42-43.)

[7/]As the ALJ Noted, David Villarino, the UFW's organizer whom Navarro testified he called and informed of the employees' reasons for the strike, was not called as a corroborative witness despite his presence at the hearing.

[8/]Nor would our conclusion be different if General Counsel had been able to put forth rebuttal testimony consistent with his offer of proof. In upholding the ALJ's conclusion that the strike was not a ULP strike at its inception, we nonetheless disagree with the ALJ's denial of General counsel's attempt to introduce

[fn. cont. on p. 6]

practices entered into the calling of the strike is obviously an afterthought when other means had failed." (NLRB v. Scott & Scott (9th Cir. 1957) 245 F.2d 926 [40 LRRM 2090].) Strike Conversion

Respondent excepts to the ALJ's finding that the strike was converted into an unfair labor practice strike on May 4, 1982, as a result of Respondent's statement to one employee on that date which indicated that returning strikers would lose seniority credit.[9/] We find merit in the exception.

As a matter of law, the mere commission of an unfair labor practice will not convert an economic strike. It must be shown that the allegedly unlawful conduct was known to striking employees and that it served to prolong the strike; i.e., the

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[fn. 8 cont.]

certain rebuttal testimony. (Associated Milk Producers, Inc. (1982) 259 NLRB 1033 [109 LRRM 1072].) The ALJ should have instructed General Counsel to seek review of his ruling by interim appeal to this Board, rather than by exception, so as to preserve the testimony. Because the question of the exclusion of the testimony is now before the Board by exception, reversing the ALJ would necessitate reopening the hearing three years after its close to take the proffered testimony. Such a course is far less desirable than if we had reached the same conclusion by interim appeal during the course of the hearing when we could have ordered that the testimony be taken. Because we are otherwise satisfied with the ALJ's credibility resolutions regarding the inconsistent testimony of Navarro, Villanueva and Orosco, we would be disinclined to reverse the ALJ on this issue even if the offers of proof regarding the disallowed rebuttal were fully developed as proffered by General Counsel. For that reason, we decline to remand.

[9/]This issue arose by virtue of General Counsel's amendment to the complaint after the hearing had commenced.

causal connection. (Robbins Company (1977) 233 NLRB 549 [96 LRRM 1569].) Robbins, supra, concerns the granting of a wage increase to one employee. The National Labor Relations Board (NLRB) reversed its ALJ's finding that the action converted the strike because:

> An unfair labor practice does not convert an economic strike to an unfair labor practice strike unless a causal connection is established between the unlawful conduct and the prolongation of the strike. Here, there is no evidence that the Union or the striking employees knew of Respondent's June 2 wage increase, or that this action had any impact upon the strike. In consequence, there is no basis for finding that Respondent's unlawful wage increase caused a prolongation of the strike. We therefore find that the strike was not converted to an unfair labor practice strike on June 2, the date of Respondent's unlawful wage increase." (233 N.L.R.B. at 549; footnote omitted.)

Soule Glass and Glazing Co. v. National Labor Relations Board (1st Cir. 1981) 652 F.2d 1055 [107 LRRM 2781], discusses the "conversion" doctrine in this manner:

> A strike begun in support of economic objectives becomes an unfair labor practice strike when the employer commits an intervening unfair labor practice which is found to make the strike last longer than it otherwise would have. It must be found not only that the employer committed an unfair labor practice after the commencement of the strike, but that as a result the strike was 'expanded to include a protest over [the] unfair labor practice,[1] and that settlement of the strike was thereby delayed and the strike prolonged. The central, and most problematic, element is causation—the effect of the employer's unlawful conduct on the union and its strike. Was the unfair labor practice a proximate cause of the lengthening of the strike? The burden of proof is on the General Counsel to demonstrate prolongation, and the Board's determination of conversion is reviewed under the usual substantial evidence standard. However, it need not be shown that the employer's unfair practice was the 'sole or even the major cause or aggravating factor of the strike,' but only that it was 'a contributing factor.' Both objective and subjective factors may be probative of conversion. Applying objective criteria, the Board and reviewing court may properly consider the probable

> impact of the type of unfair labor practice in question on reasonable strikes in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. Did they continue to view the strike as economic or did their focus shift to protesting the employer's unlawful conduct? However, in examining the union's characterization of the purpose of the strike, the Board and court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context.

The Soule court found "scant and equivocal evidence of the union's contemporaneous reaction to the wage increase" and concluded that drawing an adverse inference from that evidence would be "an unduly tenuous and speculative basis on which to hinge the Board's determination of the fundamental nature of the strike and the harsh remedial consequences that flow from such a determination." The court also noted that there was no evidence "that but for the [unlawful] wage increase . . . the strike otherwise would have settled sooner." The question presented, then, is whether Respondent engaged in an unfair labor practice and, if so, did it serve to prolong the otherwise economic strike. The evidence presented at the hearing supports neither conclusion.

Striking employee Leonardo Villanueva testified that upon receipt of a letter from the California Employment Development Department (EDO), which he interpreted to suggest that his unemployment benefits were in jeopardy, he immediately paid a personal visit to the local EDD office. There, Villanueva said he was informed that since his employer, Sam Andrews' Sons, had not replaced him, his position was open. He said he was advised to

return to Respondent's employ because "They said that as long as we had a job, we had no right to ... take the benefits."

Although Villanueva testified that he went home and from there telephoned Bob Garcia, Respondent's personnel director, on May 4, 1982, it was Garcia's testimony that Villanueva had to have called him from the EDO office because a claims representative came on the line during the conversation with Villanueva to ask Garcia whether the Company was hiring. According to Villanueva's further testimony, he asked Garcia for work in that same phone conversation but was advised that returning strikers would be hired as new employees without seniority credit. As he explained,

> He [Garcia] told me that all I have to do was to start again as a new employee with no seniority credit because we had left and I told him that was all right ... I told him that was fine, that I would go to work, and he stated that at the present time there was no job, but within ten days to a week, he was going to begin again, and that he could call me.

Garcia, on the other hand, did not think that Villanueva had made an offer to return to work and believed that the purpose of the call was only to determine Villanueva's eligibility for unemployment benefits. Indeed, Villanueva admitted that he had not told Garcia that he was abandoning the strike. The next day's mail brought Villanueva a letter from EDO explaining that his benefits would continue. A check was enclosed.

On May 18, with the assistance of UFW coordinator David Villarino, Villanueva sent Garcia a letter on UFW letterhead in which he confirmed the May 4 conversation and Garcia's purported reference to the rights of returning strikers. Villanueva said

the purpose of the letter was "to verify that I had gone to ask for a job, and that I had asked Mr. Bob Garcia for a job, and that he told us that we would be going in without any seniority, because we had gone out on strike." That letter states:

> This letter is to confirm our telephone conversation which we had on Tuesday the 4th of May 1982, where you told me that there would be some work, but that we would have to begin without any seniority for having participated in the strike which began July 9, 1981.

Asked why the letter did not seem to confirm the application for work, Villanueva replied that Garcia already knew he wanted work and had promised to call him when work became available.

The ALJ found that Villanueva had not made an unconditional offer to return to work on May 4 because "If there had been an unconditional offer, it would seem that Mr. Villarino, the union representative who helped draft the letter, would have made that clear in the letter." On the other hand, the ALJ believes that Villanueva must have said something about employment, "otherwise his reference in the May 18 letter would not make sense," but nevertheless concluded that "it is just too much to believe that that would not have been included in the confirming letter of May 18, 1982."

Villanueva returned to the Company on June 8 and 11 and spoke to Garcia on both occasions.[10/] Garcia admitted that there was some discussion of the May 18 letter but only to the extent

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[10/]On the first occasion, he asked Garcia for certain data relative to his earnings for IRS purposes and returned three days later to collect the requested material. He asked Garcia why he had not been recalled and testified that Garcia informed him no work was available at the time but promised to notify him when work did become available.

that Villanueva had told him it was not his idea. The ALJ found Garcia's failure to readily recall the incident somewhat suspect and found him generally evasive and reluctant to testify on crucial points. But, in particular, the ALJ thought it was critical that at no time did Garcia deny to Villanueva that he had made the statements concerning seniority which were attributed to him in the letter. On that basis, he proposed that, "The May 18 letter speaks for itself. Without a denial of those assertions they must be assumed to be true." Moreover, Garcia did not respond to the letter. Therefore, as the ALJ suggested, "Surely if the letter was a misstatement of fact, he would have been quick to contradict it in writing as soon as possible. His silence appears to accept it as a fact."

Declining to make a credibility resolution based on the demeanor of either Villanueva (because he lacked credibility with respect to his fabricated testimony concerning Larios) or Garcia (because he was evasive), the ALJ relied solely on the contents of the letter to find that Garcia had indeed told Villanueva that returning strikers would lose seniority credit. He also found that the statement related by Villanueva established the Company's intent to alter the relative pre-strike seniority standing of the employees, penalizing them for their union activities in violation of Labor Code section 1153(c) and (a). He concluded that the stated change of employment conditions converted the strike into an unfair labor practice strike on the date the statement was made; i.e., May 4, 1982.

Initially, we reject the ALJ's finding of an unfair labor

practice where, as here, he relied solely on the contents of a letter designed to memorialize the specifics of a conversation which allegedly occurred two weeks before, particularly when the author was not a first-hand participant or observer of the event which the letter seeks to describe and was not called to testify regarding the extent of his role in the process. Mere recounting of allegedly unlawful conduct under circumstances such as these should not alone serve as the basis for finding that an unfair labor practice has in fact occurred.[11/] Winter Garden Citrus Products Cooperative v. NLRB (5th Cir. 1956) 238 F.2d 128 [39 LRRM 2080] concerns two telegrams in which a union organizer explained that a strike was really caused and prolonged by the employer's discrimination and his refusal to bargain. While the Board accepted the telegraphic statement as evidence, the court refused to believe that these communications revealed the strike's real purpose because:

> These documents appear to be self-serving actions of a man who saw his cause slipping and who set about, by the expedient of argumentative communications having no relevance to the situation of the parties or the status of the negotiations as depicted by the credible

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[11/]Were we to find that the statement had been made, it would indeed have constituted a violation of the Act. In Transport Company of Texas (1969) 177 NLRB 180 [72 LRRM 1232], the NLRB affirmed its trial examiner who stated that "reinstated economic strikers who were once replaced, but recalled when vacancies occur or other business conditions warrant it, are not to be treated as newly hired employees but must be treated 'uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship.'" [Citations]. Such a finding, however, would not support the ALJ's conversion theory absent a snowing that the statement was a causative factor in prolonging the otherwise economic strike.

testimony but at war therewith, in an attempt to salvage what he could from the ineffectual strike.[12/]

The remaining competent evidence consists of two contradictory recollections of the only two participants in the pertinent discussion. The ALJ's failure to resolve the conflict by crediting one or the other of the witnesses presents a fatal flaw which cannot be resolved by reference to the record as a whole. But even assuming that we were to find, as did the ALJ, that Respondent threatened to deprive striking employees of their statutory rights in violation of the Act on May 4, 1982, we would still be required to find that the conduct caused employees to prolong the strike. However, in this instance, General Counsel made no attempt whatsoever to show that strikers, other than Villanueva, knew of Garcia's alleged statement regarding seniority.[13/] Instead, General Counsel appears to have proceeded on the theory that the statement was made, that it constituted an unfair labor practice, and that any unfair labor practice, without more, converts an otherwise economic strike. Such reasoning has

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[12/] In Conversion of Strikes: Economic to Unfair Labor Practice, 45 Virginia Law Review, 1322, 1331, Frank H. Stewart opined that the court's result was sound as:

> Neither employer nor union should be permitted to establish ex parte the motivation for a strike's continuance by self-serving letters and statements. Such declarations may possibly corroborate a violation already proved. But regardless of credibility resolutions, they should not establish strike conversion.

[13/] Villanueva himself denied that Garcia's statement to him prolonged his own strike participation. He testified that he remained willing to abandon the strike and return to work notwithstanding Garcia's statement and that he was awaiting word from Garcia as to an opening in the crew.

no support in law. (See, e.g., Robbins Company, supra, 233 NLRB 549 [96 LRRM 1569] .)

In sum, therefore, we cannot conclude either that Garcia made the statement attributed to him by Villanueva or, if made, that it served as a causal factor in expanding the strike. Thus, having found that the strike which commenced on July 9, 1981 was neither unlawful, initiated in whole or part in response to unfair labor practices, nor thereafter expanded or prolonged as a result of subsequent unfair labor practices, we conclude that the strike was an economic one throughout its duration.[14/]

Reinstatement Rights of Economic Strikers

Although the ALRA does not expressly include strikers within the definition of "agricultural employees", section 1140.4(b), the Board has adopted the basic principles of National Labor Relations Act (NLRA) precedents insofar as they concern strikers' reinstatement rights. Thus, by virtue of NLRA section 2(3), striking agricultural employees retain their status as employees unless they have obtained regular and substantially equivalent employment. Accordingly, upon conclusion of a strike, or when a striking employee offers to abandon the strike and

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[14/]In the official file of Exhibits in this case, the ALJ has noted that Respondent's Exhibit No. 2, although admitted into evidence, was not physically received by him and was not relied upon by him in deciding any issues herein. The exhibit in question, as described in the record, concerns a declaration submitted by UFW representative David Villarino in support of an unfair labor practice charge. In that declaration, Villarino relates a statement made to him by striking employee Leonardo Villanueva that Respondent had indicated that returning strikers would lose seniority. A declaration which matches the description set forth above is in evidence but is not marked as an official exhibit. We assume, without deciding, that the ALJ merely failed to affix a proper exhibit stamp to the declaration.

return to work, the employee has a presumptive entitlement to his or her former job with all attendant rights. We follow the analysis of the United States Supreme Court, as expressed in NLRB v. Fleetwood Trailer Co. (1967) 389 U.S. 375 [66 LRRM 2737]:

> If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by section 7 and 13 of the Act (29 U.S.C. section 158 (1) and (3)), it is [an] unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications' he is guilty of an unfair labor practice. [Citations.]
> NLRB v. Fleetwood Trailer Co., supra, 389 U.S. 375, 378 [66 LRRM 2737.)

The NLRB and the courts have defined certain "legitimate and substantial business justifications" by which an employer may be excused from the requirement of reinstating economic strikers immediately upon their offer to return to work. (NLRB v. Great Dane Trailers (1967) 388 U.S. 26 [65 LRRM 2456].) Generally, the hiring of permanent replacement workers to fill openings created by the departure of economic strikers is regarded as a legitimate business justification for refusing to take back the strikers, in view of "the employer's interest in continuing his business during an economic strike, coupled with the necessity of offering the inducement of permanent employment to secure employees willing to violate a picket line." (International Association of Machinists and Aerospace Workers v. J. L. Clark Co. (7th Cir. 1972) 471 F.2d 694, 696 [81 LRRM 27633.) Thus, unless the strikers' former positions are occupied by permanent replacements, an employer must discharge the replacements in order

to fill those positions with returning strikers. (Mackay Radio & Telegraph Co. (1938) 304 U.S. 333 [2 LRRM 610].) Replacements may be deemed permanent if the employer can "show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis." (Georgia Highway Express (1967) 165 NLRB 514, 516 [65 LRRM 1408], affd sub nom. Teamsters Local 1728 v. NLRB (D.C. Cir. 1968) 403 F.2d 921 [67 LRRM 2992].)[15]

Moreover, it is a well-settled principle that the burden is on the employer to prove that the replacements were hired as permanent employees and, further, "the employer must show a mutual understanding between itself and the replacements that they are permanent." (Hansen Brothers Enterprises (1986) 279 NLRB No. 98, slip opinion at p. 3, emphasis in original; see also NLRB v. Fleetwood Trailer Co., supra, 389 U.S. 375 [66 LRRM 2737]; NLRB v. Great Dane Trailers, supra, 388 U.S. 26 [65 LRRM 2456].)[16] In Associated Grocers (1980) 253 NLRB 31 [105 LRRM 1633], the requirement of a mutuality of employer-employee understanding of

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[15]The standard set forth in Georgia Highway Express, supra, was cited with approval by the U.S. Supreme Court in a case in which it held that in order to avoid potential civil liability to employees who are offered permanent employment but later displaced in order to accommodate returning strikers pursuant to a decision and order of the NLRB, an employer may offer them permanent status subject to such conditions. (Belknap, Inc. v. Hale (1983) 463 U.S. 491 [113 LRRM 3057].)

[16]Members McCarthy and Gonot do not subscribe to Member Carrillo's characterizations of employment patterns in agriculture, because they believe that the Board's experience in various cases indicates that many employees are hired to perform the same seasonal tasks year after year and thus should be deemed permanent, while others may be employed part time, but also on a permanent basis.

permanency was lacking as to certain employees. In that case, the hiring of replacement workers was initially conditioned on their signing a statement, at the time of hire, in which they acknowledged their understanding that they were being offered temporary, rather than permanent, employment. Shortly thereafter, before any of the economic strikers had offered to return to work, the employer altered its position as to the status of the replacement workers. A letter, ostensibly mailed to each replacement worker, advised them that "they had been hired as permanent employees entitled to company benefits after a 90-day probationary period." (253 NLRB at'31.) However, for some unknown reason, letters were not directed to every replacement worker as the Company had intended. The NLRB concluded that those replacements who actually received notice were indeed permanent employees but replacements who failed to receive a letter were bound by the original conditions of employment. The NLRB reasoned that the "permanent" status of the latter "was established only in the mind of Respondent's president, a showing insufficient to satisfy Respondent's burden." (253 NLRB at 32.)

Throughout this proceeding, Respondent properly asserted that the strike was at all times an economic strike. Consistent with that position, Respondent did not reinstate former strikers upon their offer to return to work, ostensibly because there were then no vacancies for them, their former positions having been filled by replacements whom Respondent had hired prior to the offers to return. Accordingly, Respondent placed each returning striker on a preferential hiring list, according to seniority, for

potential reinstatement upon the occurrence of a vacancy created by the departure of a replacement. We now examine Respondent's procedures vis-a-vis returning economic strikers in light of the authorities discussed above.

Strikers' Offers to Return to Work

Virtually all of the approximately 140 striking employees were replaced by Respondent during the one-year period between the commencement of the strike on July 9, 1981 and the first offer to return by 74 of the strikers on July 7, 1982. By letters dated October 23 and 26, 1982, the UFW advised Respondent that the July 7 offer was being renewed as well as extended to include all remaining strikers. The hearing in this matter commenced on October 26, 1982, contemporaneously with the initial offer to return to work by the second group of strikers.

On July 7, 1982, UFW coordinator David Villarino hand delivered to Respondent's personnel director, Bob Garcia, four separate petitions signed by a total of 74 strikers, including Leonardo Villanueva, which read as follows:

> We the below signed strikers from Sam Andrews' Sons, [work classification filled in], hereby notify the Company of our decision to return to work and end our unfair labor practice strike.

The separate petitions were signed by irrigators, shop workers, tractor drivers, and members of Cirilio Alvarado's weed and thin crew. Villanueva testified that the petition represents the first offer by any striker, including himself, to end the strike and return to work.

On July 8, Garcia acknowledged receipt of the first petitions by letter to Villarino which reads, in pertinent part, as follows:

> Those employees [who signed the petition] apparently participated in the UFW strike against Sam Andrews' Sons which started in July 1981. We presently have no vacancies in any of the classifications referred to in the petitions. However, we will maintain a preferential hiring list of the employees who have offered to return to work.

On July 9, Villarino wrote to Donald Andrews, stating:

> At your request, Bob Garcia met with me to tell me;
> 1. that the Company had sufficient amount of workers, and,
> 2. that the Union would have to file another ULP because the Company was not going to re-hire the strikers except as openings occurred regardless of their status.

Garcia testified that Respondent has adhered to a particular seniority policy as developed in a 1975 collective bargaining agreement. Each category of work and/or crew is treated as an independent unit. Thus, each crew maintains its own seniority standings; crew supervisors have sole authority to hire, fire, lay off, and recall workers in their respective crews and are required to do so in accordance with those standings. Consistent with such a policy, each striker who offered to return to work signed the particular petition relating to his former crew. For example, the 14 general laborers (i.e., weed and thin workers) signed a roster designated as that for only the Cirilio Alvarado crew. (No member of a similar weed and thin crew supervised by Diego Mireles had participated in the strike). Accordingly, Garcia developed separate preferential hiring lists for each crew based on the employees' seniority within that crew.

The legality of Respondent's failure to immediately reinstate the strikers depends not on whether there were no "vacancies" because the strikers' former positions were filled by replacement workers but whether the replacements were in fact permanent employees. The inquiry further turns on whether the replacement workers themselves understood, prior to the time the strikers offered to return to work, that their tenure did not depend on the outcome of the strike or the return of the strikers.

Although Respondent submits that it hired replacements upon its standard terms of employment, those terms apparently contemplate only Respondent's policy of granting seniority for layoff and recall purposes after an employee has completed 30 days of employment within any 90-day period. There is no indication in the record either that those terms were expressly made to the replacement workers or, more significantly, that the new hirees were explicitly advised at any time that their employment status was that of permanent employees. As Respondent has failed to present evidence that would persuade us that the replacement workers which it hired were given reason to understand that they had been hired as permanent employees, Respondent has not satisfied the requisite burden in that regard. (Hansen Brothers Enterprises, supra, 279 NLRB No. 98, slip opinion p. 4.)

Having found that Respondent has not established "legitimate and substantial business justifications" for its failure to immediately reinstate returning strikers to positions that had not been filled by permanent replacements, we shall

order Respondent to offer immediate reinstatement to all such strikers and to compensate them for all economic losses resulting from Respondent's violation of section 1153 (c) and (a) of the Act.[17/]

ORDER

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

1. Cease and desist from:

(a) Refusing or failing to reinstate, or otherwise discriminating against any employee with regard to hire, tenure or any terms or conditions of employment because of that employee's involvement in union activities.

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

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

[17/] 'The ALJ found that Respondent has a year-round operation and on that basis concluded that the Board's "Seabreeze" doctrine has no application here. (Seabreeze Berry Farms (1981) 7 ALRB No. 40; Kyutoku Nursery, Inc. (1977) 3 ALRB No. 30. Members McCarthy and Gonot agree that Seabreeze, supra, is not applicable but for reasons different than those set forth by the ALJ. It is their view that NLRB precedents governing the reinstatement rights of economic strikers are the sole applicable precedents in the agricultural context. (See Member McCarthy's Dissenting Opinion in Seabreeze, supra.)

(a) Offer immediate reinstatement to all of those employees who struck the Company on July 9, 1981, and who made an unconditional offer to return, to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make all such employees, including those already reinstated, whole for all losses of pay and other economic losses they may have suffered as a result of their not being rehired after making an unconditional offer to return to work, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll 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 and interest 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) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive 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.

(f) Mail copies of the attached Notice, in all appropriate languages, to all employees who were employed or on strike at any time from July 1, 1981 through November 1, 1982.

(g) Arrange for a Board agent or a representative of Respondent to distribute and read the attached Notice, in all appropriate languages to all of its agricultural employees, assembled 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 non-hourly wage employees to compensate them for time lost at this reading and 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 it has taken to comply herewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: December 22, 1986

JOHN P. McCARTHY, Member

GREGORY L. GONOT. Member

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MEMBER HENNING, Concurring:

I concur in the conclusion reached in the majority draft regarding the reinstatement rights of the returning strikers. However, I would uphold the ALJ's analysis on this issue and find that the strike was converted from an economic strike to an unfair labor practice strike on May 4, 1982.

The ALJ found that on May 4, 1982, Villanueva had *a* conversation with Respondent's personnel director, Robert Garcia, where Villanueva was informed that strikers, if they wished to abandon their strike, would return to work without their established seniority. I concur in the ALJ's finding that such a statement by Respondent's personnel director was an unfair labor practice having an inherently destructive effect on employees' rights and served to prolong the economic strike. Accordingly, I would find that this strike had been converted to an unfair labor practice strike as of that date and order that Respondent make

whole returning strikers who were denied reinstatement after this date.

A strike that begins as an economic strike may be converted to an unfair labor practice strike if employer unfair labor practices are committed during the strike and those unfair labor practices prolong the strike. (See, e.g., Erie Resistor Corp. (1961) 132 NLRB 621, affirmed in relevant part (1963) 373 U.S. 221 [83 S.Ct. 1139]; NLRB v. West Coast Casket Co. (9th Cir. 1953) 205 F.2d 902.) Employer unfair practices that have an inherently destructive effect on employee's rights will result in the conversion of a strike from an economic to an unfair labor practice strike irrespective of employee sentiment. Such a question of when the strike converted is generally a pure question of law and policy. (Gulf Envelope Company (1981) 256 NLRB 320, 325-326 [107 LRRM 1435]; Pittsburgh and New England Trucking Company, Inc. (1978) 238 NLRB 1706, enf't den. on other grounds (4th Cir. 1969) 612 F.2d 1309.)

In the present situation, the ALJ found that Respondent committed an unfair labor practice that was inherently destructive of employee rights and would be sufficient to convert the economic strike to an unfair labor practice strike. The majority, however, reverses the ALJ finding on the grounds that there was no evidence that the employees knew of the unfair labor practice or that evidence of the unfair labor practice was not sufficiently supported. Employee sentiment in such a situation involving inherently destructive unfair labor practices is largely irrelevant. However, even assuming that such proof of employee

sentiment or knowledge was required, on the facts of the present situation it is reasonable to presume that,as a matter of public policy, Respondent's unfair labor practice prolonged the strike. When Respondent's personnel director informed employees[1/] that strikers would be required to abandon their established seniority in order to retain or recover their jobs, and the strike was thereafter not terminated, it is reasonable to presume that the reason that the strike continued was the commission by the Respondent of the unfair labor practice.

In light of my analysis of the record, it is unnecessary for me to reach the question of economic strikers' reinstatement rights in subsequent seasons. However, were it necessary, I would find that the ALJ and member Carrillo incorrectly limit the scope of this Board's Seabreeze Berry Farms (1981) 7 ALRB No. 40. In my view, only in the relatively rare situations where an agricultural employer provides year-round, permanent employment for all its employees would I deviate from the holding in Seabreeze and permit economic strikers to be permanently replaced for longer than the season in which replacements were hired. (See, e.g., Kyutoku Nursery (1977) 3 ALRB No. 30.) I certainly would not approve the inherently unworkable administrative nightmare contemplated by my colleague Carrillo where a three-part analysis is mandated. As

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[1/]The ALJ carefully balanced the adduced evidence to conclude that such a threat was made, and Respondent's personnel director, in a subsequent hearing, admitted making such a statement implementing the illegal labor policy. In Sam Andrews' Sons, 82-CE-206-D, Respondent's personnel director admitted stating, as company policy, that returning strikers would have been deprived of seniority. (See, Sam Andrews' Sons, 81-CE-206-D, ALJ Decision, p. 15, n. 14.)

proposed by that model, this Board would have to determine if the employer is sufficiently non-seasonal to merit exception from the Seabreeze rule. Then, if the employer is sufficiently seasonal, the job duties of a particular employee may be found to be permanent (e.g., some steady tractor drivers may be permanent employees and some weed and thin workers may be seasonal or vice versa.) Only then would the reinstatement rights and backpay obligations be analyzed. Besides parceling the bargaining unit so as to make an employee's statutory right to strike depend upon the factual vagaries of his employment, such an approach would create exceptions that would swallow the Seabreeze rule.

I otherwise concur in the findings of the majority opinion.

Dated: December 22, 1986

PATRICK W. HENNING, Member

MEMBER CARRILLO, Concurring and Dissenting:

For the reasons stated in the majority decision, I concur with the conclusions that the strike commenced by the United Farm Workers of America, AFL-CIO (UFW or Union) on July 9, 1981, was an economic one at its inception and that it was not converted into an unfair labor practice (ULP) strike by Respondent's statement to an employee concerning the loss of seniority for returning strikers.[1/] I also agree with the majority that Respondent violated sections 1153(a) and (c) but I would limit my finding of a violation to Respondent's hiring new employees into 12 positions in the Diego Mireles crew that were concededly vacant at the time

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[1/]I would uphold the ALJ's finding -- based on the contents of the letter and Garcia's testimony -- that Garcia did in fact tell Villanueva the returning strikers would lose seniority credit. I would overrule the ALJ's conclusion, however, that the strike was thereby converted into an unfair labor practice strike because the General Counsel failed to show that Garcia's statement was disseminated to other strikers or had any effect on the strike.

of the strikers' offer to return to work and for which the striking members of the Alvarado weed and thin crew were qualified. (See Arlington Hotel Co. v. NLRB (8th Cir. 1986) ___ F.2d ____ [121 LRRM 2926]. Except for those 12 vacant positions, I disagree with the majority's conclusion that Respondent violated sections 1153(a) and (c) by failing to reinstate striking employees immediately following their offer to return to work. The only ALRB decision respecting reinstatement rights of agricultural strikers and respective burdens of proof under the ALRA was Seabreeze Berry Farms (1981) 7 ALRB No. 40, issued before the offers to return at issue in this case. The record does not permit adequate evaluation of the Employer's hiring pattern for me to determine whether Seabreeze or Hansen Brothers Enterprises (1986) 279 NLRB No. 98, cited by the majority, controls.

I agree with the majority that, in the industrial setting, the NLRB carefully examines the mutual understanding between an employer and its replacement workers in order to determine whether the replacement workers are "permanent." Hansen Brothers Enterprise, supra, 279 NLRB No. 98, slip opinion, at p 3. If no such mutual understanding as to permanency of work is proven by the employer, the replacement employees are considered "temporary" and the striking employees have immediate reinstatement rights upon their unconditional offer to return to work. To the extent agricultural employees are employed in year-round positions, I see no reason why the NLRB precedent dealing with rights of economic strikers should not apply.

However, the NLRB deals primarily with year-round employment and a replacement worker's job is categorized as either "permanent" or "temporary." In agriculture, on the other hand, a great number of employees are hired on a seasonal basis. The seasonal employment relationship does not reach the level of being "permanent" in the sense of constituting year-round employment, yet it is more than "temporary" because the employment relationship is usually for a definite period of time corresponding to the employer's seasonal labor needs. Thus, the Board needs to adapt the principles underlying NLRB precedent in this area to the rather unique circumstances of seasonal employment in agriculture.

The majority virtually ignores the fact that Seabreeze Berry Farms (1981) 7 ALRB No. 40 was the Board's controlling precedent on the reinstatement rights of agricultural economic strikers at all times relevant herein. In that case, due to circumstances of product perishability – more prevalent in agriculture than in industry – and "the need to complete a harvest or other task with minimal work disruption," this Board has announced a presumption that "in a strike situation, it is generally necessary for an [agricultural] employer to hire replacement workers to continue through the end of the season." (Seabreeze Berry Farms, supra, slip opinion, p. 9.) Therefore, the Board proposed to accept an agricultural employer's characterization of its replacement workers as permanent for the season(s) of the strike.

However, at least with respect to replacements working in

single crops, the Board found that "different conditions prevail" in subsequent seasons:

> Crop perishability and the need to complete a harvest or other task with minimal work disruption are not weighty factors when the employer hires employees to begin work in a subsequent season. An employer who refuses, at the beginning of a subsequent season, to rehire former economic strikers who have made an unconditional offer to return to work will be found in violation of section 1153(c) and (a) of the Act unless the employer can demonstrate that, at the time when replacement workers were hired during the strike, it was necessary to offer the replacement workers employment which would continue in the following season. [Footnote omitted.] (Seabreeze, supra, slip opn. at p. 10.)

Therefore, once the season following the offers to return has ended, the Board held it would presume such replacements to be temporary because of "shifting, flexible employment patterns [that] prevail" in agriculture, and their right to recall and/or continued employment is secondary to that of the strikers.

With respect to seasonal workers,[2/] the approach behind Seabreeze is a logical and natural application of the principles behind NLRB precedent to the agricultural setting. The Seabreeze approach focuses upon the mutual understanding of the employer and replacement worker as to the seasonality of the employment relationship. The timing and hiring, as well as the duration of the employment relationship, of a seasonal employee corresponds to

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[2/] Seabreeze does not distinguish between agricultural year-round and seasonal employees. Since I believe NLRB precedent applies to year-round employees, I would limit the application of Seabreeze to seasonal employees.

the employer's seasonal agricultural operation.[3/] When a seasonal employee applies for work and the employer hires, both understand that the work is only for that growing season. Although many seasonal employees may return to work in subsequent seasons, and indeed, some employers (like the employer in this case) may give such returning employees seniority rights, there is no explicit promise by the employer to provide work in subsequent seasons nor is there any obligation by the employee to resume the employment relationship by returning to work.

Accordingly, when strikers unconditionally offer to return to work, I would examine the circumstances under which replacement workers were hired. If the positions in question are historically year round positions and the employer contends that the strikers from those positions have been permanently replaced, the employer must demonstrate that it made explicit offers of permanent employment to the strike replacement or that circumstances evidenced the employer's intent and the replacement's understanding that the employment was permanent. Hansen Brothers Enterprises, supra.[4/] In such a case, the

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[3/]Most agricultural employers employ both year-round and seasonal employees. Year-round employees typically work on various crops and operations for most of the year and, while they may be subject to short term layoff periods, both the employer and the employee clearly expect the employment relationship to continue without significant breaks. Unlike year-round employees, seasonal workers typically expect significant breaks in their employment relationship.

[4/]Consistent with NLRB precedent, a respondent who denies an economic striker reinstatement on the grounds that the striker has been replaced will bear the burden of proving that the job has historically been year round and that the replacement was offered

[fn. cont. on p. 33]

replacement worker would be considered permanent and would have a right to continue to work (after the strikers offer to return) until he or she vacates the job.5 Otherwise, the replacement workers are temporary and strikers must be reinstated into their positions upon their unconditional offer to return to work.

If the positions in question have historically been seasonal, I would consider the seasonal layoff as the end of the job period for which the replacement worker was hired. (Seabreeze Berry Farms, supra.) The next season's job opening would be treated as a new vacancy for which strikers who have unconditionally offered to return to work would have preferential hiring rights.[6/] (Ibid.) An exception would occur where an employer demonstrates that it was necessary to replace seasonal employees who have gone on strike by promising replacement workers employment beyond the season during which they were hired.[7]

(Ibid.)

[fn. 4 cont.]

permanent -- rather than temporary -- employment. (NLRB v. Fleetwood Trailer Co., supra; Covington Furniture Mfg. Corp., supra.)

[5/] As noted above, short term layoffs with definite recall dates would not nullify the conclusion that the positions are permanent if the employer and employee clearly expect the employment relationship to continue without significant breaks.

[6/] An employer can, of course, consider replacement workers along with strikers for vacancies in accordance with the employees' seniority rights. (See Giddings & Lewis, Inc. v. NLRB (7th Cir. 1982) 675 F.2d 926 [110 LRRM 2121].)

[7/] Relevant factors would include the statements of replacement workers who refused to work unless given promises of work beyond the normal seasonal employment, the unavailability of other replacement workers, and the employer's inability to obtain replacement workers without such promises.

Respondent's Operation

Respondent's operation, as noted by the ALJ, is primarily in field crops (cotton and wheat) with multiple overlapping vegetable crops as well. Work is being performed at Respondent's two ranches year round, with the spring, summer and fall being the growing season and the winter months devoted to ground preparation and pre-irrigation. Like many large scale multi-crop growers, Respondent has a core of year round workers and a large number of seasonal employees who are laid off and recalled at various times arid for varying lengths of time throughout the calendar year.

Approximately 10 to 15 tractor drivers and 25 to 30 irrigators are employed year round performing various duties in the various crop operations. Another 10 or more tractor drivers and 40 to 45 irrigators are employed for various "peak" seasons. "Peak" season tractor drivers are laid off for a month in the early spring, another month or two in early summer and, depending on employee seniority levels, another month to three months in the fall. "Peak" season irrigators are laid off in mid-March. Depending on their seniority level and the extent of operations, some irrigators are recalled in mid-April and some not until mid-May. In mid-August, they are laid off again and not recalled until the pre-irrigation period in December and January. The Alvarado weed and thin crew works 8 to 9 months a year, with the longest layoff occurring in October and November, for approximately 60 days.

Respondent failed to present any evidence that it hired either seasonal or year round replacement workers with a mutual

understanding that their employment would be permanent. Hansen Brothers Enterprise, supra. Under NLRA precedent, unless replacement workers are shown to be permanent, returning strikers are entitled to immediate reinstatement upon their unconditional offers to return to work. However, also as noted above, this Board has recognized the special conditions existing in operations involving perishable crops and has sought to avoid the disruption to those operations which could result from massive displacement of strike replacements with returning strikers. See Seabreeze, supra. Instead of requiring immediate reinstatement of strikers who have offered to return to work and who have not been permanently replaced, therefore, the Board has permitted employers to retain strike replacements until sensitive growing season operations are concluded.

At the time of the hearing in this case, the Board's Seabreeze decision presumed that replacement workers were hired for the remainder of the season in which the strikers offered to return to work. Thus, the record does not contain evidence on what the mutual understanding was at the time of hire between the employer and replacement workers as to the duration of the latter's jobs. Furthermore, after the strikers' offers to return to work on July 7, 1982, the only layoff and rehire of replacement workers that occurred before the start of the instant hearing (November 1982) was a one month period between August and September 1982, involving a number of tractor drivers and the

Alvarado crew.[8/] I am unable to determine whether the one month layoff period was a historically significant break in the employment relationship for the latter workers or was merely a short break within the employees' traditional seasonal employment. In my view, a respondent defending against a claim that strikers should have been reinstated upon recall should be required to prove that the layoff was not a significant break and a mutual understanding of permanent employment existed. At the time of the instant hearing, however, the law respecting reinstatement rights and respondent's burden was unclear. Accordingly, on this record I am unable to find that a violation was committed by Respondent in its failure to hire strikers in lieu of the tractor drivers and Alvarado crew in September 1982, except, as noted previously, as to 12 new hires in the Diego Mireles crew.

ALJ's Decision

Even though I would dismiss most of the complaint alleging violations by Respondent in refusing to hire returning economic strikers, I feel compelled to address certain rulings by the ALJ which I feel are erroneous. The Board specifically exempted from the Seabreeze presumptions "non-seasonal industries, such as nurseries," citing Kyutoku Nursery, Inc. (1977) 3 ALRB No. 30 (Seabreezjs, supra, p. 9, fn. 5), where commodities are grown in green houses or under extremely controlled conditions and employment is correspondingly stable. The ALJ in the instant case interpreted the Board's Kyutoku footnote to exempt any grower

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[8/]Other workers such as peak season irrigators were laid off after the July 7, 1982 offer to return to work (e.g., August 1982) but had not been rehired as of the date of the hearing.

with a year round employment pattern. Accordingly, he found the Seabreeze presumptions inapplicable to the Respondent herein/ who had a core group of shop employees and some tractor drivers and irrigators who worked throughout the year and a weed and thin crew that worked in multiple crops for 75 percent of the year.[9/]

I would decline to adopt the ALJ's expansive reading of the Kyutoku footnote, given the instability inherent in field work. Like employment in industrial production and most retail and service operations under the jurisdiction of the NLRB, nursery employment is subject to the vagaries of market fluctuations and seasonal demand. Unlike nursery and industrial work, however, agricultural field work is substantially affected by climatic change as well as frequent changes in the ownership and use of agricultural land. Even the most "stable" employer of field workers cannot guarantee full or stable employment to its field workers. Therefore, whenever cultivation and/or harvest and/or packing or shipping of crops in the field constitutes the primary operation of an agricultural employer, the fact that the employer's various operations result in year round work for some of its employees will not constitute conclusive evidence that all of its strike replacements are "permanent" employees. Rather, as I previously discussed, in order to determine the rights of agricultural economic strikers, I would consider the employment

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[9/]As the ALJ noted, the existence of year round operations makes it difficult to apply the Seabreeze presumptions. The employer in Seabreeze had clearly-delineated seasonal operations limited to a single crop. Where crop seasons and agricultural operations overlap, however, the determination of when a "subsequent season" begins for purposes of applying the Seabreeze presumptions is considerably complicated.

patterns of the jobs into which the replacements were hired, as well as evidence of the understanding reached between employer and strike replacements as to the duration of their employment.

The ALJ also concluded that Respondent was under no legal obligation at any time pertinent herein to reinstate any individual who offered to return to work on July 7, 1982, based on a finding that laid-off replacements had a "definite expectation of recall by virtue of a long-standing seniority policy which Respondent is by law obligated to continue to adhere to . . . ." Citing to Giddings and Lewis Inc. v. NLRB, supra, 675 F.2d 926, 930 and Randall Div. of Textron Inc. (8th Cir. 1982) 687 F.2d 1240 [111 LRRM 2437], he found that no vacancy had been created by the layoff of the replacement due to the expectation of recall created by the seniority policy.

The ALJ's analysis is faulty in several respects. The cases he cited involve temporary layoffs of strike replacements who had been hired into permanent year round industrial sector jobs. The mere existence of a seniority policy whether communicated to hirees or not[10/] -confers no right to employment beyond that period of time to which the employer and employee agreed, usually the crop or growing season in agriculture. The Giddings S Lewis case, cited by the ALJ, does not hold otherwise. In that case/ a seniority policy was promulgated during a strike

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[10/]The evidence indicates that new hires were not told about the company's seniority policy. The fact that some replacement workers may have been recalled before strikers made their offers to return to work does not by itself confer any understanding upon employees that their work was permanent and that their rights superceded those of strikers who might someday offer to return to work.

in order to ensure permanent strike replacements that they would have recall preference over returning strikers in the event of a lay off. Respondent's seniority policy, on the other hand, dates back to 1975. Application of Respondent's long standing seniority policy to replacement workers gave them no assurance of "permanent" work -- it merely gave replacement workers seniority rights with which they would leave to compete with other workers' seniority, including that of strikers, for preference for subsequent employment after layoff.

The issue presented in Randall Div. is whether a "vacancy" is created by the temporary layoff of permanent replacements such that returning permanently-replaced economic strikers on a preferential hiring list have preference over them when operations resume. The "reasonable expectation of recall" test is applied under this circumstance to determine whether a vacancy has been created by a permanently - hired replacement worker's layoff -- not in order to determine whether the replacement worker was hired as a permanent employee in the first place. If the replacement worker was never permanent to begin with, it is clearly not necessary to consider whether his layoff has created a "vacancy".

Conclusion

Although I have no quarrel with the majority's construction of the NLRA precedent on reinstatement rights of industrial sector economic strikers, the mechanical application of the national board's rule to seasonal agricultural operations is, in my view (and that of previous boards), ill-advised. As the Seabreeze board recognized, agricultural employers with sensitive

seasonal operations involving perishable crops should not be required to undergo a total workforce turnover midway through a harvest. Moreover, agricultural employers should not be able to avoid reinstating strikers indefinitely by simply offering verbal assurances of "permanency" to migrant replacements who have no interest or expectation to return in subsequent seasons.

The majority's failure to come to grips with the special conditions of agricultural production, then, poses a serious threat to the legitimate interests of both agricultural employers and economic strikers.

Dated: December 22, 1986

JORGE CARRILLO, 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 had an opportunity to present evidence, the Board found that we did violate the law by failing or refusing to reinstate economic strikers immediately upon their offer to return to work. 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 immediate reinstatement to all those employees who went on strike on July 9, 1981 and who subsequently made an unconditional offer to return to work, without loss of seniority and pay them any money they lost plus interest because of our refusal to reinstate 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 93215. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Sam Andrews' Sons
(UFW)

12 ALRB No. 30
Case Nos. 82-CE-75-D
82-CE-112-D

ALJ DECISION

An economic strike of Respondent's employees beginning on July 9, 1981, became an unfair labor practice strike on May 4, 1982, as a result of an alleged statement to one striking employee by Respondent's personnel director that Respondent intended to deprive returning strikers of seniority. The ALJ found that all of the approximately 140 strikers were unfair labor practice strikers and as such were entitled to immediate reinstatement following their offers to return to work. The ALJ ordered that Respondent offer reinstatement with backpay to the returning strikers.

BOARD DECISION

The four members of the Board who participated in this proceeding agreed with the ALJ that the strike was an economic one at its inception. Member Henning alone concurred in the ALJ's further finding that the strike was converted into an unfair labor practice strike. Members McCarthy, Carrillo and Gonot disagreed that the strike had been converted in the absence of evidence that Respondent's statement of May 4, 1982 was disseminated to other striking employees or that it caused them to prolong the otherwise economic strike. However, Members McCarthy and Gonot agreed that the strikers were entitled to immediate reinstatement but on the basis of somewhat different theories from those adopted by the ALJ or Member Henning. Members McCarthy and Gonot strictly adhered to the precedents of the National Labor Relations Board holding that an employer may fill positions left open by departed strikers in order to maintain business operations during *a* strike. Such replacements need not be displaced in order to make room for returning strikers if both the employer and the replacement worker have a mutual understanding, prior to the strikers' offers to return, that the replacements are permanent employees. Members McCarthy and Gonot concluded that Respondent failed to sustain its burden of proof on that question. Accordingly, they reach a result similar to that reached by Member Henning and the ALJ and directed Respondent to offer immediate reinstatement with backpay to all returning strikers, such backpay to accrue from the dates of their offers to return.

CONCURRING AND DISSENTING OPINION OF MEMBER CARRILLO

Member Carrillo explicitly rejected the ALJ's finding that, because Respondent had year-round operations and some essentially year-round employees, the Board's Seabreeze Berry Farms decision

was inapplicable to all of Respondent's employees. He would examine Respondent's hiring patterns and apply Seabreeze to govern the reinstatement rights of strikers whose employment was seasonal in the sense that their periodic layoffs involved "significant breaks" in the employment relationship. Except for the 12 conceded vacancies in the Diego Mireles weed and thin crew, he would find insufficient evidence on the instant record that such a seasonal break occurred between the strikers' offers to return and the hearing such that Respondent could be deemed obligated to reinstate strikers during that period.

* * *

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

SAM ANDREWS' SON, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 82-CE-75-D 82-CE-112-D

Appearances :

NICHOLAS F. REYES for General Counsel

MARCOS CAMACHO and NED DUNPHY
for United Farm Workers of America

KENWOOD C. YOUMANS of Seyfarth,
Shaw, Fairweather & Geraldson for
Respondent

DECISION

STATEMENT OF THE CASE

The hearing was held in Delano and in Bakersfield, California, on October 26, November 2, 3, 4, 5 and 15, 1982, before Administrative Law Officer, THOMAS PATRICK BURNS.

On July 9, 1982, Mr. David Villarino, Director of the United Farm Workers of America's, AFL-CIO ("UFW"), Lament, California office filed an unfair labor practice charge with the Delano regional office of the Agricultural Labor Relations Board ("ALRB"). The basis of the charge reads as follows: "Since on or about July 7, 1982, the Company through its agents Don Andrews and Bob Garcia have refused to rehire all Sam Andrews '

Sons strikers after they made an offer to return to work and end their unfair labor practice strike." (G.C. Ex. 1-B).[1/]

On September 16, 1982, a complaint issued grounded on the unfair labor practice charge which had been filed on July *9,* 1982 (G.C. Ex. 1-C). The complaint contained one substantive allegation. Specifically, at numbered paragraph 5, General Counsel alleged: "On or about July 7, 1982, and continuing thereafter to present, Respondent, through Bob Garcia, has-refused to reinstate unfair labor practice strikers and supporters of the United Farm Workers to their former jobs after they unconditionally offered to return to work" (G.C. Ex. 1-C). Respondent admitted the jurisdictional allegations CG.C. Ex. 1-F). The complaint contained a notice of hearing which set the matter to be heard on October 26, 1982 (G.C. Ex. 1-C).

After the pre-hearing conference which was held on October 1, 1982, and, indeed, on the first day of the hearing, General Counsel successfully sought to amend the complaint. The amendment, contained in numbered paragraph 6, alleged that Respondent unlawfully refused to reinstate Leonardo Villanueva, an "unfair labor practice striker," to his former job on or

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[1/] A record of the proceedings was made and reference to the transcript of the proceedings shall be made as follows: (Tr._____;_____;) with the first reference to the transcript volume. Reference to the exhibits shall be as follows: Respondent's exhibits (Resp. Ex. ____); and General Counsel's exhibits (G.C. Ex. _____).

about May 1, 1982, after he had allegedly made an unconditional offer to return to work.[2/] Respondent opposed the amendment on the grounds that it was untimely and would prejudice Respondent in not permitting it to prepare fully its defense to the allegation. Further, Respondent opposed the amendment as one constituting an entirely new legal theory and hence not one sufficiently similar to the allegation, and underlying theory, contained in the first complaint. Nevertheless I allowed the amendment. Respondent denied the new subtantive allegation.

Respondent contends in his closing brief that, because the General Counsel did not seek to amend the complaint at the close of the hearing, as provided for by 8 Cal. Administrative Code Section 20222, I must limit my decision to those facts alleged in the complaint. It contends, therefore, that the only issue that I must decide is whether or not the strike which commenced July 9, 1981, was an unfair labor practice strike at its inception or at any time prior to July 7, 1982. It admits that, if it was, then certain legal obligation flowed to Respondent when offers to return to work were made on July 7, 1982. Respondent contends that if it was not an unfair labor practice strike, the complaint must be dismissed.

I disagree with Respondent in light of the decisions of the Agricultrual Labor Relations Board (hereafter Board).

[2/] Although the amended complaint as written alleged the critical date to be May 7, 1981, it was orally amended to read May 7, 1982.

"Under National Labor Relations Board precedent, this Board does not require an amendment of the complaint to conform to proof as a prerequisite for finding a violation not alleged in the complaint." D'Arrigo Brothers Company, 8 ALRB No. 45. Also, "Where an issue not alleged in the complaint is related to matters alleged, and has been fully litigated at the hearing, a finding on the issue may be upheld." George Lucas & Sons, 7 ALRB 47. , In any case, the one issue for which I found Respondent to be liable, did, in fact, take place prior to July 7, 1982. That is discussed infra.

I took judicial notice of a prior Sam Andrews' Sons case, 8 ALRB 69 (1981), which will be referred to throughout this decision.

Much of the pre-trial activity and all of the activity on the first hearing date involved General Counsel's subpoena of various records of Repondent. Ultimately, General Counsel received and had in his possession throughout the hearing copies of Respondent's employment records which revealed the names and numbers of all of its employees in the pertinent classifications—that is, irrigators, tractor drivers, shop personnel and Cirilio Alvardo's weed and thin crew—who were employed in those classifications between July, 1981, through September, 1982. Accordingly, General Counsel possessed the basic employment records to refute any misstatements Respondent may have made regarding employment patterns or numbers or matters in general.

During the hearing General Counsel called three witnesses, and Respondent called two witnesses to testify. The United Farm Workers of America, AFL-CIO (hereafter UFW or the Union), was present and represented. All parties were given full opportunity to participate in the hearing, and after the close thereof, General Counsel, the Union, and Respondent each filed a brief in support of their respective positions. Upon the entire record, including my observations of the demeanor of the witnesses, and in consideration of the briefs filed by the parties, I make the following findings of fact, analysis, conclusions of law, and determination of relief.

FINDINGS OF FACT

A. Jurisdiction

Respondent is a general partnership with agricultural operations in Kern County and the Impiral Valley, California. The partnership is owned by three brothers, Robert S. Andrews, Fred C. Andrews and Donald S. Andrews. Respondent has two Kern County ranches which are six miles apart: the Lakeview Ranch, located at the intersection of Copus and Old River Roads; and the Santiago Ranch, located on Copus Road, approximately six miles west of Old River Road. The Santiago Ranch, structures include an office, a packing house and an equipment yard.

Respondent grows cotton, cantaloups, watermelon, carrots, lettuce, wheat, onions, garlic and tomatoes on its two ranches. The largest crop, which exceeds by far the others,

is cotton.

Don Andrews is in charge of labor relations and collective bargaining negotiations. Fred Andrews is in charge of the farm operations. Robert Andrews is in charge of sales. Jerry Rava is the general manager. Bob Garcia handles many of the day-to-day labor relations matters and personnel problems.

The UFW was certified to represent Respondent's employees in August, 1978, and the negotiation sessions began in January, 1979, and have continued periodically since then. The negotiations have been marked by several strikes, walkouts, protests and the filing of unfair labor practice charges by both Respondent and the UFW. On July 9, 1981, the UFW commenced its strike 'against Respondent. 8 ALRB No. 69, ALO's decision at pp. 4-5. Facts herein stipulated by all parties, taken from that decision. Accordingly, I find Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act, (hereafter Act).

B. Alleged Unfair Labor Practices

The issues to be determined in this case include the following: Was the July 9, 1981 strike made an unfair labor practice strike, by the fact that it was partially based upon a protest of the manner in which the eight irrigators were treated when they refused to ride in a company vehicle? (This was not found to be an unfair labor practice when

litigated in 8 ALRB 69.) Was the July 9, 1981 strike made an unfair labor practice strike because of an alleged protest over the company's refusal to rehire Francisco Larios? (The refusal to rehire Larios was found to be an unfair labor practice in 8 ALRB 69.) Did the workers actually strike over the Larios issue? Did Leonardo Villanueva make an unconditional offer to return to work on May 4, 1982, when he spoke to Mr. Robert Garcia? If there was an unconditional offer to return to work on May 4, 1982, was the subsequent hiring of non-striking employees an unfair labor practice? If it were found to be an unfair labor practice, would that convert a previously found economic strike to an unfair labor practice strike? Did Mr. Garcia threaten to change the seniority system as a punishment to strikers when he spoke to Mr. Villanueva on May 4, 1982? If it is found that Mr. Garcia did make such a statement, would that convert a previously found economic strike to an unfair labor practice strike? Did the Company commit an unfair labor practice when it hired employees, after a stipulated unconditional offer to return to work made on July 7, 1982, or, indeed, on October 26, 1982? If the Company did commit an unfair labor practice, did it convert a previously found economic strike to an unfair labor practice strike? The Company admitted that if it were found that the strike was an unfair labor practice strike, it would have a duty to restore all of the strikers to their positions immediately, and that they should be paid from the date of the

violation.

Further issues to be determined in this case were those raised by Respondent, when it alleged that the instant case was barred by res judicata and collateral estoppel, in light of certain of the issues having been litigated in the previous case cited, i.e., 8 ALRB 69.

Testimony of Ramon Flores Navarro:

General Counsel called Mr. Navarro, who testified that he had been employed prior to July, 1981, as an irrigator at Sam Andrews' Sons. He said that he holds the position of "Coordinator" for the U.F.W., with regard to employees of the Company.

Mr. Navarro testified that on July 8, 1981, the day before the strike, Mr. Francisco Larios came to his trailer home early in the morning, before he went to work. The trailer was located on Company property near Old River Road and Copus Road, an intersection. Mr. Navarro testified that Mr. Larios told him he was coming to go to work, and asked the starting time. He said he had an order from the ALRB to require that he be put back to work. Mr. Larios left and Mr. Navarro went to work. Then, according to his testimony, at lunch time Mr. Navarro had a conversation with Mr. Leonardo Villanueva in the park adjoining his trailer home. Also present was Javiera Ramirez.

Mr. Navarro testified that he heard from Mr. Villanueva that the irrigators had been left standing, and that Mr. Larios

had not been put to work by the Company. Mr. Navarro then left on his motorcycle. He returned to work and began thinking about what he termed discrimination by the Company against "Chavistas", based, he said, on the failure to rehire Mr. Larios, whom he described as the right arm of the union, and the treatment of the irrigators. Mr. Navarro said that he decided to meet with the principals, i.e., captains of his group, to discuss the problem after work that day. He waited and stopped Mr. Miguelito Sanchez (of the welding shop), Mr. Francisco Ijinez (an irrigator), and Juan Orosco (a member of the thinning and weeding crew). Navarro: "I told them about the discrimination that had been done to our co-workers, about leaving them behind and not taking them to work, and we agreed *at* that moment, almost simultaneously, that we had to make a protest against the discrimination that the Company had against us, the workers, and were tired of having to put up with the Company and the way they discriminated against us."

Q. "What did you tell Francisco Ijinez, Juan Orosco and Miguel Sanchez about the discrimination against Mr. Larios?"

A. "I told him about what they had done to Mr. Larios of not giving him a job, even though he had the order from the ALRB of giving him his job back, and they did not give it back, and that they had left eight co-workers from the Lakeview Ranch without taking them to work, and that if they kept on this way, none here would be left of the

ones that wanted the union here."

Mr. Navarro testified that the four persons, including himself, decided, then, to make a protest on the following morning, July 9, 1981, over the alleged discrimination. He said that, on the following morning, at 4:00 a.m., they met at the crossroads at Old River and Copus Road to wait for their co-workers, who would be arriving there to work. All of the workers for Lakeview and Santiago Ranch would be expected to come through the cross roads.

The person who was named to call the crew of Cirilio Alvarado out on strike, was to be Juan Orosco, according to Mr. Navarro's testimony.

Navarro: "In the morning, at 4:00 in the morning as we had agreed with before, with our companions, we had to be stopping them there as they went by and explained to them what had been done, the discrimination been done, and that we had to do something." . . . "That is when the strike began."

Mr, Navarro alleged that he had called Mr. Villarino of the union at 4:00 that morning of July 9, 1981, to inform him of the fact that they were calling a strike to protest the alleged discrimination against the eight co-workers, and also about Mr. Larios, that they had not given him his job.

Q. "What did you tell the workers when you were at the corner of Copus Road and Old River Road?"

A. "As soon as the first ones were arriving, and I told him that they had discriminated against us, against

eight co-workers from the Lakeview, and also about Mr. Francisco Larios and therefore we had to make a protest, because there had been too much discrimination against us, and that is the way we began."

On cross-examination of Mr. Navarro by Respondent's Counsel, he was asked to recall the time that he testified at another ALRB hearing on September 23, 1981. He said he testified truthfully at that hearing. (Reference was made to Volume XII, page 97, line 11 of the transcripts in 8 ALRB 69.) It was an effort to impeach the witness.

Respondent's counsel asked: "The question, the, Mr. Navarro, do you recall responding to *a* question why you wanted to talk to your co-workers on the morning of the strike, thusly and I quote, "Because we had to tell them that we had to do something for ourselves, for the co-workers that had been left without going to talk to them just because they had protested about the truck that was taking them to work.[1]?"

Answer by Mr. Navarro: "Yes."

Respondent's counsel then asked about further testimony given by Mr. Navarro in the earlier hearing. (Reference was made to Volume XII, page 96, line 24.)

Q. "Now, do you recall being asked in an ALRB hearing in Delano, in September of 1981, the question, and I am referring to line 24, page 96, and I quote it in its entirety. 'Okay, when did you decide to call it,' and responding, 'We decided on the 8th when they left eight workers standing.[1]'"

A. "Yes."

Mr. Navarro was then asked about the specifics of his meeting at noon on July 8, 1981, with Mr. Villanueva. He said that after he had finished eating he went out of his trailer to the place where he left his Honda motorcycle, and that about that time Mr. Leonardo Villanueva and Javiera arrived and he spoke to them. He said that as he saw Mr. Castro arriving he looked at his own watch and decided it was time to return to work so he got on his motorcycle and left without looking back.

In an effort to impeach the witness, Respondent's counsel made reference to Volume XII, page 101 and 102 of the 8 ALRB 69 transcripts. It was agreed that the Hearing Officer should read them and decide whether or not they were different than what was testified to in the instant hearing. TR IV 47-51.

In an effort to rehabilitate the witness, General Counsel asked, on redirect, that Mr. Navarro explain each of the items which the Hearing Officer was asked to take notice of in the earlier transcripts, i.e., 8 ALRB 69. Thus the witness was given the opportunity to explain each of the statements that had been characterized as prior inconsistent statements.

General Counsel asked him to explain what discrimination he was referring to.

He answered: "The first one, that they denied Mr. Francisco Larios to go to work with us. And then they

left those eight workers there without taking them to work, just because they protested about getting on the truck full of valves and tins, and where would they sit in order to get to where they were going to take them, transport them."

Testimony of Leonardo Villanueva;

Mr. Villanueva testified that he had been employed at Sam Andrews' Sons. He went out on strike on July 8, 1981. He said that he made an unconditional offer to return to work on May 4, 1982. He stated that he called the Company from home on that date and spoke to Mr. Bob Garcia, the chief of personnel, whom he identified as present in the hearing room. Mr. Villanueva testified as follows: "I told him that they had told me at the unemployment office that they were going to cut off our benefits, because the Company had not replaced us, and our jobs were still there. I told him that if the job was there, I wanted to go to work."

Q. "What did Mr. Garcia say to you, if anything?"

Villanueva: "He told me that all I have to do was to s-tart again as a new employee with no seniority because we had left and I told him that was all right. ... I told him that was fine, that I would go to work, and he stated that at the present time there was no job, but within ten days to a week, he was going to begin again, and that he would call me."

Mr. Villanueva testified that he did not hear from Mr. Garcia, or anyone else at the Company, during the following

ten days. He said he went *to* the unemployment office, and told them that they had not given him a job, as they said they would, that they were not released, as of that date.

Mr. Villanueva testified that he sent a Spanish language letter, identified as General Counsel's Exhibit 2, on UFW stationery, dated May 18, 1982, to Mr. Bob Garcia. He said that he sent the letter to remind Mr. Garcia that he had gone to ask him for work, and that he was waiting for an answer. He said that Mr. David Villarino, director of the UFW Office in Lamont, had helped him draft the letter.

Mr. Villanueva testified that he went to see Mr. Bob Garcia in his office at the Company on the Santiago Ranch two or three days before June 11, 1982, and then again on June 11, 1982. On the first visit, he said that he needed a letter for his income tax. In addition to discussing the need for the letter, Mr. Villanueva claimed that he spoke to Mr. Garcia about work: Villanueva: "I told him that I was waiting, and asked him why he hadn't called me yet, and I told him that, this was after, I told him that he had taken in some more, and he said that there was nothing right now. He told me that there was no work at the moment, but that as soon as there would be he would call me ... I told him if there was any work any other place, like the shop, or if there was something else besides irrigating, that I was willing to work. . . . (He said) that there isn't anything right now, but as soon as there is, I will call you."

On June 11, 1982, Mr. Villanueva testified, he went again to see Mr. Garcia in his office, to pick up the income tax letter that was being prepared for him. Mr. Villanueva said that he again asked Mr. Garcia about a job. "I asked him what happened, and if there wasn't any place at the ranch that I could work. . . . He told me that there wasn't anything, and whenever there would be, he would call me."

Mr. Villanueva testified that on July 8, 1982, he signed a petition along with others who had participated in the strike.

He stated further that he has not been offered work at Sam Andrews' Sons to date.

General Counsel's Exhibit number 2 was translated from Spanish to English as follows: "Bob Garcia, May 18, 1982, Bob Garcia, Personnel Director at Sam Andrews' Sons, Route 3, Box 900, Bakersfield, California 93309. Regarding seniority with Sam Andrews. Dear Bob: This letter is to confirm our telephone conversation which we had on Tuesday the 4th of May, 1982, where you told me that there would be some work, but that we would have to begin without any seniority for having participated in the strike which began July 9, 1981. Sincerely, Leonardo Villanueva, Sam Andrews striker."

Mr. Villanueva testified also about a time just before the strike began. He said that on July 8, 1981, he was at the park located at Copus and Old River Road at about fifteen or twenty minutes after noon, at which time he had a

conversation with Mr. Ramon Flores Navarro. Also present was Mr. Javiera Ramierez, Mr. Jose Castaneda and Miguel Alvarez.

Villanueva: "When I was arriving, I saw Miguel and he asked me what happened. I told him that in the morning we had protested because of conditions of the truck, and I told him that they had left us there and not picked us up and I told him that I saw Mr. Francisco Larios at the union office. . . . I told him that I saw Francisco Larios and I told him that they had also denied him the job, that they had denied him the job independent of the fact that he took a letter from the Agricultural Labor Relations Board. .... Well, I told him (Mr. Navarro) that he (Larios) had gone to ask for work, and they had denied it, and they had refused to give him the job, and that he had an order from the Agricultural Labor Relations Board, and even so, that Mr. Fred Andrews chased him around." TR II 89-91. Mr. Villanueva testified that Mr. Navarro then became kind of serious, and in a defensive mood said, "I'm going to work.", and that he then left on a motorcycle.

Following the foregoing direct testimony of Mr. Villanueva, Respondent's counsel offered into evidence *a* copy of a declaration made by the witness in his complaint in the previous case that resulted in 8 ALRB 69 (See Respondent's Exhibit 1). He also submitted the declaration of Mr. David Villarino for impeachment purposes as it was alleged that it contradicted the testimony of this witness, and was a prior

inconsistent statement. (See Resp. Ex. 3)

On cross-examination Mr. Villanueva testified that he worked year-round, except for vacations, from 1976 through 1980, and from January, 1981, through July, 1981.

Mr. Villanueva testified that he had not personally signed the petition which was previously characterized as an unconditional offer to return to work in July, 1982. He admitted that his name had been signed by Mr. Villarino, who had called him, where he was in Mexico, a couple days before the date of the petition, i.e., July 7, 1982. (Mr. Villanueva had previously testified that he had signed the petition.) The petition read: "We the below signed strikers from Sam Andrews' Sons, irrigators, hereby notify the Company of our decision to return to work immediately and end our unfair labor practice strike." Counsel for Respondent tried repeatedly, over continuous objections of General Counsel, to get the witness to answer the question as to whether or not it was the understanding of Mr. Villanueva that by submission of that petition they were for the first time offering to end the strike. The witness dodged the questions in a highly sophisticated manner, but finally admitted that if that was what it indicates then that is what it means. He admitted that when he allegedly called Mr. Garcia on May 4, 1982, he had asked for work, but he had not said that he was ending the strike.

As part of the cross-examination testimony,

Mr. Villanueva testified that he had gone to the office of the Employment Development Division, (E.D.D.) in response to a letter from that department which he did not understand because it was in English.

Villanueva: "After the letter, I went to the employment office and it was there when they told me that the benefits were going to be cut, because we had not been replaced, and that the job was still there, and I wanted to go to work, because the job was there." . . . "They told me that I had the job there, that is why I couldn't receive any unemployment benefits, because I had the job there. Then I went to talk to Bob Garcia, so that I could go to work." TR II 132

(Testimony of the witness was continued to the next day and he testified as follows:)

Q. "And what specifically was said to you at the EDD Office that prompted you to call Mr. Garcia?"

A. "That we had not been replaced and that we had the job there."

Q. "Did the person at the EDD Office say that you were going to lose your unemployment benefits?"

A. "They said that as long as we had a job, we had no right to have the benefits or take the benefits." TR III 1.

After further extensive effort to obtain testimony, Respondent's counsel asked: Q. "After you told the EDD about your conversation with Bob Garcia on May 4, did you continue to receive, or did you receive unemployment benefits?"

A. "At the moment that I informed the young lady at the employment office, she told me that I could not receive any benefits and I went home to wait so that they would call me to work. I remember that day was a Thursday and then on Friday, in the post office, I received a letter from the EDD, and a check, and they told me to show up, to show up as soon as possible and see that same young lady, that she had decided to make me eligible to receive the unemployment benefits, to go to the EDD office, and that she would explain everything to me there."

Q. "Okay. Now, did you continue to receive benefits in May and June, 1982?"

A. "Yes."

Mr. Villanueva also testified that he knew that the irrigation foremen are the people responsible for hiring. He said, "I am aware that they hire and they also fire, but I also know that talking to Bob Garcia, he can advise the foremen, and he talks to the foremen, but I have been there before for some other things and instead of going to the foreman, I go to Bob Garcia."

Q. "At no time between May 4 and July of this year, did you contact an irrigation foreman about work?"

A. "No."

When asked about the reasons for going on strike, the testimony of Mr. Villanueva went as follows:

Q. "When did you first learn that the strike had

commenced in July of 1981?"

A. "I received a telephone call and they told me something about it, but when I went to the ranch on Copus and Old River Road, that is when I saw the flags and everything and that is when I found out about it. . . ."

Mr. Villanueva allegedly learned from one of the workers there the reason for the strike.

Q. "What did he tell you the reason for the strike was?"

A. "They said that they had decided to go out on strike on account of discrimination about the irrigators and the discrimination against Francisco Larios."

In an effort to impeach by prior inconsistent statements, Respondent's counsel then quoted from a transcript of the hearing in 8 ALRB 69, at which Mr. Villanueva had testified. He cited Volume IX, page 43, lines 15-18.

Q. "Mr. Villanueva, do you recall being asked by Ms. Leon, the attorney for the State, 'Well what were you told was the reason for the protest?' And you responded, 'They told me that they were protesting for what they had done to us the day before.'

A. "Yes, that happened the day before."

Q. "Do you recall testifying under oath as I just read?"

A. "Yes."

Q. " Did you at any time during that proceeding

testify that the strike was in response in part to the Company's treatment of Mr. Larios?"

A. "They didn't ask me about that."

Q. "They asked you, though, what the workers told you they were protesting about, isn't that right?"

A. *"Yes."*

Q. "Did the workers on the line tell you that they were protesting the treatment of the irrigators?"

A. "Yes."

Q. "And did they say anything else?"

A. "Yes, they told me about Larios."

Q. "Is it your testimony here that you did not testify in the earlier proceeding about anything relating to Mr. Larios?"

A. "They didn't ask me." TR III 19.

Respondent's counsel then offered transcript of 8 ALRB 69, Volume IX, pg. 141.

Q. "Mr. Villanueva do you recall being asked questions by the attorney for the Company?"

A. "Yes."

Q. "Do you recall him asking you, and I quote, 'When you first arrived out at the Lakeview Ranch on July 9, and you stopped and spoke to the pickets on the corner, what did you say to them, and what did they say to you?' And you responded, 'They told me that they were protesting,' and the attorney then said, 'And was there anything else said?'

And you said, 'I was there for ten minutes.' And you said, 'I was there talking, but a little bit about it regarding that too.[1] And he said, 'Okay. Would you tell us what else was said and what else they said?[1] And you responded, 'They were protesting on account of what they done to us.[1] And the attorney asked 'Anything else?' And you said, 'I told him that was all right.' Now do you recall being asked those questions and giving those answers?"

A. "Yes."

Mr. Villanueva was also asked again about the letter of May 18, 1982, which was sent to Mr. Bob Garcia. He was asked the purpose of that letter.

A. "To verify that I had gone to ask for a job, and that I had asked Mr. Bob Garcia for a job, and that he told us that we would be going in without any seniority, because we had gone out on strike."

Q. "So the purpose of the letter is limited to telling Mr. Garcia that you in fact asked for a job on May 4 and that Mr. Garcia made certain statements about seniority?"

A. "Yes."

Q. "There is no other purpose for the letter?"

A. "So that he would know, or to remind him that I had asked for the job, and that I wanted to work and I was waiting to be called."

Q. "Okay. Now, why didn't you indicate in the letter that you were waiting to be called or that you wanted employment?"

A. "Well, he had already stated that he was going to call me."

Q. "Well, he also said something about seniority and you felt the need to record that, so why not—why did you not indicate in the letter that you were still interested in work?"

A. "Well, when I went, I told him that I was interested in the job and that I wanted to work and I still want to."

On redirect examination, Mr. Villanueva testified that, though he was not laid off seasonally, there were other irrigators with less seniority than he, who were laid off.

As part of General Counsel's redirect examination he asked Mr. Villanueva what he meant by the statement he had made in the prior hearing (8 ALRB 69) when he said that they told me that they were protesting for what they had done to us the day before. He responded: "What had happened the day before was that they had left us and had refused to give Mr. Francisco Larios the job."

On recross examination Respondent's counsel followed up on a previous question by General Counsel as to whether or not Mr. Villanueva had called the strike. He said that he had not, that it was called by Mr. Navarro and two or three of his co-workers. He said that Mr. Navarro would be the one to know why the strike had been called. Mr. Larios was not present when Mr. Villanueva learned of the cause of the strike.

Testimony of Juan Oroseo:

Mr. Orosco was called by General Counsel to testify after two previous witnesses had testified. He was not present in the hearing room during the testimony of Mr. Navarro, but he had been present during the testimony of Mr. Villanueva, notwithstanding an order for sequestering of witnesses. I indicated that, if any of the testimony overlapped with that which he was present to hear, it would be viewed in a dim light.

Mr. Orosco testified that he worked in the weeding and thinning crew of Cirillo Alvarado at Sam Andrews' Sons. He said that he met with Mr. Navarro, Mr. Sanchez and Mr. Iniges on July 8, 1981, after work, at about 6:00 or 6:30 p.m. He alleged that, at the meeting, Mr. Navarro informed him about Mr. Larios not getting his job back, and about the irrigators that had been left standing and not given a ride to work, and that there had been too much discrimination.

Mr. Orosco testified that, on the following morning, July 9, 1981, while on the bus with the workers, he stood up when the foreman got off, and said to the workers: "I want everyone to listen to me for a moment, please. The co-workers, irrigators and tractor drivers are outside protesting because of what they did to co-worker Larios in refusing to give him his job back, in spite of the fact that he had an order from the ALRB, and other co-workers that were left standing, irrigators that were not given a ride to work. That there had been a lot of discrimination against us, and that please,

all of those that wanted to follow me, to follow me and get off the bus, and the workers followed me."

This took place at approximately 5:30 a.m., July 9, 1981.

On cross-examination Mr. Orosco was able to identify a number of persons whose names were read to him, as either being on the bus when he made his speech, or as not having been on the bus at all. He was also able to say which of the persons remained on the bus after he finished his speech. He said the capacity of the bus was 42 and that it was filled that morning of July 9, 1981. He said also that about half of the workers got off the bus after his speech.

Testimony of Irene Salcido:

Mrs. Irene Salcido testified for Respondent that she is presently employed at Sam Andrews' Sons, in the crew of Cirilio Alvarado, and was so employed on July 9, 1981.

Mrs. Salcido said that she boarded the bus in Bakersfield, and rode to work. The bus was full. When the bus stopped at Lakeview to get some ice, Mrs. Salcido testified, she heard Mr. Juan Orosco say to the employees on the bus, "Fellow workers, the hour has come so that we can make a stoppage for an increase in wages, an increase in wages and that they will treat the people right." She said she was able to hear that statement as he passed by her. She said that after he passed her he went to the front door of the bus

and said, "It is not going to be a strike, it is just going to be a stoppage. Afterwards he repeated the original statement again and again. Mrs. Salcido said she did not remember hearing Mr. Orosco say anything about the irrigators or about Francisco Larios. Some of the people got off and about 20 stayed on the bus.

On cross-examination, Mrs. Salcido testified that she was seated about five seats behind the driver, and that Mr. Orosco came from the rear of the bus. She was seated next to Maria Lavia. Mr. Salcido had been sleeping, but awoke when the bus stopped. The foreman got off to get ice, and then Mr. Orosco began to speak. Salcido: "I was leaning, and then I woke up and that is when he said, 'Companeros, the hour has come.' He was behind me and then he went by." TR VI 19. Mrs. Lavia was awake by the time Mr. Orosco went by. Mrs. Salcido testified that she did not hear anything that may have been said in the back of the bus. She did hear when Mr. Orosco began his address to the workers as he was passing her seat.

General Counsel asked Mrs. Salcido: "You said that Mr. Orosco passed by you when you were sitting, and he made some statements then, is that correct?"

A. "Yes, he said, "Fellow Workers, the hour has come."

Q. "Now what did you mean when you earlier in your testimony said that the rest of it I didn't hear afterwards?"

A. "Yes. Because later when he got off he kept on talking and when he was at the door and that I didn't hear, and I didn't put any attention to it."

Q. "So he keeps on talking when he was standing by the door?"

A. "Yes."

Q. "And that is the part that you didn't hear, is that correct?"

A. "No. I didn't hear that afterwards."

Q. "You didn't hear him say something about the Company did not treat the employees right, is that correct?"

A. "Well, I just heard him say was 'So the Company would treat the people right, and that a raise in salary or wages.'" TR VI 27, 28.

Q. "Is it still your testimony that you cannot recall anything about Francisco Larios or the irrigators besides on that morning?"

A. "I don't remember, or else I didn't pay any attention."

On cross-examination by the Union counsel and on redirect by Respondent's counsel, Mrs. Salcido testified that Mr. Orosco had made his statement as he was going from the back to the front of the bus, and that then he got off the bus. He told them that it was not going to be a strike, that it was going to be a work stoppage for a raise in wages and so that the people would be treated right. Then Mr. Orosco

got off the bus again. She did not hear anything he may have said off the bus. TR VI 43, 44.

Testimony of Robert Garcla, Jr.:

This witness, referred to in other testimony as "Bob" Garcia, was called by Respondent. He testified that he was now, and had been, the personnel director at Sam Andrews' Sons, for approximately four and a half years.

Mr. Garcia testified that he was called on the telephone by Mr. Leonardo Villanueva in early May, 1982, and that the call was originated from the EDD office. He knew that, because he spoke to the secretary, who was processing the claim of Mr. Villanueva. He said that Mr. Villanueva asked if there was employment at the Company, i.e., if the Company was hiring anybody. Mr. Garcia testified that he told Mr. Villanueva that the Company had no openings at that time, and that more than likely the supervisors would be recalling the people in about two weeks. Mr. Villanueva did not say that if there was a job he might go to work. Mr. Garcia stated that he did not tell Mr. Villanueva that he would call him if work was available.

Mr. Garcia testified that, sometime in June, 1982, Mr. Villanueva again called him and indicated that he wanted a letter from the Company to the I.R.S., indicating that he

X

used his automobile in the course of his employment, and that the Company did not reimburse him for any of those expenses. Mr. Garcia told Mr. Villanueva he would prepare the letter,

but it would take a couple of days. Mr. Garcia testified that he did not have a conversation about the availability of work. He denied the statements made in Mr. Villanueva's testimony about his promising to call when work was available or even that Mr. Villanueva asked for work.

A couple of days later Mr. Villanueva came to Mr. Garcia?s office to get the letter he had requested. He was given the letter. Mr. Garcia denied that Mr. Villanueva asked for work on that occasion, and that he had told him no work was available or that he would call him. TR V 29.

Mr. Garcia testified that the person responsible for recalling and hiring employees in Cirilio Alvarado's crew is Cirilio Alvarado. He said also that the person responsible for hiring and recalling employees in Diego Mirales crew is Diego Mirales. One supervisor does not have the authority to hire or recall employees to work in the other's crew. *If a* person wants a job he must go to the supervisor of the specific crew in which he wants to work. Each crew maintains a separate seniority list. When temporary layoffs occur the layoff is effectuated by crew.

Mr. Garcia said that approximately 140 employees went out on strike on July *9,* 1981. Approximately fourteen members of Cirilio Alvarado's crew went out on strike. There were about 45 persons in that crew, just before the strike.

On cross-examination by General Counsel, Mr. Garcia testified that he has among his responsibilities the duty of

directing the work force, which includes making sure the foremen follow Company procedures such as seniority, recall, hiring and firing.

Mr. Garcia testified that recalled employees are hired on the basis of seniority, i.e., where they stand on the seniority list. He said seniority is based upon duration of employment.

Going again to the matter of Mr. Villanueva having called Mr. Garcia on May 4, 1982, he stated that Mr. Villanueva asked, "Is the Company hiring at the present time." Mr. Garcia testified that Mr. Villanueva then said, the secretary, who was interviewing, him wanted to know, because they were going to cut off his unemployment benefits. Mr. Garcia testified that Mr. Villanueva then said that they were trying to process his claim, and that his claim was running out, and that they needed to know whether or not the Company was hiring, in order to continue his unemployment benefits. It was at that time that the woman who was interviewing him for benefit purposes got on the line, and she asked basically the same question. Mr. Garcia told Mr. Villanueva, and the secretary at EDO, that the Company was going to rehire "layoff people" in about two weeks.

Mr. Garcia testified that he does not do the hiring or firing at the ranch in certain jobs and categories. He let's the supervisors handle that in their particular categories. When asked by General Counsel why he did not

keep a note or record of the particular call of Mr. Villanueva, Mr. Garcia answered that he thought then, when he called, all he wanted to do was extend his unemployment benefits, so he didn't think it was that important.

Initially, Mr. Garcia testified, both on direct and on cross-examination, that the only conversation he had with Mr. Villanueva on June 11, 1982, in his office, was that concerning the picking up of a letter for the I.R.S. Then, under persistent questioning by General Counsel, the witness began to think that he might have had some conversations about the letter that was sent to him from Mr. Villanueva, Then he began to think that maybe he did have such a conversation, and then little by little his testimony began to change, so that he paused for about three minutes to think, and then recalled that he did, indeed, have a conversation with Mr. Villanueva, about the letter he had sent regarding seniority, etc. Mr. Garcia testified in answer to General Counsel's question, "What did Mr. Villanueva tell you about that letter?"

A. "I'm thinking counsel."

Q. "Take all the time that you need."

A. "I will. Thank you."

(then the 3 minute pause)

"I think he said something to the effect that he did not write the letter, that it was written by Mr. David Villarino. I'm sorry I can't recall the contents of that

conversation other than bits and pieces.

There was some mention, I think he did say that he was not the author of the letter, that Mr. Villarino was, and that he signed it or words to that effect, but I can't recall anything else." Then he recalled also that Mr. Villanueva had said that Mr. Villarino had brought it to his house to sign.

Mr. Garcia was recalled to testify for the second time by Respondent's counsel. He testified that he was in a position to know whether or not new employees of certain classifications or crews have been hired since July 7, 1982. He said that on July 7, 1982, he was handed an unconditional offer to return to work by David Villarino. He became involved in it for the sole purpose of monitoring, to see that if anyone was hired after July 7, that such people would be hired from a preferential hiring list.

He testified that no new irrigators had been hired since that date, and that there had been no vacancies. He said that no new tractor drivers had been hired since that date, and that there have been no vacancies for tractor drivers. He testified that there was one shop person hired since July 7, 1982, i.e., Miguel Sanchez. He was taken from the preferential hiring list. He was selected for rehire by his original date of hire. He was the most senior employee,

Mr. Garcia testified that the Company employs irrigators the year round. He said the Company maintains a

separate list for irrigators. An employee gains seniority rights if he works 30 days within any 90-day period. The effect of obtaining seniority rights is that once the seniority employee accrues seniority, he has the preference for rehire and layoff, and when a layoff occurs, he is one of the first to be rehired. The policy has been in effect since there was a union contract in 1975.

There are temporary layoffs of irrigators, and these are effected according to seniority, i.e., those with the least seniority are laid off first and the reverse for recall. New employees are not hired before recalling employees on layoff. An irrigator on temporary layoff does not lose his seniority. He has recall rights on layoff.

The same procedure applies to tractor drivers. Shop personnel work year-round. There are also temporary layoffs of shop personnel.

Irrigators, tractor drivers and shop personnel lose their employment rights when they quit, are fired, or if they do not return on a recall.

The Company has not employed more irrigators since July 7, 1982, than it did on that date. It is anticipated that there will be a need for additional irrigators in December, 1982, and January, 1983.

Since July 7, 1982, the Company has not laid off any irrigators and recalled them. Since July 7, 1982, the Company has not recalled any irrigators that were laid off

prior to that date.

After July 7, 1982, the Company has laid off tractor drivers for approximately 30 days, and then recalled them.

Since July 7, 1982, the Company has not laid off any shop personnel, and has not recalled any shop personnel laid off prior to that date.

The Company has not employed, after July 7, 1982, more tractor drivers than it had on that date.

The Company has not employed any labor contractors to perform irrigation work or tractor driving work, since July, 1981.

The irrigators, tractor drivers, and shop personnel who went on strike in July, 1981, and who have offered to return to work have been put on a separate preferential hiring list.

Employees on layoff, with seniority rights, do not have to compete with new employees for reemployment.

The Cirilio Alvarado crew is responsible to thin and weed all the cotton, vegetable crops, melons, and lettuce. The Company farms over 10,000 acres in the area. Mr. Alvarado's crew works eight to nine months of the year. The longest duration of a layoff of his crew is 45 to 60 days. The current layoff is the longest they have had. Other layoffs vary, from a week to two or three weeks. When there is a layoff, the entire crew is laid off. At no

time are only part of the members of the crew laid off. No one loses seniority while on layoff. Irrigators earn seniority the same way as tractor drivers and shop personnel.

The Company also employs one other weeding and thinning crew, i.e., that of Diego Mirales. That crew works two or three months of the year.

Separate seniority lists are maintained for the two separate weeding and thinning crews. There are occasions when one weeding and thinning crew is laid off while the other weeding and thinning crew is retained. Under those circumstances some of the more seniority employees in the layoff crew have been laid off, while the less seniority employees in another crew have been retained.

Mr. Cirilio Alvarado has not hired any new employees in his weeding and thinning crew since July 9, 1982, and there have been no vacancies in that crew. The Cirilio Alvarado crew was laid off sometime after July 7, 1982, for four weeks, and recalled on about September 7 or 9, and has since been laid off again, and has not yet been recalled.

The members of Cirilio Alvarado's crew that went on strike in July, 1981, who have offered to return to work, have been put on a preferential hiring list. Francisco Larios has not been a member of the Alvarado crew.

Mr. Garcia testified that there were ten or eleven rows in the bus that was used for transporting employees to work, and that there are two seats on each side of the aisle.

The marked bus capacity is 42.

In answer to my own question as to whether the preferential hiring list, so often referred to in his testimony, was made in a certain order, Mr. Garcia answered as follows:

Garcia: "No sir, no, it wasn't. What I did is nothing more than a yellow pad, and when the employees came to the ranch and asked if there was any work available, and what *I* did was put their name down and the date, and that was it. And if there was an opening, we hired them, and put them to work that day." TR. VI, 113, 114.

Mr. Garcia testified that he hired Mr. Miguel Sanchez, a couple of weeks ago, to work in the shop, and that he got his name from the unconditional offer list dated October 26, 1982. (See GC Ex. 8)

When asked why he had hired Mr. Sanchez prior to hiring back some of the other shop personnel who had been on the earlier list dated July 7, 1982, Mr. Garcia answered: "Mr. Sanchez is the, number one, when the original unconditional offer of July 7, that was made, there was no openings in the shop, and number two, Mr. Sanchez has more time with the Company than does Mr. Lopez."

Mr. Garcia recalled that an opening had occurred the previous week in the tractor department and that another person was hired off the preferential hiring list, i.e., Mr. Jose Flores.

Mr. Garcia explained that when an opening occurs they look at the preferential hiring list, and then they check the files to see that they are hiring the person with the most seniority for the specific position.

Mr. Garcia testified to what counsel for Respondent had repeatedly offered to stipulate to, i.e., that new employees had been hired as irrigators after the date of May 4, 1982, but before the date of July 7, 1982. The major irrigation season started about the second week of May, 1982. A large number of new persons, at least some of which had not been previously employed by Sam Andrews' Sons, were employed on May 10, 1982. Some of those new employees would be laid off at the end of the season in August. Those new employees, who worked 30 days within a 90-day period, would have gained seniority. So persons hired on May 10, would be likely to have earned seniority by July 7, 1982.

Mr. Garcia testified, in response to General Counsel's questions, as to the seasonal patterns of employment, which were clearly based upon a number of variables. He testified again on redirect examination to clarify the patterns.

Tractor Drivers: If the tractor drivers are not planting a particular crop, they are furrowing up beds and are preparing the grounds. Before planting, the lands must be prepared by the use of tractors. After the cotton season ends, the bulk of the work-would consist of thrashing, mulching and discing. October and November are some of the

peak seasons. The next peak season is in December when they have to disc up all the cotton stalk, land plane the ground stubble, disc, and then set up the beds for whatever crop the superintendent or owners decide to grow, i.e., lettuce, tomatoes, melons, or whatever. That work goes on through January and parts of February. Because of the coming rainy season, the work force is somewhat constant from October through part of February. Then there is a start up again around the middle of March. Cotton planting begins from about the 15th through the 20th of March.

Some of the tractor work involves use of the backhoe, and some requires work with the land plane. The Company has different classification, i.e., tractor driver 1 and tractor driver 2. Some drivers have more skill in the vegetables, which requires precision driving.

Irrigators: In the month of January, approximately 50 to 70 irrigators are working. The start of an irrigation operation may begin in December or in January, with that number of irrigators. That operation lasts two and a half months. The Company begins to scale down on about March 15, and approximately 30 to 35 irrigators are laid off at that time. Hence, the Company retains as many as 30 to 35 irrigators, Then, depending upon the work, there may be a slight recall in April. The recall may be from 10 to more than 20 irrigators being called back to work in April. The reason for the recall is that the cotton is coming up by then, and they are

needed for the melons, which are ready, and the tomatoes need water, as well as for other reasons. Then irrigators are recalled again, after that slight recall in mid-April, about the first or second week of May. All of the senior irrigation workers are recalled at that time. If more workers are needed, new employees are hired then as well. About 70 or 75 irrigators are employed in May. The peak of the employment complement is reached by the middle of June, and is maintained through the rest of June, all of July, and through the first two weeks of August. Then, in August, layoffs begin with 25 or 30 irrigators being laid off at a time, down to a low point of about 25 persons. That point is reached in the first part of October. That level of employment is then maintained until the pre-irrigation period, which is December and January.

Tractor drivers: In January, there .are approximately 24 or 25 tractor drivers. That level is maintained through all of January, and through most of February. Most of the work is completed, because of the need to prepare the ground prior to the rains, by mid-February. A layoff occurs in mid-February and about 12 or 15 tractor drivers are kept working. A recall is made on about the 15th or 20th of March, when cotton plainting is started, and the complement goes back up to approximately 25 tractor drivers. That level is maintained through March, April and into part of May. At that time another layoff occurs, and the work force drops

to 10 or 15 tractor drivers. That level is maintained until the middle or the end of June. At that time tractor drivers are called back to pull equipment, and the level rises to 20 or 25 drivers. That level is maintained for approximately 45 days, and there is another layoff. The number is reduced to about 15 or 16 drivers. That level is maintained until the start of August, at which time another recall is made. It is raised to a peak of about 25 or 26 drivers/ by the first part of October. That level is maintained until January.

Cirilio Alvarado's weeding and thinning crew: The members of that crew remain somewhat constant during the process of various operations. Those employees work in the harvest of the honey dew melon. That harvest lasts approximately three weeks. Then there is a layoff of the crew and they are recalled in approximately four weeks.

Transcript of prior testimony of Arcela Navarro:

There was extensive discussion concerning the request by Respondent's counsel that I receive into evidence the prior testimony of Arcela Navarro, the wife of General Counsel's first witness. The testimony was made in the hearing which resulted in 8 ALRB 69. Initially, Respondent's counsel wanted to have Mrs. Navarro testify in the present hearing, but her husband did not return to the hearing, and it was uncertain whether or not she could be found.

Respondent's counsel offered the testimony of the prior hearing for the truth of the matter stated. On November 5, 1982, both General Counsel and the union representative said they would agree to the introduction of the transcript without objection. TR. V 147. Then, when they learned that their stipulation would not result in Respondent's counsel closing his case without further witnesses, they withdrew the stipulation. TR. V 150.

On November 15, 1982, Respondent's counsel reintroduced the transcript of the testimony of Mrs. Navarro, and asked that it be received under the exception that allows the receipt of prior testimony when the witness is unavailable or beyond process. Counsel represented that Mrs. Navarro was now in Mexico and could not be brought back under process.

Both General Counsel and the Intervenor argued that introduction of the testimony would be prejudicial. They contended that there was no opportunity for the absent witness to explain her testimony, or deny, or elaborate on those material portions which would be relied upon. It was argued that General Counsel, in the prior hearing, had no interest in litigating whether or not it was an unfair labor practice strike, and that the issue was different, in the instant case.

It was further argued that there was no testimony by Mrs. Navarro at what point she got on the bus, whether it was before Mr. Orosco made the speech while he was walking

from the rear of the bus to the front of the bus, after he had gotten off the bus, talking to some strikers, and got back on the bus, etc.

Nevertheless, I received the record of the prior testimony into evidence with the statement that it will go to the weight, and I would give it whatever weight it appears to me to have.

The testimony is as follows from Volume XI pages 114 and 115, 8 ALRB 69.

General Counsel: "How did you find out in the morning of July 9 about the protest?"

A. "In the morning when I went to work, I take the bus, and when the bus stopped, it stopped to take the ice for the workers."

Q. "Now, Mrs. Navarro, where would you get on the bus?"

A. "At the entrance of the ranch, where I live."

Q. "Okay. And where does the bus stop for ice?"

A. "Just a few feet away, right where the bus stops at the entrance, just a few feet away from where it stops for ice."

Q. "Okay, now how did you find out that there was going to be a protest?"

A. "Because the one that told me was Juan Orosco."

Q. "Was he on the bus with you?"

A. "Yes."

Q. "And what did he tell you?"

A. "That there was going to be a protest."

Q. "Did he tell you why?"

A. "No, that was how he told us."

ANALYSTS

Was it an unfair labor practice strike from the outset?

The primary question to be answered in this matter is whether the strike was an unfair labor practice strike from the outset. If it was, then it is clear that Respondent had a duty to immediately reinstate all striking workers, upon their unconditional offer to return to work, even if it meant termination of replacement workers. Seabreeze Berry Farms, (1981) 7 ALRB No. 40. Failure to reinstate all the unfair labor practice strikers is unlawful discrimination. NLRB. v Dubo Manufacturing Co. 353 F 2d 157 (6th Cir. 1965).

The General Counsel based his case upon the testimony of three striking employees, all of whom testified that the strike was called on account of two alleged unfair labor practices: (a) the Company's alleged discrimination against workers by dismissing those eight irrigators who refused to get into the truck that was provided for them; and (b) the Company's refusal to rehire Mr. Francisco Larios after it had been ordered to do so by the ALRB.

The General Counsel asked that I take judicial notice of the decision of the Board in Sam Andrews' Sons,

8 ALRB 69, in which the same Company was charged with the foregoing violations- of the Act. I have done that. In that decision it was found that the Company had refused to rehire Mr. Francisco Larios, and that it was an unfair labor practice. The Board, in the same decision, affirmed the findings of the Administrative Law Officer, which held that, though eight irrigators had engaged in protected concerted activity, there was no showing that the Company had suspended, laid off or discharged the workers for such activity. Accordingly, it was found that that matter did not constitute an unfair labor practice.

In the instant case, the issue of whether or not there was an unfair labor practice strike at the outset turns on the two alleged violations heard in the earlier decision. *(It* is discussed separately, infra, as to whether or not the matter was res judicata, in light of the same matters appearing in both cases.) Because the Board found in 8 ALRB 69, supra, that the matter involving the irrigators did not constitute an unfair labor practice, it would be incorrect to make a contrary finding here. Indeed, the specifics of that incident were not litigated in the instant case. It was only referred to as one of the alleged causes of the July 9, 1981 strike.

Though all three of General Counsel's witnesses testified to the irrigator problem as being one of the causes of the strike, it cannot be treated as an unfair labor

practice. Hence it could not make the strike an unfair labor practice strike on that ground alone. Granted, the workers may have seen it as an unfair labor practice, but that does not make it so. If, for example, an employee had been dismissed for violating a company rule, and then the employees had gone on strike to protest the dismissal, it would not make it an unfair labor practice strike once it was determined by the Board that the dismissal was without discrimination. If that were not so, then anytime an employee group wished to go on strike for economic reasons, they would only need to allege some violation of the Company, later found groundless, and have the strike termed an unfair labor practice strike. The Company would be denied any defense at all against such findings. The employees may very well have gone on strike, at least partially, because of the irrigator problem, but I find that that does not make it an unfair labor practice strike.

I find it strange that General Counsel did not call TJr, Villarino, the U.F.W. representative, to testify as to why the strike was called on July 9, 19.81. Also, I am dismayed by the fact that masses of employees, fully equiped with flags, were present for picket duty at 5:45 a.m., when the bus containing workers stopped at Copus Road and River Road. It seems questionable that such organization should have taken place, when it was alleged by Mr. Navarro, as cooridinator of the strike that only he and his three companions,

Sanchez, Ijinez, and Orosco had any idea of calling a protest until they informed the workers on July 9, 1981, at that very early hour. It appears to me that there was too much preparation to believe that this was a last minute protest. The Administrative Law Officer, (ALO) in 8 ALRB 69, found that the irrigator problem was one of the causes of the strike, but that left the possibility of other reasons, including that of it being an economic strike. In fact, witnesses who appeared in the earlier proceeding, as well as the instant hearing, stated that a cause of the strike was the irrigator problem, i.e., that the strike was called to protest Respondent's treatment of the eight irrigators who had protested about the truck that was taking them to work. See testimony, supra, of both Navarro and Villanueva and the references to their prior testimony in this regard.

What remains, then, is to determine if some other unfair labor practice was the reason for the strike. In the instant hearing, for the first time, it was alleged that the second cause of the strike was the Company's refusal to rehire Francisco Larios, a well known union advocate, on account of his union activities.

We know, from the earlier case, i.e., 8 ALRB 69, that it was found that there was an unfair labor practice in the refusal to rehire Larios. Nevertheless, we must know whether that previously found unfair labor practice precipitated the strike. The testimony of General Counsel's

witnesses certainly asserts that it was the second cause of the 1981 strike. Can we believe two of them though, in light of their contradictory testimony in the earlier hearing? I think not. The prior inconsistent testimony is, in my mind, clear evidence that Navarro and Villanueva fabricated the Larios scenario, post facto, in order to contend that it was an unfair labor practice strike. There was ample opportunity for them to have mentioned the Larios matter during the prior hearing. There explanations of not having done so are weak to say the least.

I was asked to read the transcripts of the entire hearing in 8 ALRB 69, in order to put the testimony of the impeached witnesses into focus. I did that. I read for the flavor of the case, and to gain a clear perspective of whether or not the testimony of the impeached witnesses was being taken out of context, or if it was to the point of the instant hearing. I made the 23 transcripts of that prior hearing my own exhibit for purposes of the general review, (Hearing Officer Exhibit 1), but Respondent's counsel met the evidence code requirement of reading each of the alleged prior inconsistent statements to the witness, and giving him a chance to explain the conflicts in testimony.

It is easy now for the witnesses, Navarro and Villanueva, to claim that what they meant by discrimination was the "Larios matter", as well as the "irrigator problem", or that the reason he didn't say it is that he wasn't asked

about it. It just does not wash with the testimony of that case, or the instant case. These were two very sophisticated witnesses, who appeared to clearly understand the importance of the "Larios" allegation in their testimony. The fact is, though, that they were contradicted by their own prior statements. It cast a shadow over the remainder of their testimony, in light of those inconsistencies.

The earlier testimony, given in 8 ALRB 69, was offered during the strike, and only a month or two after the events in question. Here, it is over a year later that the witnesses tell a different story as to what caused the strike. One must be drawn to the greater likelihood that the strike involved the events testified to closer to the event, Given that fact, it also calls into question the testimony of Juan Orosco, who did not testify in the earlier case, but who alleged here that one of the two precipitating causes of the strike was the Company's refusal to rehire Larios. In 8 ALRB 69 on page 10 of the Decision, the ALO made a finding that the only reason the eight irrigators stopped working at the employer's ranch was their own election to abandon their jobs in protest over the transportation. Having read the transcripts of that case, I agree with the ALO, but it does not matter whether I do or not; that was the finding by the person who heard the case, and that was the finding approved by the Board. It would not be legal for me to make a finding different from that, merely

because the principals in the scenario have now changed their stories to add the Larios matter, because it now suits their needs to have the strike declared an unfair labor practice strike.

It would appear that General Counsel made a strategic error in offering only the principal players to assert their claim of the Larios matter being a cause of the strike. These could easily be contradicted by their own prior testimony. It would have made sense for him to introduce testimony from several of the strikers who might allege that they were convinced to join the strike by hearing of the Larios matter. It is true that General Counsel offered to bring in such witnesses after his case was completed, and after the Respondent's case had finished. He saw then, I believe, that his key witnesses were in question. His offer then, however, I found to be only an effort to corroborate the earlier testimony, rather than true impeachment testimony as provided for in a rebuttal case. I ruled against the introduction of a cooroborative case at that late date.

Frankly, I am also struck by the fact that the Larios matter was not even an issue until after the 8 ALRB 69 case was published. It was only then that General Counsel amended his case, in which he had relied entirely on the irrigator problem, to call it an unfair labor practice strike. If the Larios issue was so prominent in the cause of the strike, as it was alleged in the instant

case, how could it not have been included in the initial complaint? How was it possible to discover it only when it was the only thing that might save the case for the union?

Also questionable was the fact that Mr. Francisco Larios himself, the key figure in the play, sat center stage during the entire hearing. He was never asked to testify. Who would be better able to say that he had learned that over 70 people had gone out on strike because he had been refused a job?

Also present during the hearing, serving as "trial assistant" to General Counsel, was Javier Ramirez. Ramirez was another principal player with Navarro, Villanueva, and Orosco. If there was to be cooroboration of the facts, why was he not called during General Counsel's case in chief?

At the outset of the hearing, prior to the taking of any testimony, I gave an order to both counsel that all witnesses should be sequestered. It was understood and agreed that no person should be in the hearing room who would later testify in the hearing. General Counsel assured me that he was only going to have two witnesses and that he would sequester them. The fact is that General Counsel called a third witness, Mr. Juan Orosco. Mr. Orosco had been in the hearing room during the testimony of one of the other two witnesses. I was loathe to hear the testimony in view of the violation of the sequestration order. General Counsel and the union representative assured me that there

would be no overlap in the testimony of Mr. Orosco and either of the previous two witnesses. I stated that it would cast the testimony in a bad light if that was not so, and I invited all counsel to argue in their briefs whether or not their had been overlapping of testimony. I do find that there was overlapping of testimony. Mr. Orosco was present when Mr. Villanueva testified about an alleged conversation between Navarro and Villanueva on July 8, 1981, that would explain how Navarro learned of the Larios matter. Orosco testified to that very matter. Accordingly, I do find that the testimony of Mr. Orosco was placed in a bad light by his presence in the hearing room in violation of the order. I do not base my entire acceptance or rejection of his testimony on such a finding, however. It only adds weight to what ever else is found. In any case, Mr. Orosco could not have helped but learn of the importance being placed on whether the Larios matter was the cause of the strike, Regardless of whether or not he understood English, and the extensive arguments over the matter between counsel during every stage of the hearing, it was the central focus of the hearing, and he could not have easily missed it.

I find, however, that Mr. Orosco's testimony was offset by the testimony of Mrs. Irene Salcido. Mrs. Salcido heard Mr. Orosco when he stood up in the bus on July 9, 1981, and asked the workers to join him in a protest for better wages and for better treatment of the workers by the Company.

She did not hear him say anything at all about Mr. Larios. How could she miss it, if it was said? She was seated in the fifth row of the bus. There are only ten rows to the bus, so she was half way in the bus. He made the statements as he was passing her seat, she was wide awake. I watched her testify. I could see that, by the questions, it was somehow implied to her that she had missed some other thing said by Mr. Orosco. When she said she did not hear or remember anything else, other than that which she testified to, I understood her to mean that was all that was said, not that something else was said and that she didn't hear it. She was a straight forward, honest witness with nothing to gain from the giving of the testimony, except perhaps the scorn of some of her fellow workers. I saw no evidence of prompting. She had been told to tell the truth, and I believe that is just what she did.

On the other hand, I do not believe Mr. Orosco testified truthfully. His testimony contradicted that of Mr. Villanueva and Mr. Navarro in the earlier hearing, i.e., 8 ALRB 69. He testified to what he claimed was his actual speech. In it, he spent the most words, and mentioned first, the matter of Mr. Larios not being rehired in spite of the ALRB order. He made no mention of wages at all in his telling of it at the hearing.

The testimony of Mr. Orosco had *a* ring of falsity. Mrs. Salcido's testimony, on the contrary, had the ring of

truth. Accordingly, I find that Mr. Orosco did not mention anything about Mr. Larios in his July 9, 1981, bus speech.

As to the testimony given by Mrs. Arcela Navarro, in 8 ALRB No. 69, *I* find that it merely adds further weight to the finding that Mr. Orosco did not tell the truth about Larios being a factor in the cause of the strike. I find it somewhat corroborative of Mrs. Salcido's testimony, but I do not make my finding on this transcript alone. It is supportive, not determinative.

With the fall of the third witness of General Counsel, the house of cards falls completely. If the testimony of Mr. Villanueva, Mr. Navarro and Mr. Orosco are all found to be false as to the question of whether or not the refusal to rehire Mr. Larios was a precipitating cause of the strike, then it leaves no basis at all to assert the claim that it was an unfair labor practice strike from the outset. And that is my finding, i.e., that the 1981 strike at Sam Andrews' Sons was not an unfair labor practice strike from the outset. I will consider separately the question of whether other factors may or may not have subsequently converted it to an unfair labor practice strike.

Did Mr. Villanueva make an unconditional offer to return to work May 4, 1982?

Leonardo Villanueva testified that he had asked Bob Garcia for his job back, or for any other work that might be available. He claimed that he had called on May 4, 1982,

because he was being denied unemployment benefits on the ground that jobs were supposed to be available at Sam Andrews' Sons. Bob Garcia testified that it is true that Mr. Villanueva called, but that the secretary of the EDD came on the phone to ask if they were hiring. It appeared to Mr. Garcia that the reason for the call was to determine Mr. Villanueva's eligibility for benefits. It did not appear to him that the inquiry was an unconditional offer to return to work.

On May 18, 1982, Mr. Villanueva sent a letter to Mr, Garcia, (see General Counsel's Exhibit 2). The letter was a confirmation of the conversation of May 4, in which Mr. Garcia had allegedly told Mr. Villanueva that the striking employees would have to start again without any seniority, for having participated in the strike which began July 9, 1981. The letter did not state that it was intended to confirm that Mr. Villanueva had asked for his job, or that he had made an unconditional offer to return to work.

If there had been an unconditional offer, it would seem that Mr. Villarino, the union representative who helped draft the letter, would have made that clear in the letter. He did know to do that in later correspondence in which an unconditional offer to return to work was submitted on behalf of the strikers.

It is difficult to know who to believe in this instance, because I find the testimony of both witnesses

suspicious. Mr. Garcia gave a classic demonstration of a person who was trying to avoid answering questions put to him by General Counsel. His manner of testifying was evasive and appeared to be intentionally designed to prevent the taking of clear and accurate testimony. General Counsel was able to make some headway on cross-examination of Mr. Garcia to the extent of his making a total reversal of his earlier assertions. He gradually admitted to facts about the conversation he had in regards to the May 18 letter. At first he denied any such conversation. Then he said it was possible, then he said there was some conversation, and finally he admitted the conversation, but only after a three minute pause in which he was allegedly trying to recall. The act was not persuasive.

On the other hand, I am convinced that Mr. Villanueva was not truthful about the allegations concerning the cause of the strike, as is discussed, supra, therefore it casts his testimony about applying for a job in equally questionable light. He must have said something about employment, otherwise his references in the May 18 letter would not make sense. It is doubtful, though, that he did in fact make an unconditional offer to return to work on May 4, 1982. It is just too much to believe that that would not have been included in the confirming letter of May 18, 1982.

I find that Mr. Villanueva did not make an unconditional offer to return to work on May 4, 1982.

Absent a prior unfair labor practice, was Respondent under a legal obligation to reinstate strikers who made an unconditional offer to return to work on July 7, 1982?

General Counsel contends that repeated conduct of hiring new employees to perform work previously performed by the strikers, after the strikers had made unconditonal offers to return to work, is conduct inherently destructive of employee rights and converts the strike to an unfair labor practice strike. It is true that unfair labor practice strikers are entitled to immediate reinstatement upon making their unconditional offer to return to work. Seabreeze Berry Farms Co. (1981) 7 ALRB No. 40. If the strike is found to be an economic strike, General Counsel contends, Respondent's hiring of over 14 new employees to perform work which was previously performed, and could have been performed by the strikers after the July 7, 1982, unconditional offer, converts the strike to an unfair labor practice strike. NLRB v. Pecheur Lozenge Co., supra; NLRB v. PlastiliteCorp., supra.

It is true that Respondent stipulated that it hired over 14 new employees to perform work as crew laborers. The work of the two separate crews of Cirilio Alvarado and Diego Mirales performed identical work duties and were known as the weeding and thinning crews. The persons hired to work in the Mirales crew performed the exact same work which was being performed by Alvarado's crew when it worked.

General Counsel contends that it was bad faith for

Respondent to hire new employees without offering employment to the strikers. He said that Respondent could have offered the positions and left it up to the union at the bargaining table to claim the positions were not substantially similar positions. General Counsel contends that the failure to hire the strikers was unlawful discrimination according to Seabreeze Berry Farms, supra, 7 ALRB No. 40 and NLRB v. Murray Products Inc., 548 F2d 934.

If the jobs were the same, and all conditions were the same, then I would agree that Respondent's failure to reinstate the unreplaced strikers, despite the availability of job openings, constituted an unfair labor practice.[NLRB y. Fleetwood, supra, 389 U.S. 375; Weather-Tec Corporation (1978) 238 NLRB 1535, enf'd (9th Cir. 1980) 626 F2d 868.] General Counsel contends that the strike resumed, and continued, by prolonging the reinstatement of the strikers and was thus, converted to an unfair labor practice strike. [Admiral Packing Co. (1981) 7 ALRB No. 43; NLRB v. Windham Community Memorial Hospital (1977) 230 NLRB 1070; NLRB v. Pecheur Lozenge Co. (2nd Cir. 1953) 209 F2d 393 cert den., supra, 347 U.S. 953; Cavalier D.W. of Seeburg Corp. (.1971) 192 NLRB 290, mfd. on other grounds (B.C. Cir. 1973) 476 F2d 8687]

The question is, then, whether or not the positions to which Respondent assigned new employees were substantially similar to the work previously performed by striking employees, If it is found so, then the Company was obligated to discharge

the replacements, if necessary, to make positions available. JAdmiral Packing, supra, 7 ALRB No. 43, p. 25; Mastro Plastics v. NLRB (1956) 350 U.S. 270, 278 [76 S. Ct. 347].]

Respondent, on the other hand contends that the positions to which it assigned new employees were not substantially similar to those previously held by the strikers.

Respondent argues that any analysis of the statutory rights of economic strikers must begin with the federal Supreme Court's decision in NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). The Court noted that:

> "Although section 13 of the act . . . provides, 'Nothing in this Act [chapter) shall be construed so as to interfere with or impede or diminish in any way the right to strike', it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." 304 U.S. at 345-46 (footnote omitted.)

The Court further noted that an employer "was not bound to displace men hired to take the strikers' places in order to provide positions for them." 304 U.S. at 347. The Court, however, found that unreinstated economic strikers continued to be employees, as that term is defined in the NLRA, and therefore were entitled to priority consideration for any vacancies that were available.

Respondent points out that the reinstatement

rights of economic strikers were succinctly set forth in the recent ALRB decision where the agency, modifying its original decision in order to clarify the rules set forth in Seabreeze Berry Farms, 7 ALRB No. 40 (1980) , wrote:

> "Economic strikers who have unconditionally offered to return to work are entitled to reinstatement to their previous positions until permanently replaced, and are thereafter entitled to preferential hiring as the replacements leave or as other job openings become available." Patterson Farms, Inc., ALRB No. 57 (1982), at p. 3 of Supplemental Decision and Erratum.

Respondent admits it is obligated to return strikers to their former positions or substantially equivalent ones if and when such positions are available. Part-time jobs, it argues, are not equivalent to full time jobs and jobs, which are unequal in authority, hours and/or pay are not substantially equivalent. See, e.g., Certified Corporation, 241 NLRB 369 (1979) and New Era Electric Cooperative, Inc., 217 NLRB 477 (1975). Accordingly, Respondent contends it was not obligated to offer strikers who formerly worked in Alvardo's crew work in Mirales[1] crew. The annual employment ("hours") of the two crews differs substantially. The work available in the two crews differs as does the work of a full time versus a part-time job.

Respondent states in its brief that the employment rights of economic strikers are statutory in origin and cannot be equated to the employment rights of laid off employees. The recall from a strike is dissimilar from a

recall from a layoff; they are governed by different principles, one statutory, one contractual. See Bio-Science Laboratories, 209 NLRB 796 (1974) and Brooks Research & Manufacturing, Inc., 202 NLRB 634 (1973). Accordingly, reinstatement rights of economic strikers may not be viewed as a seniority rights question.

Here, Respondent was obligated to maintain its employees' terms and conditions of employment, including their seniority rights as those rights applied to layoffs and recalls. Respondent would have violated the Act by unilaterally changing the existing terms and conditions of employment. NLRB v. Katz, 369 U.S. 736 (1962). Certainly, there was no discriminatory motive in retaining and continuing to apply a term and condition of employment which pre-existed. There is no evidence that the UFW, through negotiations has sought to change that practice or to have it made applicable to unreinstated strikers.

Because I am entirely in agreement with the argument and citations, I have adopted Respondent's contentions hereafter as my own.

One of the first cases in which the NLRB was confronted with the competing recall rights of laid-off replacement employees (which may include reinstated strikers) on the one hand and reinstatement rights of economic strikers on. the other was Bancroft Cap Co., 245 NLRB 547 (1979) The employers' layoff and recall procedure in that case was

strikingly similar to Respondent's. The employer there, when it needed additional employees, attempted to meet this need first by recalling employees from layoff. At that point, unreinstated economic strikers were not considered for recall along with the employees on layoff status. If the employer could not meet its need for more actively working employees by recalling laid off employees, it attempted then to fill its employee needs by reinstating economic strikers. 245 NLRB at 549. This practice resulted in laid off employees with less seniority being recalled to work prior to the reinstatement of economic strikers with more seniority. 245 NLRB at 550.

As the ALJ in Bancroft noted: "The critical question thus is whether the positions to which the laid off employees were recalled were "vacancies" or were positions filled by such employees even though on layoff. If such positions are not "vacancies," the economic strikers' right to reinstatement is not applicable to such positions." 245 NLRB at 550. The ALJ concluded that "the job position of the employee must be viewed in broad terms and to be that of holding a position in the overall work complement whether actively working or on layoff status," and thus "there did not exist a 'vacancy' at the time of the recall of the 'laid off employees', and the economic strikers' right of reinstatement was not applicable because a vacancy did not exist." 245 NLRB at 550-51. To have reinstated economic strikers in

preference to recalling laid off replacement workers "would be tantamount to requiring the Respondent to discharge, layoff, or continue employees in layoff status in order to reinstate economic strikers." 245 NLRB at 552. That, the ALJ concluded, would be contrary to the Mackay Radio rule that an employer is under no obligation to discharge or layoff permanent replacements at the termination of an economic strike. The ALJ noted that cases subsequent to Mackay have not altered its rule. 245 NLRB at 552.

In affirming its ALJ's decision, the Board relied on the fact that "the General Counsel has failed to prove by a preponderance of the evidence that the laid-off employees had no reasonable expectation of recall." 245 NLRB at 547, n. 1, citing Certified Corporation, 241 NLRB 369 (1979) (the recall of a replacement employee on disciplinary layoff who had a reasonable expectation of recall after economic strikers had made an unconditional offer to return to work was permissible). Accord; Kennedy & Cohen of Georgia, Inc., 218 NLRB 1175 (1975).

In Giddings & Lewis, Inc., 255 NLRB 742 (1981), the NLRB indicated that the reasoning of Bancroft was not applicable regardless of the length or the cause of the layoff. The NLRB apparently still subscribes to the notion that if a laid-off employee has a reasonable expectation of recall he may be preferred to an unreinstated striker but that such expectations only exist if the term of the layoff

is relatively brief. The disciplinary layoff in Certified Corporation, supra, lasted approximately five months. The layoffs involved in Bancroft were two to seven days. The policy found unlawful by the NLRB in Giddings applied to layoffs of indefinite duration.

The NLRB in Giddings recognized that The Laidlaw Corporation, 171 NLRB 1366 (1968), enfd 414 F.2d 99 (7th Cir, 1969) , cert, denied 397 U.S. 920 (1970) "does not require an employer to disrupt his existing work force in the event of a temporary layoff where there are no true vacancies," but held that an employer cannot give recall preference to laid-off nonstrikers and replacements "in almost every situation regardless of the circumstances of the layoff." 255 NLRB at 745. The NLRB specifically noted that it was not holding that the employer was required to give preference to strikers or to place nonstrikers and replacements in a subordinate position with respect to recall rights. 255 NLRB at 745.

The circuit court which decided The Laidlaw Corporation, which the NLRB cited with approval in deciding Giddings, reversed the NLRB when the employer in that case sought review of the NLRB's order. Giddings & Lewis, Inc., 675 F.2d 926 (7th Cir. 1982). The facts there are virtually identical to those here, except there the policy giving preference to laid-off replacement workers over unreinstated strikers was adopted and implemented after the unconditional offers to return to work was made. After reviewing Mackay

and its progeny, the Court wrote:

> "Mackay thus stands for the proposition 'that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements' NLRB v. International Van Lines, 409 U.S. 48, 50, 93 S. Ct. 74, 76, 34 L.Ed. 2d 201 (1972). 'Economic strikers who have been permanently replaced are entitled to reinstatement only as vacancies occur thereafter in the employer's work force.' NLRB v. Murray Products, Inc., 584 F.2d 934, 938 (9th Cir. 1978).Accord, Winn-Dixie Stores, Inc. v. NLRB, 448 F.2d 8, 12 n. 11 (4th Cir. 1971).
>
> "We find the Mackay rule to be dispositive of this case. The employer here has hired replacements for economic strikers and assured the replacements, through promulgation of the seniority rules in question, that their positions are permanent. In light of the inevitable fluctuations which occur in the nation's economy, with their concomitant impact on the labor force, such a system serves only to assure replacements the permanent status to which Mackay says they are entitled. Affirmance of the Board's holding that layoffs activate a striker's right to reinstatement would eviscerate the Mackay rule. Employers attempting to hire replacement workers could guarantee them employment only until a layoff occurred. Such replacement workers could hardly be called 'permanent.' In the event of a layoff, unreinstated workers would inevitably replace their 'permanent' replacements. Such an outcome would significantly interfere with what the Mackay Court found to be the employer's legitimate interest in maintaining production during an economic strike." 675 F.2d at 930.

The Court noted that the decisions in NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), and The Laidlaw Corp. v. NLRB, 414 F.2d 99 (.7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), were easily distinguishable from the case before it and did not remove the case from the scope of the Mackay rule. 675 F.2d at 930.

The Court pointed out that the NLRB's reliance on certain prior cases was misplaced. In that regard, the Court wrote:

> "The Board further asserts that a line of NLRB decisions establishes a uniform rule that unreinstated strikers have a right to reinstatement when a vacancy occurs. MCC Pacific Valves, 244 NLRB 931 (1979); Wisconsin Packing Co.,"23T NLRB 546 (1977). While we agree with the Board's summary of these decisions, we do not believe that they apply in this case. A layoff, by definition, is not a termination of the employment relationship. The employee retains his or her status as an employee, but is placed in an 'inactive[1] status for the period of the layoff. There is, therefore, no creation of a 'vacancy[1] in the work force which would entitle a striker to reinstatement, under either the Board's decisions or the court decisions examined above."11
>
> "Thus, none of the authorities cited by the Board support a departure from the Mackay rule in this case. The seniority system does not discriminate between strikers and nonstrikers, nor does it deny unreinstated strikers the right to reinstatement should vacancies occur in the work force. Rather, it constitutes the very practice upheld in Mackay: the assurance of permanent status to replacement workers." 675 F.2d at 931.
>
> "11. Furthermore, we believe as did the administrative law judge below, that the more applicable decision of the Board in Bancroft Cap Co., 245 NLRB 547 (1979). In Bancroft, the Board upheld an administrative law judge's finding that an employer did not commit an unfair labor practice in recalling laid-off replacement workers before reinstating strikers. The Board limited this finding to situations in which the laid off employees had 'a reasonable expectation of recall.' Id. at 547 n. 1. Because the layoff in question had been brief, the Board found that a reasonable expectation of recall existed. Id. Here, the employer promulgated rules which specifically set forth the period during which employees will be considered to be laid off and entitled to recall. The rules thus provide employees with *a* reasonable expectation of recall for a defined period."

The Court of Appeals for the Eighth Circuit in Randall, Division of Textron, Inc. v. NLRB, 687 F.2d 1240 (.8th Cir. 1982), stated that it had "no quarrel" with the Seventh Circuit's view that the layoff of a permanent replacement, who had been given a definite expectation of recall, did not amount to a "vacancy." 687 F.2d at 1247. The Eighth Circuit agreed that to hold otherwise would be to infringe on the permanance of replacements.

The pertinent facts here as they relate to the reinstatement rights of economic strikers are virtually the same as those which existed in Giddings. The federal precedent, and the precedent the Seventh Circuit relied upon in so holding, is applicable here. Where the employment pattern is similar to that which exists in industries falling within the jurisdiction of the NLRB, the ALRB has followed, without modification, the precedent under the federal law. Kyutoku Nursery, Inc., 3 ALRB No. 30 (1977). Here there is year-round employment for many irrigators, tractor drivers, and shop personnel and there is eight to nine months of work annually for members of Alvarado's weed and thin crew. Crew members who are temporarily laid off have a definite expectation of recall—indeed, they are advised at the time of the lay off what the projected recall date is. In fact, all employees who are laid off who have acquired seniority rights have a definite expectation of recall. Respondent's seniority policy which has been in

existence for many years makes every seniority employee a permanent employee whose employment rights are extinguished only if he or she is discharged, quits or fails to respond in a timely fashion to a recall notice.

The ALRB's decision in Seabreeze Berry Farms, 7 ALRB No. 40 (1981) is inapposite. The description of hiring practices and employment patterns there is totally different from the practices and patterns here. Respondent employs a group of tractor drivers, irrigators and shop personnel year-round and the other classification, Alvarado[1] s crew, works during seventy-five percent of the year. That stands in stark contrast to the seasonal work patterns described in Seabreeze and is much closer to the year-round employment pattern the ALRB found significant in Kyutoku, supra. Indeed, a requirement that strikers be reinstated "in the season immediately following their offer to return" makes no sense here where a substantial number of irrigators, tractor drivers and all of the shop personnel work year-round. Lu-Ette Farms, Inc., 8 ALRB No. 55 (1982). For those three classifications, there is no "season immediately following" as that term was used in Lu-Ette Farms after July, 1982. And for members of Alvarado's crew who work in multiple crops— sometimes going from one to another on consecutive days—there similarly is no subsequent season. Furthermore, the facts here, where employees on layoff have a definite expectation of recall by virtue of a long-standing seniority policy which

Respondent *is,* by law, obligated to continue to adhere to, are distinguishable from cases where similar employment rights did not exist and where work is seasonal and relatively brief in length.

The generalizations the Board made regarding agricultural employment patterns in Seabreeze are not applicable to Respondent. And since the Board has adopted a case-by-case analysis in these matters, these significant differences should be taken into account. Once they are taken into account and applicable federal precedents are considered and followed, it is concluded that, even though I found the underlying strike was an economic strike, Respondent was under no legal obligation, at any time pertinent here, to reinstate any individual who offered to return to work on July 7, 1982. We must look to other factors to determine whether the employer had an obligation to rehire the strikers, i.e., whether the strike was converted to an unfair labor practice strike.

I have included the foregoing discussion, notwithstanding any other finding that may make Respondent liable, because all issues should be disposed of in a decision of the Board. This part of the Analysis was predicated on the statement that it should apply if no other finding shows an unfair labor practice prior to July 7, 1982. It will be seen that there was, indeed, such a violation.

Was it an unfair labor practice for Mr. Garcia to state that strikers would lose their seniority when they returned to work?

As discussed supra, Mr. Villanueva testified that Mr. Garcia told him that returning strikers would have to lose their seniority if they returned to work. I believe that Mr. Villanueva was telling the truth on that point, because he, with the assistance of Mr. Villarino, wrote a letter, (G.C. Exhibit 2) on May 18, 1982, confirming that conversation. It was shortly after that date, that Mr. Villanueva called Mr. Garcia about the need for a letter to the I.R.S., to support his income tax claim. Mr. Garcia admitted that he made no comment about the May 18 letter. A couple of days later, Mr. Villanueva went to the office of Mr. Garcia to pick up the I.R.S. letter. Mr. Garcia testified, after extensive prodding and repeated efforts to get him to tell what happened, that there was a brief conversation, but that it had to do with Mr. Villanueva's saying that it was not his idea to send the letter. At no time did Mr. Garcia deny to Mr. Villanueva that he had made those assertions concerning seniority and the returning strikers. The May 18, 1982, letter speaks for itself. Without a denial of those assertions they must be assumed to be true. Mr. Garcia admitted that he did not even respond to the letter. Surely if the letter was a misstatement of fact, he would have been quick to contradict it in writing as soon as possible. His

silence appears to accept it as fact.

Having found that Mr. Garcia did make the statements as set forth in G.C. Exhibit 2, the question is, was that an unfair labor practice?

Respondent, through Mr. Garcia, testified that it had a seniority system which entitled persons who worked thirty days in a ninety day period to the special rights of last layoff and early recall from layoff status. It was clearly a benefit which, if lost,would be a substantial change in the rights and working conditions of the employees.

Mr. Garcia's statements to Mr. Villanueva concerning the fact that striking employees would be rehired as new employees because of their having struck the employer, changed the pre-strike relative seniority standing of the employees to the detriment of the strikers, thus impairing the tenure of their employment, and penalizing them for their union activities. Such conduct had the foreseeable consequence of discouraging union activity and was, therefore, inherently destructive of the employees' organizational rights. See NLRB v. Erie Resistor Corp. (1963) 373 U.S. 221 J53 LRRM 2121] .

Respondent offered no legitimate or substantial business justification for its action. The Board in Julius Goldman's Egg City (1980), 6 ALRB No. 61, has noted that an employer's apparent desire not to penalize those employees who worked during the strike was without justification. In that case the Board found such employer conduct inherently

destructive of organizational rights, the business justifications may be discounted in light of such conduct, since "whatever the claimed overriding justification may be, {the conduct} carried with it unavoidable consequences, which the employer not only foresaw, but which he must have intended." NLRB v. Erie Resistor Corp., supra, 373 U.S. at 228. See also NLRB v. Great Dane Trailers, Inc. (1967) 383 U.S. 26 (j55 LRRM 2465]. Mr. Garcia was found to be part of the management of Sam Andrews' Sons, therefore his act was the act of the Respondent. I find therefore that Respondent's conduct violated Labor Code Section 1153 (c) and (a).

Was the strike converted to an unfair labor practice strike?

General Counsel argues that, even if it is found that the strike was not an unfair labor practice strike at the outset, then it was converted to one after it started, because of the alleged refusal to rehire Leonardo Villanueva and the subsequent hiring of other new employees before hiring strikers with unconditional offers to return to work.

I have found, supra, that Mr. Villanueva did not make an unconditional offer to return to work on May 4, 1982, therefore I do not find, on that ground, that it was an unfair labor practice for Mr. Garcia to not hire him prior to the time that he did, in fact, make an unconditional offer along with the other strikers.

If it were found that Mr. Villanueva had, indeed, made an unconditional offer to return to work on May 4, 1982,

then Respondent would have had a duty to hire him at the first available opening.

Following an unconditional offer to return to work from an economic strike the strikers have a right to positions of the same type they held prior to the strike as soon as an opening occurs. If it is an economic strike, the employer is not required to dismiss workers who were hired as replacements for the strikers to make room for the strikers, but if the opening occurs after the unconditional offer is made, then the returning striker has a right to the job. In NLRB v. Fleetwood Trailer Co., supra, 389 U.S. 375, the court ruled that following the strike, and upon their unconditional offer to return to work, the strikers remained employees, until they had obtained substantially equivalent employment elsewhere. The court concluded that the job openings should have been filled by the strikers, and indeed, would have been, had the employer considered them as employees rather than applicants. The court held that, in such a situation, because the employer's conduct is inherently destructive of important employee rights, the General Counsel was not required to prove anti-union motivation. The court found the employer's conduct to be inherently destructive, because it had the effect of discouraging employees from exercising their rights to organize and strike. Relying on its prior decision in NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [87 S.Ct. 1795J , the court held that, unless

an employer can show a substantial and legitimate business justification for its refusal to reinstate strikers, the employer has committed an unfair labor practice.

General Counsel in the instant case contends that applying the holdings of Fleetwood Trailer, supra, and NLRB v. Laidlaw Corp., supra, here that Sam Andrews' Sons failure to offer the crew labor positions to crew laborers with outstanding unconditional offers to return to work was conduct which was inherently destructive of the employee's rights.

General Counsel argues that the refusal to reinstate the strikers to positions in crew labor jobs to perform the type of work they had previously performed acted to convert the strike into an unfair labor practice strike on the day the additional new hires were made. He cites NLRB v. Pecheur Lozenge Co. (7th Cir. 1953) 33 LRRM 2324 cert, denied, (1954) 347 U.S. 953, 34 LRRM 2027, and NLRB v. Plastilite Corp. (:8th Cir. 1967) 64 LRRM 2741.

I agree with General Counsel that the strike was converted to an unfair labor practice strike, but not on the same grounds that he asserts with regard to Mr. Villanueva having been denied employment after a May 4 application for work. General Counsel asserts separately the contention that conversion took place as a result of a stated change of employment conditions for return to work. It is on that ground that I conclude the strike was converted to an unfair labor practice strike. I find that it was converted at the time

of the statement to Villanueva by Garcia regarding the fact that strikers would have to lose their seniority to return to work, i.e., on May 4, 1982. Hence, from the date of the unconditional offers to return to work, i.e., July 7 and October 26, 1982, Respondent had a duty to reinstate the striking workers.

Is the present litigation barred by the principle of Res Judicata and or Collateral Estoppel?

Respondent renewed in his brief the argument he presented during the hearing, in which he contended that the matter was barred by res judicata and collateral estoppel, He argued that because the parties were the same in Sam Andrews' Sons, 8 ALRB 69, and that the findings of fact in that case included the determination of the strike date as July 9, 1981, and that one of the reasons the employees were protesting was an incident involving the eight irrigators, it would be illegal to hear the matter again. Respondent's counsel noted that in 8 ALRB 69, the matter of Mr. Larios having been unlawfully refused reinstatement was litigated. He pointed out that at no time in the prior hearing had anyone suggested that the strike was called, even in part, because of the treatment of Mr. Larios. Respondent argues that, though the nature of the strike was not an issue raised in the complaint, in fact, was litigated and decided. He argued that a finding here that employees, not the UFW, commenced the strike, and that the strike was caused by

Respondent's treatment of Larios, would be inconsistent with the findings in 8 ALRB 69 (1982).

Respondent argued also that the matter was barred by the six month limitation period.

Section 1160.2 of the Labor Code provides that "no complaint shall issue based upon an unfair labor practice occurring more than six months prior to the filing of the charge with the Board." A similar section in the NLRA is Section 10(b). In 1950 the NLRB ruled that a strike could not be held to be an unfair labor practice strike, because the unfair labor practice the General Counsel was relying on to make the strike an unfair labor practice strike had occurred over six months prior to the filing of the charge, and thus was barred by the statute of limitations. That was the now overruled case of Greenville Cotton Oil, 92 NLRB 1033, 27 LRRM 1202 (1950).

The reasoning in Greenville Cotton Oil, has been expressly rejected by the Courts of Appeal and found that its reasoning is illogical. In NLRB v. Brown & Root, Inc. 203 F.2d 559, 31 LRRM 2577 (8 Cir. 1953) the court specifically found the reasoning in Greenville Cotton Oil, supra to be illogical. The Board attempted to distinguish Brown & Root, supra from Greenville Cotton Oil, supra, on the grounds that in Brown & Root a separate timely charge was filed with respect to the unfair labor practice which caused the strike. However, the Court of Appeals held that such a distinction

was really irrelevant. The Court stated:

> "Whether this distinction is sound we need not determine, since we are of the opinion that evidence to establish the nature of the strike, the reinstatement rights of the strikers, and the reinstatement obligations of the respondent, was admissible, and that the limitation provision of Section 10(b) did not preclude the Board from finding that the strike was an unfair labor practice strike. A contrary conclusion seems to us illogical." Brown & Root, supra, at 2582 (emphasis added)

In NLRB v. American Aggregate Co., 305 F.2d 559, 50 LRRM 2580 (5 Cir. 1962), the Company made the identical argument that Respondent offers. Basically the Company argued that the statute of limitations should exclude all evidence of events occurring prior to the six months' period. They reasoned that the strike began prior to the six months' period, the evidence of occurrances that lead up to and caused the strike or which contributed to its continuation is barred by the statute of limitations. The Court held that even the most cursory analysis of this position was untenable. The Court then went on to state:

> In a §8 (a) (3) striker reinstatement case the significant thing is not when the strike started, or how long it has gone on. What is important is the status of the returning striker. This is because an employer's responsibility of reinstatement is quite different for those who struck as a protest against an employer's unfair labor practices. Determination of the employees' status must therefore necessarily depend on the causes of the strike. It is inescapable that such evidence will have to go back to the beginning or at least to the time the character of the strike changed. But §10(b) does not bar evidence. It bars

> charges. The charge under review was not the Company's action giving the strike its unfair labor practice character. It was that within the 6 months' period, the Company refused to reinstate an employee then having a significant status entitling him to different treatment.

American Aggregate Co., supra, at 2583.

In Philip Carey Mfg. Co., v. NLRB, 331 F.2d 720, 732, 55 LRRM 2821 (6th Cir. 1964), the Court applied and followed the rational used by the Court in Brown & Root, supra. The Court went on to use the rational by stating:

> The Court [In Brown & Root, Inc., supra,] reasoned that the charge was not based upon failure to bargain, but upon the Company's refusal to reinstate strikers whose status was such as to entitle them to reinstatement. Applying this reasoning to the case at bar, the refusal to reinstate occurred in August, and the charge so alleging was filed in September and therefore was timely. We hold that this is the more logical approach.

Thus, these circuit courts have held that the six month period begins to run from the date reinstatement was denied and that evidence of an earlier unfair labor practice may be used for the limited purpose of determining whether the strikers were unfair labor practice strikers and thus entitled to reinstatement even though permanently replaced. The later position has much to recommend it because it eliminates the possibility that strikers returning after an unfair labor practice strike longer than six months duration might never be entitled to reinstatement.

In Machinists Local 1424 v. NLRB, 362 U.S. 411, 419, 45 LRRM 3212, 3216 (1960) the U.S. Supreme Court came

out with a two prong test to be used in determining what is barred by the statute of limitations. In Colonial Press, Inc., 509 F.2d 850, 88 LRRM 2337 (8 Civ. 1975) the Court of Appeals applied the Supreme Courts two prong test to facts very similar to the one in the present case.

In Colonial Press, Inc., supra, charges had been filed on the unfair labor practices which caused the strike. The charge alleging the strike to be an unfair labor practice strike had been filed over six months after the ULP's that caused the strike. The Court of Appeals used the language in Machinist Local 1424, in a way that is applicable to the present case. The Court stated:

> It is doubtless true that §10(b) [statute of limitation section of NLRB] does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purpose of §10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six month limitations period in and of themself may constitute as *a* substantive matter, unfair labor practices. [in the instant case these were the Company's refusals to rehire the strikers] These earlier events [the prior unfair labor practices] may be utilized to shed light on the true character of matters occurring within the limitations period: and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events. Colonial Press, Inc., supra footnote 6.
>
> The Court then went on to state:
>
> This case fits within the first situation discussed in Machinists Local 1424 v. NLRB,

> supra, 363 U.S. at 416-17. The Board's ruling that the instant strikers were protesting unfair labor practices could not be said to be "inescapably grounded on events predating the limitations period ..." Machinist Local 1424, supra, at 422, as the current complaint rests on failure to reinstate unfair labor practice strikers. Otherwise, the Board would never be able to punish an employer's refusal to reinstate after a strike lasting more than six months and in which the employer's conduct complained of occurred before and after but not during the strike. Id., 88 LRRM at 2339.

Thus, it is clear under the above case law that the evidence as to the nature of the strike is not barred by the statute of limitations.

Furthermore, the ALRB has found that "events within the six-month period must, in and of themselves, constitute an unfair labor practice, although earlier events may be used to shed light on the true character of matters occurring within the limitations period. Julius Goldman's Egg City (1980) 6 ALRB No. 61, citing Local Lodge 1424 v. NLRB (1960) 362 U.S. 411, 45 LRRM 3212.

Respondent argues that this case has already been litigated in 8 ALRB No. 69 and thus the principle of res judicata applies. I do not agree. The present complaint alleges as an unfair labor practice the Company's failure to reinstate the alleged unfair labor practice strikers after they made an unconditional offer to return to work. The complaint, in 8 ALRB No. 69, alleged twelve separate violations of the Act—none of those related to the reinstatement of unfair labor practice strikers. One reason that

such an issue was not litigated in 8 ALRB No. 69 is because at the time 8 ALRB No. 69 was litigated the strikers had not made any unconditional offers to return to work. Thus, the employer's obligations of reinstatements of the strikers had not yet matured.

It is clear that in 8 ALRB No. 69, only the unfair labor practices committed by the employer at that time were litigated. The issue of whether the strike was an unfair labor practice strike and what reinstatement rights strikers had was not raised since it was premature. In Colonial Press, Inc., 207 NLRB 673, 84 LRRM 1596 (1973), the facts are very similar to the ones in the present case. There the Union went on strike due to various unfair labor practices. Those unfair labor practice were litigated in a separate hearing than that of the employer's refusal to reinstate the strikers. The ALJ, with the Boards approval, stated;

> Respondent contends that since the matters which Powers said caused the strike occurred more than six months before the charges in the instant case were filed they are barred by Section 10(b) of the Act and may not be considered in this proceeding. I find no merit in this position. As indicated, these matters were litigated in the- prior proceeding before Judge Funke on the basis of timely charges. What is being done here is determining the nature of the strike and deciding on the basis of that decision whether Respondent's refusal to reinstate certain strikers is a new unfair labor practice. Since there is also a timely charge alleging a discriminatory refusal to reinstate strikers, there is no bar to considering matters outside the 10(b) period in order to shape the proper remedy of reinstatement.

Colonial Press; Inc., supra at 677.

The ALJ, also with the Board's approval, then went on to state:

> Not only are testimony and findings about the nature of the strike not barred by Section 10(b) of the Act, as the cases hold, but neither is General Counsel relitigating matters already litigated, for the unfair labor practice strike issue was not litigated in the earlier case. It could have been, but it was unnecessary and premature to have done so because the strike was still current and the issue of refusal to reinstate may never have arisen.

Colonial Press, Inc., supra, footnote 3.

Therefore, the issues of whether the strike was an unfair labor practice, and the reinstatement rights of the employees, have not been litigated before. Further, the conversion of the strike from an economic strike had not yet occurred during the earlier case and would not have been discovered if the instant case had been barred.

CONCLUSIONS OF LAW

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

1. Sam Andrews' Sons is a California corporation engaged in agriculture, and is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

2. United Farm Workers of America, AFL-CIO, is a labor organization within the meaning of Section 1140.4 (f) of the Act.

3. The July 9, 1981, strike of the U.F.W. against

Sam Andrews' Sons was not an unfair labor practice strike at the outset.

4. Leonardo Villanueva did not make an unconditional offer to return to work on May 4, 1982.

5. Unconditional offers to return to work were made on July 7, and October 26, 1982.

6. Respondent employer engaged in an unfair labor practice within the meaning of Sections 1152 and 1153 (a) and (.c) of the Act insofar as it threatened to change the seniority system upon reemployment of striking employees because they had struck the Company.

7. Due to the foregoing unfair labor practice, the strike was converted to an unfair labor practice strike as of May 4, 1982.

8. The unfair labor practice affected agriculture within the meaning of Section 1140.4 of the Act.

9. The instant case was not barred by either res judicata or collateral estoppel.

REMEDY

Having found the Respondent employer has discriminated against striking employees for having engaged in protected concerted activity by telling Leonardo Villanueva that striking employees would lose their seniority rights upon recall to work, in violation of Sections 1152 and 1153 (a) and (c) of the Labor Code, and having found that such action converted the economic strike to an unfair labor practice

strike, I shall recommend that the Employer shall immediately reinstate all of the striking employees who sought reinstatement by their unconditional offers to return to work. I shall also recommend that Respondent shall make all such employees whole for the loss of pay and other economic benefits resulting from the unfair labor practice. I shall also recommend that the Respondent employer shall cease and desist from further such actions of discrimination. I recommend that interest be paid at the rate determined by the Board in the Lu-Ette Decision, 8 ALRB No. 55.

Accordingly, upon the basis of the entire record, and of the Findings of Fact and Conclusions of Law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended order and notice:

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Sam Andrews.' Sons, its officers, agents successors and assigns shall:

1. Cease and desist from:

(a) Refusing to reinstate, or otherwise discriminating against any employee with regard to hire, tenure or any terms or conditions of employment because of that employee's involvement in concerted or union activities.

(b) In any like manner interfering with, restraining or coercing employees exercising their rights

guaranteed under Labor Code Section 1152.

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

(a) Immediately offer reinstatement to all of those employees who struck the Company on July 9, 1981, and who made an unconditional offer to return, to their former positions without prejudice to their seniority or other rights and privileges.

(b) Make all such employees, including those already reinstated, whole for any loss of pay and other economic losses (plus interest thereon, computed at a rate consistent with the Lu-Ette Decision, 8 ALRB No. 55) they have suffered as a result of their not being rehired after making an unconditional offer to return to work.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records and reports, and all other records relevant and necessary to a determination by the Regional Director, of the back pay period and the amount of back pay due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reproduce sufficient copies of each language for the purposes set forth hereafter.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in

conspicuous places at all of its offices, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed.

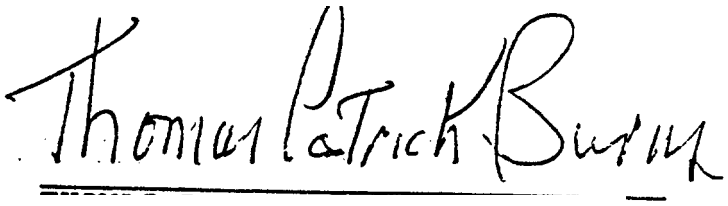
(f) Mail copies of the attached Notice, in all appropriate languages, to all employees who were employed or on strike at any time during the payroll periods of July, 1981 and November, 1982.

(g) Arrange for a Board agent or a representative of the Respondent to distribute and read the attached Notice in all appropriate languages to all of its agricultural employees, assembled on Company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and 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 it has taken to comply herewith, and continue to report periodically thereafter, at the Regional Director's

request, until full compliance is achieved. DATED:

March 18, 1982



THOMAS PATRICK BURN
Administrative Law Officer

NOTICE TO EMPLOYEES

After charges were made against this employer, Sam Andrews' Sons, by the United Farm Workers of America, AFL-CIO, and a hearing was held where each side had an opportunity to present evidence, the Agrigultural Labor Relations Board has found that Sam Andrews' Sons interfered with the rights of our workers by telling Leonardo Villanueva that those who struck against the Company in July, 1981, and after would lose their seniority rights upon reinstatement. Such statement constitutes an unfair labor practice. The Board has ordered us to distribute and post this Notice, and to do the things listed below.

Sam Andrews' Sons will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

3. To bargain as a group and to choose a union or anyone they want to speak for them;

4. To act together with other workers to try to obtain a contract or to help or protect one another; and

5. To decide not to do any of these things.

Because you have these rights, Sam Andrews' Sons promises you that:

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

WE WILL NOT terminate any worker because that person has done any of the things listed above.

WE WILL offer to reinstate all those persons who went on strike, and who made an unconditional offer to return, and we will pay back wages, plus interest, to those who were denied their jobs back.

DATED: SAM ANDREWS' SONS

By: _____

(Representative) Title

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA, AND IS NOT TO BE DESTROYED, DISFIGURED OR DEFACED IN ANY WAY.