Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	)	Case No. 82-CE-206-D 13 ALRB No. 15

DECISION AND ORDER

On December 29, 1983, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions to the ALJ's Decision with a brief in support of exceptions.

The Agricultural Labor Relations Board (Board) has considered the record and the attached decision in light of Respondent's exceptions and brief and has decided to affirm the rulings, findings and conclusions of the ALJ to the extent that he found a failure or refusal to reinstate returning economic strikers in violation of Labor Code section 1153(c)[1/] of the Agricultural Labor Relations Act (Act).

Striker's Reinstatement Rights

One of the two issues in this proceeding concerns Respondent's alleged failure or refusal to reinstate economic

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

strikers upon their offers to return to work on July 7, 1982, and October 26, 1982. Precisely that question was decided in Sam Andrews' Sons (1986) 12 ALRB No. 30 (hereinafter, Andrews I).[2/] In that case, we made the following findings of fact: (1) an estimated 140 of Respondent's employees engaged in a strike which commenced on July 9, 1981; (2) one year later, on July 7, 1982, approximately half of the striking employees offered unconditionally to return to work in the same category of work, crew, and position which they had occupied prior to the strike; (3) on October 26, 1982, virtually all of the remaining strikers took similar action; (4) the strike was an economic one at its inception and remained so throughout its duration; no intervening conduct by Respondent, as alleged and litigated by General Counsel, served to convert the strike into an unfair labor practice strike; (5) during the course of the strike, Respondent replaced many, if not all, of the employees who had joined the strike and (6) when strikers in either of the two groups offered to abandon the strike, they were not immediately reinstated to their former positions but instead were placed on a preferential rehire list to await recall, according to seniority, in the event of vacancies created by the departure of their replacements.

In this case, the ALJ's Decision issued prior to the Board's Decision in Andrews I. He concluded, as ultimately did

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[2/] Notwithstanding the primary focus of the parties here on those strikers who offered to return to work on October 26, 1982, as well as a group of strikers who either initially or for the second time, offered to return on January 14, 1983, we perceive no material factual or legal distinction between this case and Andrews I with respect to the strikers' return rights.

the Board in the prior proceeding, that Respondent failed to prove legitimate and justifiable business reasons for its failure or refusal to immediately reinstate the economic strikers upon their unconditional offer to return to work in violation of section 1153(c) and (a) of the Act. Specifically, the ALJ found that Respondent failed to establish that the new employees who replaced the strikers were hired as permanent employees. Therefore, Respondent was obligated to displace the replacements, if necessary, in order to create vacancies for the returning strikers.

Here, as in Andrews I, Respondent correctly observes that it is not an unfair labor practice for an employer to hire replacements in the event of a strike. Nor must an employer discharge permanent replacements in order to accommodate returning economic strikers. (See, e.g., International Association of Machinists and Aerospace Workers v. J. L. Clark Co. (7th Cir. 1972) 471 F.2d 694 [81 LRRM 2763].) Respondent then asserts that the status of the replacement workers was permanent because they were hired in conformity with the Company's standard terms of hire which provide that an employee who completes 30 days of satisfactory employment within a 90-day period is accorded seniority, for purposes of layoff and recall. But, again, the essence of the problem is that Respondent was unable to "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 (B.C. Cir. 1968) 403 F.2d 921 [67 LRRM 2992]; Sam Andrews' Sons, supra, 12 ALRB No. 30; emphasis added.)

Thus, on this record, the ALJ properly found that Respondent failed to demonstrate the requisite mutuality of understanding between itself and the replacement workers, prior to the time the strikers offered to return to work, that the replacements had indeed been hired as permanent employees. (Hansen Brothers Enterprises (1986) 279 NLRB No. 98; Associated Grocers (1980) 253 NLRB 31 [105 LRRM 1637].) Accordingly, the ALJ's Decision in that regard is hereby affirmed.

As the Order in our related Decision in Andrews I fully remedies Respondent's unlawful failure to reinstate those economic strikers whose reinstatement rights were again at issue in the instant proceeding, no additional order is necessary to remedy the violation of the Act.

Change In Irrigation Practices

Respondent excepts to the ALJ's conclusion that a change in irrigation practices was instituted during the 1982-1983 winter (pre-irrigation) season for the purpose of eliminating tractor driver and irrigation crew positions which otherwise would have been filled by returning economic strikers. We find merit in the exception.

General Counsel unsuccessfully sought to convince the ALJ that Respondent reduced its work force requirements by adopting the less-labor-intensive form of row or furrow irrigation in lieu

of the sprinkler method which allegedly had been utilized more heavily in recent past seasons. In support of its theory, General Counsel called irrigation foreman Camerino Esparza who credibly described a meeting called by Robert Garcia, Respondent's personnel director, in December of 1982 "regarding whether we could make it without having strikers there." Esparza testified further, again credibly, that Garcia advised the foremen that they would have to get by with the then existing work force and could neither hire nor fire anyone. Esparza said Garcia expressed concern that should any openings occur, Respondent might be obligated to fill them with returning strikers. Garcia himself testified that the Company did not know at that time what it would do about the strikers, as "we just didn't know exactly how we were going to handle the situation."

Respondent acknowledged a difference in the program for the relevant year, but only as to the duration and the intensity of the overall irrigation effort. Respondent conceded that it expected to meet irrigation requirements in the 1982-1983 season with a significantly smaller work force than that utilized in 1981-1982.[3/] However, it denied that the change was premised on

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[3/] It is uncontested that in December 1982 and January 1983, Respondent employed a fairly steady pre-irrigation contingent of 6 irrigation foremen, each with 4 or 5 employees, and a tractor driver crew that never exceeded 25 employees. By contrast, during those same months in prior years, with virtually the same amount of acreage, Respondent could have as many as 40 to 60 tractor drivers working around the clock in 2 shifts of 20 to 30 workers per shift. After January, the size of the tractor crew often dropped to about 20 employees. A similar pattern prevailed with respect to the irrigation crew whose size could vary from a high of 61 to a low of 46 employees. In some years, the irrigation crew consisted of as many as 60 to 90 employees during the comparable 2 month period.

reasons proscribed by the Act. Rather, Respondent stated that once it was assured of adequate water availability for the coming season, it could embark on the extended irrigation season which sound farming practices dictate it follow should conditions permit. Respondent contended that the preferred method of irrigation had not been an available option in recent years due to a severely inadequate supply of water.

Where, as here, the question is whether a legitimate or unlawful motive under the Act controlled the employer's actions toward its employees, the analysis must follow the test set forth by the National Labor Relations Board (NLRB) in Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enforced as modified (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 455 U.S. 989 [109 LRRM 2779] (Wright Line). As approved in National Labor Relations Board v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857], Wright Line applies to all cases alleging violations of Labor Code section 1153(c) and (a) which turn on the question of motivation.[4/]

Under Wright Line, the General Counsel first must make a prima facie showing sufficient to support an inference that the protected conduct was a motivating factor in the employer's

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[4/] Wright Line would apply to discharge as well as to refusal to rehire cases but would not be applicable in a case where motivation is not an issue. Thus, the Wright Line analysis would have no meaning where, for instance, the question was whether an employee would have received seniority and been recalled pursuant to those rights under a collective bargaining agreement. (See, e.g., Engineered Control System (1985) 274 NLRB 1308, 1314 [119 LRRM 1038] .)

decision to take the action that it did. Once this is established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that its conduct would have been the same even in the absence of the employees' protected activities. (Wright Line, supra, 251 NLRB at 1089.) We are persuaded that General Counsel has met his burden of establishing a prima facie case. Thus, the burden shifted to Respondent to demonstrate that it would have made the same change even in the absence of the striker's offer to return to work.

In question is Respondent's winter (pre-irrigation) program for the 1982-1983 season as compared to prior years. Fred Andrews, one of Respondent's principals, testified that water conditions alone dictates the duration of the pre-irrigation season in any given year. On the basis of water projections, Respondent arrives at a completion date for that phase of its farming operation and then, working backwards, determines an appropriate start date, the intensity of the effort that will be required to meet the desired schedule and, accordingly, the size of the work force necessary to complete the project in the time allocated.

Respondent testified further that only under ideal water conditions can it embark on a preferred January to April pre-irrigation period. Under those conditions, Respondent would strive for a subsoil moisture depth of three to five feet by slow and repeated applications of water by means of row or furrow

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irrigation on level terrain.[5/] Respondent testified that an extended irrigation schedule generates higher crop yields.

Respondent pointed out that although December is not generally a good time to start pre-irrigation, it may be advisable to pre-irrigate at that time when certain conditions exist. Thus, should Respondent learn in October or early December that it could face a water shortage in the coming year, it would immediately plan on a two rather than a five month pre-irrigation program to be completed in December and January.[6/] In the relevant year, however, and for the first time in several years, Respondent was assured of an adequate water supply and, on the basis of that

[5/] Sprinkler irrigation, according to Respondent, although less efficient in achieving desired moisture depth, incurs an additional cost of approximately $80 per acre in energy consumption. Nonetheless, sprinklers must be used on certain unlevel parcels of land which do not facilitate row or furrow irrigation regardless of water availability. Sprinklers also have a practical application, even on level terrain, but only in years of low water availability because they disperse less water overall. The complaint alleged, in pertinent part, that Respondent violated Labor Code section 1153(c) by discriminatorily changing from more labor intensive sprinkler to row or furrow irrigation in 1982-1983 because the latter method requires less man hours. The ALJ found no evidence to support General Counsel's contention in this regard. As no exceptions were filed to his finding regarding the allegation that the change in question here was from sprinkler to furrow irrigation, we adopt, pro forma, the ALJ's finding in that regard.

[6/] Since a specified amount of water is proportionately allocated yearly to particular parcels of land by the water district, and must be paid for whether or not used, Respondent hedges against a threatened shortage by accelerating its irrigation schedule. First, Respondent draws any water remaining in the current year's allocation, that is water which it otherwise would relinquish on December 31. In 1981 as one example, Respondent pre-irrigated in December in order to utilize $250,000 of paid up water. Next, if available, and the cost not prohibitive. Respondent purchases surplus water in the district's reservoir; that water must also be drawn prior to December 31. During January, Respondent then draws on its allotment for the coming calendar year.

information projected a five month pre-irrigation program. Respondent thus began irrigating in January and expected to complete the same amount of work as in years past, but with a significant work force reduction resulting from an extended but less intensive program. Respondent offered an additional reason for needing fewer workers in December of 1982. Supervisor Lionel Terrazas testified that rainfall in that month was unseasonally heavy, accounting for more precipitation in that month than in years past, and creating an impediment to tractor and irrigation work at that time.

Respondent has successfully rebutted General Counsel's prima facie case by demonstrating that the extended irrigation schedule in the pertinent year was initiated on the basis of a lawful motive. When examining an employer's motives in any given situation/ we must avoid substituting our own judgment for that which the employer may choose to follow in the course of business. (See, e.g., FPC Advertising, Inc. (1977) 213 NLRB 1135.)

The justification proffered by Respondent to explain the pre-irrigation season finds support in data obtained by Respondent from the appropriate water agencies and other official sources which projected a favorable water situation for 1983. In addition, Respondent called David West, a privately employed agronomist as an expert witness. West confirmed Respondent's contention that an assessment as to future water supplies is the dominant factor governing an irrigation program. West also testified that the preferred period in which to irrigate cotton, Respondent's primary crop, is January through March. West

testified that he was familiar with the water shortages of prior years but noted that there would be a large surplus in 1983. West specifically indicated that the month of December 1982 was one of unusually high rainfall when compared to the same period one year earlier.

In light of all the circumstances, we conclude that Respondent met its burden of proving it would have adopted the same program in the 1982-1983 season with respect to the pre-irrigation schedule even in the absence of the strikers' offers to return to work. (Wright Line, supra, 251 NLRB at 1098.) Accordingly, the complaint, insofar as it alleges that Respondent altered established irrigation methods and/or procedures for the discriminatory purpose of eliminating positions for returning economic strikers, is hereby dismissed.

Dated: October 15, 1987

JOHN P. MCCARTHY, Member[7/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[7/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority. Chairman Davidian did not participate in this matter.

MEMBER HENNING, Concurring and Dissenting:

In the earlier matter concerning this Employer and its striking employees, I would have found, like the Administrative Law Judge (ALJ), that this strike was converted to an unfair labor practice strike due to Andrews' admitted policy of only considering reinstatement requests from returning strikers as new hires, that is, with none of the strikers previously acquired seniority rights. (See Sam Andrews' Sons (1986) 12 ALRB No. 30, dissenting and concurring opinion at p. 27.) In light of my conclusion there, I concur in my colleagues' result here, but would premise the analysis upon the reinstatement rights of unfair labor practice strikers rather than the majority's analysis of the reinstatement right of returning economic strikers.

I dissent from the remainder of the majority's decision regarding Andrews' manipulation of its irrigation practices so as

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to avoid recalling striking tractor drivers and irrigators. The ALJ's lengthy and painstaking analysis of the evidence and argument on this issue merits our adoption. The ALJ correctly found that Respondent failed to meet its burden of presenting evidence to support its business rationale for altering irrigation practices following the offer to return by Andrews' striking employees. Further, the ALJ noted that Respondent's admitted decision to avoid rehiring employees (returning strikers or laid off replacements) due to an uncertainty as to who would have been entitled to the openings was premised upon the employees protected activity and had a discriminatory effect because only strikers were entitled to fill vacancies that might have become available. (NLRB v. Fleetwood Trailers (1967) 389 U.S. 375.) Dated: October 15, 1987

PATRICK W. HENNING, Member

CASE SUMMARY

Sam Andrews' Sons 13 ALRB No. 15
UFW Case No. 82-CE-206-D

ALJ DECISION

Following an evidentiary hearing in this unfair labor practice proceeding, the Administrative Law Judge (ALJ) determined that Respondent failed to establish a legitimate business justification for its failure or refusal to offer striking employees immediate reinstatement to their former positions when they offered to abandon their strike and return to work. Specifically, he held, consistent with applicable precedents of the National Labor Relations Board, that returning strikers are entitled to reinstatement unless the positions they vacated as a result of the strike have been filled by permanent replacements. He concluded that Respondent failed to demonstrate the requisite showing that the replacements had been hired as permanent employees. As remedy for this violation of section 1153(c) and (a) of the Act, the ALJ ordered Respondent to immediately offer returning strikers reinstatement to their former positions and to compensate them for economic losses they may have suffered from the date of their unconditional offer to return to work. The ALJ also found that Respondent subsequently changed its established irrigation practices for the discriminatory purpose of eliminating positions which otherwise could have been claimed by the former strikers.

BOARD DECISION

The Board agreed with the ALJ insofar as he found a violation of the Act based on the failure to reinstate the strikers, observing that his finding was consistent with the Board's analysis of the same question as litigated and decided in an earlier case involving this same Respondent. (Sam Andrews' Sons (1986) 12 ALRB No. 30.) However, with respect to the alleged change in irrigation practices, the Board determined that while Respondent did not materially change its methods, it nonetheless did alter the overall pace or intensity of the irrigation schedule with the result that a smaller work force accomplished the same amount of work as in years past. But, the Board also found that the approach to irrigation in the relevant year was consistent with sound farming practices and that Respondent would have followed that approach even in the absence of the strikers' offer to return to work. Accordingly, the Board dismissed the complaint insofar as it alleged that Respondent altered its irrigation practices in order to discriminate against those employees who engaged in protected strike activity.

CONCURRING/DISSENTING OPINION

Consistent with his position in Sam Andrews' Sons (1986) 12 ALRB No. 30, Member Henning holds that the strike had been

converted into an unfair labor practice strike. Therefore, while he agrees with his colleagues that the strikers were entitled to reinstatement immediately upon their offer to return to work, he does so on the basis that they were unfair labor practice strikers rather than economic strikers who had not been permanently replaced. With respect to the allegation of a discriminatory change in irrigation practices, he would affirm the ALJ's conclusion that Respondent failed to meet its burden of presenting a defense to the General Counsel's prima facie case. He noted also that Respondent admitted that it chose not to reinstate the strikers due to its own uncertainty as to whether they were entitled to fill any vacancies which might occur and this admission further supports the ALJ's finding of Respondent's unlawful action.

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD.

In the Matter of:	
SAM ANDREWS' SONS,	Case No. 82-CE-206-D
Respondent,	
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	

Appearances:

Nicholas F. Reyes,
for the General Counsel

Jyrl A. James
Seyfarth, Shaw, Fairweather &
Geraldson for the
Respondent

Marcos Camacho
for the Charging Party

Before: Thomas Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:

PROCEDURAL HISTORY

This case was heard by me in Delano, California on March 15, 16, and 17, May 14, 25, 26, 27 and 31, and June 1, 1983. By complaint filed November 23, 1982 General Counsel alleged that, since October 26, 1982, Respondent has refused to rehire unfair labor practice strikers[1/] after they unconditionally offered to return to work. At the commencenent of the hearing, General Counsel moved to amend the complaint to allege: (1) that Respondent violated Labor Code section 1153(c) by changing from sprinkler to row irrigation in order to avoid reinstating the strikers, and (2) that Respondent violated section 1153(e) by refusing to bargain over such a change. (I:52.)

I permitted the amendment so far as it entailed trial of Respondent's implementation of a scheme to defeat the reinstatment rights of strikers, but I refused to consider whether an economically motivated but unilateral change in irrigation practices might also violate section 1153(e). (See Interim Ruling, dated March 16, 1983.) The principal reason for refusing to consider whether a "non-discriminatory" change in irrigation practices was an independent violation of section 1153(e) was the Supreme Court's recognition in N. L. R. B. v. Fleetwood Trailer Co. (1967) 389 U.S. 375 that legitimate and substantial business reasons would justify an employer's failure to reinstate economic strikers:

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1. As I will explain below, for the purposes of this decision, the strikers are assumed to be economic strikers.

> In two types of situations, "legitimate and substantial business justifications" for refusing to reinstate striking employees have been recognized. The first is when the jobs which the strikers claim are occupied by workers hired as permanent replacements during the strike in order to continue operations.
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> * * *
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> A second basis for justification is suggested by the Board -- when the striker's job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations: for example, "the need to adapt to changes in business conditions or to improve efficiency." (Ibid, at p. 277.) 2/

In light of Fleetwood Trailer, it seemed to me that if a change in Respondent's irrigation techniques was motivated by "considerations [unrelated] to labor relations", Respondent could not be guilty of violating 1153(c) and it followed that the strikers would not be entitled to reinstatement by virtue of the change. Accordingly, the only employees who might have been effected by the change considered as an independent 1153(e) violation would be the replacement workers, and it seemed entirely inappropriate to have one theory of General Counsel's case aimed at ousting replacements and another aimed at increasing the work available to them.3/

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2. See also, Morris, Developing Labor Law, 2nd Edition, Vol I, p. 229-30:

> Where an employer fails to rehire economic strikers and cannot prove that permanent replacements have been hired or that there exists a legitimate and substantial business justification for the failure to rehire, reinstatement with back pay from the date of a striker's unconditional offer to return to work is the appropriate remedy.

3. I recognize that, as a matter of law, a certified union represents replacements as well as striking employees (Bruce Church (1981) 7 ALRB No. 20, pp. 16-18). Whatever may be true as an abstract matter, however, the interests of replacements and strikers in holding the same job are obviously antagonistic. My ruling precluded the General Counsel from representing two such adverse interests.

After the conclusion of the hearing, General Counsel filed an Amended Complaint to Conform to Proof which contained four allegations: the first, duplicative of the sole allegation of the original complaint, concerns the refusal to reinstate unfair labor practice strikers; the second, alleging a refusal to rehire strikers in the succeeding agricultural season, reflects the Board's Seabreeze analysis, according to which, it may be an unfair labor practice to fail to make jobs available to returning economic strikers at the commencement of a new agricultural season;[4/] the third and the fourth are the allegations described above, of a discriminatory change in irrigation practices and a refusal to bargain over the change.

Respondent moved to strike the Amended Complaint on various grounds, among them: (1) that no procedure authorizes an Amended Complaint to Conform to Proof; (2) that, to the extent 8 Cal. Admin. Code section 20222 permits complaints to be amended after hearing, General Counsel's amendment was untimely; (3) that General Counsel failed to prove the allegations in the amended complaint; and (4) that General Counsel's insertion of an 1153(e) theory is prohibited by the terms of my interim ruling. Since, as noted, I had already ruled that I would not consider General Counsel's 1153(e) allegation, I would strike so much of the Amended Complaint as concerns it even in the absence of any of the procedural considerations raised by Respondent. Different considerations, however, govern my treatment of the other allegations in the Amended

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4. Seabreeze Berry Farms (1981) 7 ALRB 40.

Complaint.

Construing the Amended Complaint to Conform to Proof as an attempt to comply with 8 Cal. Admin. Code section 20222, Respondent is correct that it is untimely since it was "filed and served" outside the 10-day period from close of hearing provided by the Regulations. [5/] However, since Board precedent does not require my striking the remaining allegations solely for General Counsel's failure to comply with the regulations,[6/] and the discriminatory change and Seabreeze issues were fully litigated by the parties (and might have been the subject of findings even if General Counsel had never attempted to engross them in an Amended Complaint), I will not strike these two allegations. For the reasons stated below, similar considerations will not save the allegation that Respondent refused to rehire unfair labor practice strikers.

This is the second case in which General Counsel has litigated Respondent's failure to reinstate the strikers to their former positions. In the first case, heard by Administrative Law judge Thomas Patrick Burns,[7/] General Counsel alleged that since July 7, 1982, Respondent has refused to rehire unfair labor practice strikers after they unconditionally offered to return to work. That

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5. The hearing ended June 1, 1983; General Counsel's Amended Complaint to Conform to Proof was not served until June 13, 1983, and it was not received by the Board until June 16, 1983. Under 8 Cal. Admin. Code section 20480, therefore, the Amendment is untimely.

6. Nash-de-Camp (1982) 8 ALRB 8, rev'd on other grounds (1983) 146 Cal. App.3d 92; George Arakelian Farms (1979) 5 ALRB 10,

7. In the Matter of San Andrews' Sons, Case Nos. 82-CE-75-D and 82-CE-112-D.

case was heard in October and November, 1982.

Prior to the commencement of hearing in this case, Respondent moved to abate the instant proceedings on the grounds that General Counsel had already tried all questions relating to Respondent's failure to reinstate the strikers. I granted the motion to abate only to the extent of precluding re-litigation of the nature of the strike from its inception through October 26, 1982. (See Ruling on Motion to Abate Further Proceeding, dated February 24, 1983.) Having precluded litigation concerning whether the strike was an unfair labor practice strike, it followed that for the purposes of considering the reinstatement rights of the strikers as of their October 26, 1982 offer, it must be assumed that the strike was an economic strike. Accordingly, I shall strike the allegation in the Amended Complaint which requires consideration of the strikers as unfair labor practice strikers.

Three days after the hearing in this case opened, ALJ Burns issued his Recommended Decision finding that the strike was economic in origin, but was converted to an unfair labor practice strike on May 4, 1982. In the course of his decision, he made findings and engaged in extensive discussion about the very issue to be tried in this case, the Seabreeze issue. (See ALJ decision, case Nos. 82-CE-75-D et.al., pp. 56-68.)

General Counsel, Respondent and Charging Party each filed exceptions to that decision and the record is presently before the Board. If Administrative Law judge Burns' decision is upheld by the Board, much of this case will be moot; even if he is reversed, the Board may well make findings on some issues which could conclude the

matters litigated in this case. Indeed, it seems to me that in either case, the only issue that would not be concluded by Board decision in the previous case would be whether Respondent altered its irrigation practices in order to avoid rehiring strikers.

However, to date the Board has not issued its decision in 82-CE-75-D, so the following questions must be answered: (1) Assuming the strike was an economic strike, what are the reinstatement rights of the strikers? and, (2) Did the Respondent change from sprinkler to row irrigation in order to defeat them?

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DID RESPONDENT VIOLATE 1153(c) BY FAILING TO REINSTATE THE ECONOMIC STRIKERS

On July 9, 1981 Respondent's employees struck. On October 26, 1982, an unconditional offer to return to work was made on behalf of most of Respondent's striking employees. On January 14, 1983, another unconditional offer[8/] was made on behalf of additional members of Cirilio Alvarado's thin and weed crew who were apparently omitted from the October 26th offer. With few exceptions, as of the close of the record in this case, Respondent admitted it has not reinstated the bulk of the striking tractor drivers or irrigators on the October 26, 1982 offer. Although

8. An earlier unconditional offer to return was made on July 7, 1982; that offer is not the subject of the present litigation. Respondent does not presently contest the unconditional nature of any of the offers. (See, e.g., Testimony of Robert Garcia, V:7, V:ll-14.)

Respondent has apparently reinstated most of the members of Cirilio Alvarado's weed and thin crew, with the exception of Miguel Altamarino, none of the employees on the January 14, 1983 unconditional offer has been reinstated. (See GCX 18.)

Relying on Seabreeze Berry Farms, General Counsel argues that Respondent's refusal to discharge the replacements in order to make room for the strikers is an unfair labor practice. If Seabreeze were to apply, it is clear that Respondent would have violated section 1153(c) by failing to discharge its replacements in order to make room for the strikers. See Lu-Ette Farms (1982) 8 ALRB 55, p. 4. General Counsel's principal argument in support of application of Seabreeze is that because Respondent's work force experiences seasonal fluctuations, it is "seasonal" in the Seabreeze sense.

Respondent, on the other hand, contends that its employment patterns do not exemplify the characteristics of agricultural employment relied upon by the Board in undertaking its Seabreeze analysis, and that its employment practices have been specifically designed to assure that very continuity of employment, the general absence of which in agriculture, justified the Board's embarking on its unique analysis in Seabreeze. Respondent urges me to apply the Mackay standard, N.L.R.B. v. Mackay Radio and Telegraph Co. (1938) 304 U.S. 333, and especially those cases following Mackay which hold that it is not an unfair labor practice to fail to reinstate strikers to positions "occupied" by laid-off replacement workers with a reasonable expectation of employment since, under such circumstances, no "vacancies" exist for strikers to occupy. (See

e.g., Giddings and Lewis, Inc. v. N.L.R.B. (7th Cir. 1982) 675 F.2d 926;[9/] Randall Division of Textron Inc. v. N.L.R.B. (8th Cir. 1982)687 F.2d 1240, at 1246-1247.)

As posed by the parties, then, the threshold question in this case is whether Respondent's employment practices require a Seabreeze analysis. On this record, that is an interesting question which I will not attempt to answer since I believe the debate over "seasonality" is irrelevant to the question whether Respondent committed an unfair labor practice in not discharging replacements in order to make room for the strikers upon receipt of their unconditional offers. For the purposes of my analysis, I will simply assume (as Respondent has asked me to conclude) that the Board's Seabreeze analysis is inapposite and I will apply applicable NLRA precedent.

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9. In holding that strikers were not entitled to be reinstated before laid-off permanent replacements with less seniority had been recalled, the court in Giddings & Lewis, supra, said:

> 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.)

Any discussion of the reinstatement rights of strikers under the NLRA must begin with Mackay Radio and Telegraph Co. (1938) 304 U.S. 333. In that case, Respondent Mackay called upon telegraph operators from around the country to replace its striking San Francisco operators. Replacements coming to San Francisco were "assured" they would be permitted to remain there permanently. Exactly what form these "assurances" took is not clear from either the underlying Board decision[10/] or the Supreme Court decision, but, as a result of the Supreme Court decision, it became and remains the law that:

> . . . the assurance by Respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. (N.L.R.B. v. Mackay Radio and Telegraph Corp. (1938) 304 U.S. 333, 345-46.)

NLRB cases after Mackay have not consistently made a point of analyzing what "assurances" have been given replacements, with the result that some commentators have noted that "[an] employer's characterization of the replacement as permanent rather than temporary will usually not be contradicted." (German, Basic Text on Labor Law (1968), p. 342, citing The Texas Company (1951) 93 NLRB 1358, rev'd on other grounds (9th Cir. 1952) 198 F.2d 540; see also, e.g., C.H. Guenther and Son (1969) 174 NLRB 1202, enf'd (5th Cir. 1970) 427 F.2d 983.) In Seabreeze, our Board also has stated that "the NLRB generally accepts an employer's characterization of replacement workers as permanent employees." Seabreeze Berry Farms,

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10. See 1 NLRB 201.

Despite these statements, numerous NLRB cases, do focus on the "assurances" given to replacements (See, e.g., Hot Shoppes Inc. [1964] 146 NLRB 802, 804 and especially Report of the Trial Examiner at 816, Cyr Bottle Gas Co. [1973] 204 NLRB 537, enf'd [6th Cir. 1974] 497 F.2d 800.) In Covington Furniture Mfg. Corp. (1974) 212 NLRB 214, enf'd (6th Cir. 1975) 514 F.2d 995, the Board affirmed the Administrative Law Judge's statement of applicable law as follows:

> While an employer may hire permanent replacements during the course of the strike in order to protect and continue his business, and need not discharge those permanent replacements in order to create vacancies for economic (as distinct from unfair labor practice) strikers who wish to return to work, N.L.R.B. v. Mackay Radio and Telegraph Co., 304 U.S. 333, 345-346 (1939), the employer's hiring offer must include a committment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses. See Laidlaw Corp. v. N.L.R.B., supra, 414 F.2d at 105; American Machinery Corp., supra, 424 F.2d at 1327; Georgia Highway Express, 165 NLRB 514, 516 (1967), aff'd. 403 F.2d 921 (C.A.D.C., 1968), cert, denied 393 U.S. 935; Cyr Bottle Gas Co., 204 NLRB No. 83, slip op. pp. 2-3 (1973).

And the Supreme Court regards inquiry into the type of assurances given replacements as critical:

> Indeed, as the Board interprets the law, the employer must reinstate strikers at the conclusion of even a purely economic strike unless it has hired "permanent" replacements, that is, hired in a manner that would "show that the men [and women] who replace the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis. Georgia Highway Express, Inc., 165 NLRB 514, 516 (1967), affirmed sub. nom., Truck Drivers and Helpers Local No. 728 v. N.L.R.B., 403 F.2d 921 (DC Cir. 1967), cert, denied, 393 U.S. 935 (1968). (Belknap v. Hale (1983) ___ U.S. ___, 51 LW 5079, 5082. (Emphasis added.)

Even assuming the applicability of some general policy of deferring to an employer's characterization of replacements as permanent, where, as here, the evidence supplied by Respondent's

Supervisors[11/] reveals that the replacements did not receive "assurances" of permanent employment, such deference would be inappropriate.[12/]

Thus, Lionel Terrazas, Respondent's chief tractor foreman testified that he made no promises to drivers hired as replacements. Terrazas' full testimony on this point is as follows:

> Q: (By General Counsel) I'd like to talk to you about the situation when the strike was going on. When you hired employees during the strike, they were well aware that there was a strike situation, isn't that true?
>
> A: That's true.
>
> Q: And you recall that you made no promises to those employees, did you? You made no promises of any employment other than the time that the strike situtation was on, isn't that also true?
>
> A: I don't remember if I might have said that.
>
> Q: You never gave them any promises of jobs, isn't that true?
>
> A: That's true. I don't promise them. When they start, I just tell them I don't know how long it's going to last.
>
> Q: And it's just a question of finishing out that work during that period, isn't that true?

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11. Since both Fred Andrews and Bob Garcia testified they did not hire, only the supervisors could have given the requisite assurances of "permanency" to the replacements. Thus, all of Respondent's defense to the effect that Andrews and Garcia regarded the replacements as permanent is irrelevant: the critical question is what assurances the replacements were actually given.

12. See, for example, The Texas Company (1951) 93 NLRB 1358, the case cited by Professor German as his authority for the proposition that the NLRB accepts the employer's characterization of the replacements as permanent: in that case, the Board expressly states that it was "satisfied that the replacements were assured that if they so desired, their jobs might be permanent." (Id. at 1362.) Thus, it seems to me that where the evidence does not satisfy a trier of fact that such "assurances" were given, Respondent has committed an unfair labor practice.

A: Until we lay them off.

(II: 171.) And John Perez, Respondent's chief irrigator forman testified:

Q: (General Counsel) Well, you never made any promises in the beginning, isn't that ture?

A: The only thing we told them was there might be a chance for them to stay on permanent when we hired them.

Q: But you never knew at that time, did you?

A: No.

Q: And you never told them that?

A: We told them, yeah.

Q: That there may be a chance?

A: That it was a permanent position that they were filling in for the people that had walked out.

Q: Who did you tell?

A: The irrigators.

* * *

Q: Did you ask them to help you finish out the season, during the irrigation season in August, July and August?

A: What year?

Q: In 1982?

A: We're talking about the irrigators, now, right?

Q: Yes.

A: To help me finish out the season. Yes. They did to help me finish out the season.

Q: No, did you tell them that?

A: To help me finish out the season in '82, last year.

Q: The year of the strike, 1981?

A: No, when we hired them, we told them that there was a chance for some of the people to be put on permanent, you know, there was too many people to stay on permanent, so we were going to have to lay some off when they came in.

(III:59-60.)

Terrazas' testimony is clear: he made no commitment to replacements. Perez[1] testimony is more ambiguous. As noted, he told the replacements "there was a chance for some of [them] to be permanent", "that there was too many to stay on permanent". Employees were apparently given no explanation of the conditons under which "some" would have "a chance" to be permanent and I do not know who, upon hearing Perez[1] statement, would "regard [himself] ... as having received his job on a permanent basis."[13/] Moreover, given the admission of Terrazas that he gave no assurances at all, I do not credit Perez' testimony about the weak "assurances" he said he gave. It seems highly unlikely that Respondent left the task of setting its labor relations policy during a strike to individual supervisors. It is far more likely that Respondent had a uniform policy or none at all and, in fact, Respondent's Personnel Director, Bob Garcia, essentially testified

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13. Compare these "assurances" to those given by the company in Belknap v. Hale, supra. In that case the company advertised for "permanent" replacements. After each replacement was hired, Belknap presented to the replacement the following statement for his signature:

> I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. ... as a regular fulltime permanent replacement to permanently replace _____ the job classification of _____.

that it had none.[14/] Since under traditional principles of labor law, how an employer is going to "treat" economic strikers, turns on how he has "treated" his replacements, Garcia's uncertainty reflects on the "assurances" given replacements.

Although neither party elicited testimony regarding the "assurances" given shop or crew employees, in view of my doubts about the "assurances" given to replacements in the other crews, I conclude that Respondent has not satisfied its burden of showing adequate assurances of permanency were given to replacement members of these crews either.

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14. Garcia testified that, as late as March 1982, the company didn't know what position to take with respect to the reinstatement of the strikers:

(By General Counsel):

Q: Do you recall testifying that that would be the way you'd handle it — treating the strikers as new employees?

A: Well, when I testified back in March [1982] uh – uh -- I -- and I did say "probably would lose their seniority" -- that's probably true. The company was in a -- uh -- situation at that time that -- uh -- that it knew exactly, legally, how to, uh — how to treat -- I don't want to use that term, "treat", but how to un -- bring back, or how to -- what type of benefits of seniority or system that we would use, uh -- when a -- if and when an employee would return from a strike.

Uh -- we just didn't know exactly how we were going to handle the situation, and yes, I may have said that at that time.Uh -- however, that is not the case.uh -- since that, we've had several different legal opinions, and, urn -- that, statement was -- was something that we weren't actually sure of at that time. I did say that, yes.

(V:51-52.)

Accordingly, I find Respondent violated section 1153(c) when it failed to reinstate strikers to positions occupied by their replacements upon receipt of the unconditional offers.[15/] The identity of the strikers entitled to reinstatement must await compliance since General Counsel did not put on precise evidence as to the identity and seniority of current employees.

2

DID RESPONDENT ADOPT A DISCRIMINATORY SCHEME TO AVOID REHIRING STRIKERS

This does not end our inquiry for it only determines the reinstatement rights of those strikers with the seniority to oust their replacement counterparts. General Counsel also contends that Respondent discriminatorily changed its irrigation practices in order to avoid creating additional "vacancies" which strikers might fill and so discriminated against all tractor drivers and irrigators who would have been entitled to be hired had Respondent not changed its irrigation practices. Since I have found that the strikers are entitled to reinstatement, it follows that any scheme to prevent vacancies from arising would be an act of discrimination directed against them and a violation of Il53(c). Because decision on this issue does not turn on the simple evidentiary issue detailed above with respect to "permanency", more extensive findings of fact are required.

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15. In view of this conclusion, I find it unnecessary to consider General Counsel's further contention that Respondent's professed recall procedure was an illegal grant of superseniority.

BACKGROUND

Respondent, a partnership owned by Donald, Robert and Fred Andrews (the managing partner), grows a variety of crops in Kern County, including melons, lettuce, carrots, tomatoes and cotton, with cotton being by far the primary crop.[16/] Respondent's crop patterns make for a year round operation, and the size of the labor force traditionally fluctuates depending upon the operation performed. With respect to the period of time at issue in this case -- from fall of one calendar year through spring of the next calendar year -- Respondent's employment needs have, in the past, followed certain fixed cycles. These are described below.

EMPLOYMENT PATTERNS OF THE TRACTOR CREWS

After the cotton harvest, a variety of cultural practices are performed in order to prepare the ground for the next planting. Stalks are cut, then disced under, after which the ground is "subsoiled", and -- depending on the next crop to be planted -- the ground may be planed, the beds prepared, the soil fertilized and fumigated. All of these operations are in preparation for planting, and all of them require tractor work.

In the past, the peak period of employment for tractor drivers, then, has been November, December and part of January.

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16. Respondent's primary crop is cotton, the harvesting of which generally takes place in October, November and December before the ground is once again pre-irrigated to take new crops. Even though Respondent plants and harvests its crops year-round, because of the primacy of the cotton crop and the start of a new pre-irrigation cycle at the end of the cotton harvest, I will be characterizing the start of the pre-irrigation phase after the cotton harvest as the start of the new "crop year." The cotton harvest will mark the end of the crop year.

During these months, Respondent would have 40-60 drivers working around the clock in two shifts of 20-30 workers a shift. (See 1:106-107; II: 153.) After January, tractor work generally falls off sharply as ground preparation gives way to planting, and the size of the tractor crews contracts to fewer than twenty drivers (I:111)[17/] in February.

Drivers are generally recalled in March and April (II: 29; 1:112; II: 156) for the cultivating and planting. (I:112.) Peak tractor employment is not as high during planting as it is during land preparation and only one shift of approximately 25-30 drivers is used. (I:112.) The number of drivers remains relatively stable until August and September when another layoff reduces the number of drivers to a core group, the size of which may range from a dozen to eighteen drivers. (II: 141; 1:117.)

Lionel Terrazas, Respondent's tractor driver supervisor, testified that during the 1982-83 crop year, he had about 24 drivers in late October before the crews began to be recalled for fall land preparation. (II: 139, 156) Although he acknowledged hiring "some more" workers in December (II: 139-140), through the date of hearing the number of drivers has remained at around twenty-five (II:140, II:161) [see also, testimony of Garcia: no drivers recalled since October 26, 1982, V:47-48]), a figure somewhat higher than the previous core of steady drivers. Also, contrary to the practice during the years preceding the strike, no one was laid off in the

17. Lionel Terrazas testified that the core group of full time drivers just before the fall land preparation season consisted of approximately 18 drivers. (II:141.)

month of February, even though sometimes there was either no work at all -- or only two or three days of work — for the drivers. (See GCX 4, 5, 6, II:161.) Terrazas admitted the company rotated workdays among its drivers in order to spread the available work among them. (11:190)[18] Sometimes the work was so slow that Terrazas assigned drivers to fix pallets and to move furniture. (II:184)[19] According to Terrazas, the work force was relatively stable this year for two reasons: one, because the company didn't rent as much equipment as it had in the past (II:159)[20] and, two, because the winter was so wet, there was "less pressure" to finish the land preparation. (II:161,203, see also II: 218-219, V:41)[21]

Respondent rehired only two strikers: only one, Jose Flores, was on the October 26, 1982 offer to return[22]; the other recalled striker, Cosme Montoya, apparently abandoned the strike before any of the offers to return was made. (II:138) With these exceptions, no other strikers have been recalled. Although Garcia testified generally that no new tractor drivers have been hired since October 26, 1982 (VI:39), Terrazas did use his sons to scrape

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18. In the past Terrazas testified, he wouldn't ordinarily recall employees if he only needed them for a day or two. (11:191? see also II:160 ["We done that all the time.]

19. Terrazas testified it was not unusual to make such assignments during slow periods in the past. (I:204.)

20. Although at times there was idle equipment, Terrazas testified that the drivers were shifted from machine to machine, depending upon the job. (II:160.)

21. Fred Andrews testified to the same effect: Sometimes the fields were so wet the tractors couldn't get in to prepare them. (IV:79-80, 89.)

22. The date of Flores[1] recall is not certain.

roads on tractors (11:178, 183-184; GCX7, 8) and Jerry Rava Jr, the son of Respondent's general manager, drove a tractor sometime after October 26, 1982 (V:33). These relatives of foremen, apparently all students, were hired, as they had been in the past, during school breaks and, because of their brief period of employment, were not able to acquire seniroity (VI:63).[23/]

EMPLOYMENT PATTERNS OF IRRIGATOR CREWS

Although, as will be discussed below, there is considerable dispute about the length of the pre-irrigation season, there is no dispute that during the few years immediately preceding the current crop year, pre-irrigation[24/] was accomplished during December and January. The "irrigation" season -— the growing season —- runs from May thru August.

For at least several pre-irrigation seasons prior to the 1982-83 crop year, Respondent's irrigation force reached its peak in December and January. Respondent stipulated that in the week ending December 6, 1981, it employed 50 irrigators (up from 29 irrigators the previous week); the week ending December 13, 1981, it employed 61 irrigators; the week ending January 17, 1982, it employed 53 irrigators; the week ending January 24, it employed 46 irrigators. (II:76-77.) Fred Andrews acknowledged that some years Respondent might have employed between 60-90 irrigators in December and January. (II:22; See also testimony of John Perez, II:17-20.)

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23. Under Respondent's seniority system, a worker obtains seniority when he works 30 days within a 90 days period. (VI:40)

24. Pre-irrigation is a phase of ground preparation. The land is soaked to take a crop.

Respondent's witnesses acknowledged that during a similar period, December 1982 — January 1983, Respondent employed fewer irrigators than it did during the comparable period of the previous crop year. (See II:77, III:22, V:28) In December 1982 - January 1983, Respondent had 6 irrigator foremen, but each had only 4 or 5 employees in his crew. Thus, the number of irrigators employed during what in the past had been the peak pre-irrigation season, was well below the previous peak.

Moreover, unlike the immediately preceding seasons, the number of irrigators did not fluctuate, (V:28), but remained roughly constant throughout the crop year -- from well before December through so much of the irrigation season as had passed during the hearing and never reached the 1981-82 "growing season" peak complement of 120 employees.[25/] Bob Garcia admitted that only 3 or 4 irrigators might have been recalled since the ordinary October low. (VI:68) Garcia conceded that on October 26, 1982 there might have been 20 irrigators and, around Christmas time, there might have been 25 or 27 (VI:69), including some students, children of the foreman (VI:69), doing odd jobs. Only two strikers — Francisco Larios and Leonardo Villanueva — were reinstated as irrigators on May 24, 1982 (V:20). Garcia testified they were reinstated because the Board ordered Larios reinstated in 6 ALRB No. 69 and ALJ Burns

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25. In the past it was not unusual to have six crews of twenty irrigators during this peak irrigation season, mid-May through August. (III:17; 1:146.)

"ordered" Villanueva reinstated.[26/]

DISCUSSION

It is clear, as General Counsel argues and Respondent's witnesses admit, that the size of Respondent's tractor and irrigator crews did not fluctuate during the 1982-83 crop year as they had in the past. What is disputed is the reason for the relatively reduced and constant level of employment: Whether it was for discriminatory, or for substantial and legitimate business, reasons. For his part General Counsel argues that the "stabilization" of the work force among the irrigators and tractor drivers demonstrates the existence of a scheme on Respondent's part to avoid reinstating the strikers. In addition to the "leveling out" of what had been the ordinary seasonal fluctuations in these crews, General Counsel points to a number of other factors as proof of the existence of such a scheme; among them, and the element which assumed the greatest importance during the hearing, was General Counsel's contention that Respondent changed from sprinkler to furrow irrigation because furrow irrigation requires fewer employees. Before considering the evidence relating to the "change" in irrigation practices, I shall briefly consider those other factors which General Counsel contends lend credence to the conclusion he

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26. ALJ Burns did order Larios reinstated, but only as a member of the entire class of unfair labor practice strikers when he found the strike converted as a result of certain statements made by Garcia to Villanueva. Thus, no remedy runs to Villanueva "personally" that does not also attach to all the strikers and it is unclear why he was singled out for reinstatement.

would have me draw that Respondent changed its irrigation practices to avoid reinstating the strikers. These are: the use of tractor drivers to perform "odd jobs", the irrigator foremen's practice of loaning crew members to each other if they needed more employees (III:67-68), instead of increasing the size of their crews (III:65); the hiring of the children of foremen to perform tractor and irrigator work (III:69-70, II:209; VI69); the unusual practice of foremen having to do crew work (V:7l-72); and the use of thin and weed employees to put plastic in the irrigation ditches, to move sprinkler lines (VIII:80), and to push water (IX:3l), all of which tasks, General Counsel contends, are irrigators' work.

First, as to the tractor drivers performing "odd" jobs, the use of the children of foremen to do irrigator and tractor work,[27/]

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27. It is not clear that, in hiring the students, who apparently worked only temporarily, General Counsel made out an unfair labor practice. Economic strikers are entitled to preference over new hires only with respect to positions substantially equivalent to the ones they 'formerly occupied. Under NLRA precedent, temporary workers are not necessarily considered "new hires". For example, in Certified Corporation (1979) 241 NLRB 369, the Board adopted the following conclusions of its Administrative Law Judge:

> The evidence is undisputed that Michael McKenna was hired and worked as a part-time temporary employee for 4 weeks during the latter part of October at a time when some 58 striking employees had made unconditional requests to return to their jobs. The General Counsel argues that this is a per se violation as enunciated in the Laidlaw case, supra, because Respondent failed to advance any legitimate or substantial business justifications for ignoring the strikers' request for rehire as recently adopted by the Board in South Central Timber Development, Inc., 230 NLRB 468 *(1911~)~.* However, General Counsel ignores the fact that Respondent's obligation is to return the strikers to their former positions or substantially equivalent ones if and when such positions are available. The part-time temporary job held by McKenna cannot be characterized as "substantially equivalent" to any job formerly held by any

(Footnote continued——)

the practice of loaning crew members to each other, and the use of weed and thin employees to place plastic and make taps, Respondent's witnesses testified credibly that such practices were common in the

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(Footnote 27 continued——)

> striker since the strikers were all employed on a regular full-time basis. While certainly not binding as judicial precedent, it is interesting to note that the division of advice in the General Counsel's office authorized dismissal of a charge in a case that raised an issue identical to that surrounding the hiring of McKenna. According to the advice memorandum the "case was submitted for advice on the question of whether an employer is under a Laidlaw obligationto offer part-time jobs to permanently replaced strikers who have made an unconditional offer to return to work, even through the part-time jobs are not substantially equivalent to the strikers former jobs." In concluding that the charge should be dismissed, the memorandum cited New Era Electric Cooperative, Inc., 217 NLRB 447 (1975), wherein the Board had noted that "assuming the Charging Party was an economic striker, the first class lineman position and the second class lineman position were not substantially equivalent jobs because they were unequal in authority, hours, and pay." The advice memorandum further pointed out that the employer had not violated the Act by failing to offer strikers the non-equivalent position since (1) the strikers' offer to return to work did not clearly encompass an offer to take nonequivalent jobs and (2) there was no evidence that the employer's failure to offer the jobs was discriminatorily motivated. These factors are present in the instant case. I conclude and find that the temporary part-time employment of Michael McKenna did not violate the reinstatement rights of any of the strikers because McKenna's job was unequal in duties, hours, and pay and thus not substantially equivalent to the jobs formerly performed by the strikers.

In this case, of course, there is evidence that some irrigators (and tractor drivers) work only part of the year, but there is no evidence as to how long the students actually worked or whether there were any strikers who worked only an amount of time which was "substantially equivalent" to the amount of time the students worked. Thus, I consider the evidence only in the context of General Counsel's allegation of a scheme to avoid reinstating strikers.

past.[28] (See/ e.g., V:95 [irrigator foremen loaning employees to each other]; VI: 71-72, VII:95 [crew labor placing plastic and making taps].)[29] In these respects, General Counsel has failed to show that Respondent's practices changed and the fact that they were simply carried over from before the strike weakens the force of the inference General Counsel would have me draw, that in resorting to them, Respondent was motivated to deny strikers their jobs.

This particular difficulty does not attach to proof that Respondent used weed and thin employees to move lines since Respondent witnesses admitted that this did represent a change.[30] (IX:23, VII:96.) Nor does this difficulty attach to Angel Gonzales' uncontradicted testimony that using foremen to do crew labor was a change. (VI:72.) However, a difficulty of another kind detracts from the probative force of even these conceded changes: proof that a few jobs might have been made available to strikers, and were not,

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28. Bob Garcia was generally an evasive and cautious witness; however/ in discussing the laying of plastic, he aggressively asserted that weed and thin people had frequently done this without any of the defensiveness that characterized so much of his testimony. Accordingly/ I credit him as to this. (VI: 71-73.)

29. Leonardo Villanueva also testified the weed and thin people were making "contras". It appears that laying plastic and making "contras" are two descriptions of the same task. Compare, IX:24 with VI: 72-73.

30. Respondent contends that using its weed and thin people to move lines was simply a mistake which occurred when Pete Espinosa mistakenly told his foremen to use the men to move pipes. They did it only briefly. Angel Gonzales, an irrigator foreman, testified he asked his supervisor Espinosa for extra irrigators and Espinosa brought him the weed and thin people. (VIII:81.) Whatever the reason, the fact is that an irrigator foreman needed help and, instead of hiring more irrigators, Respondent transferred other employees to him.

cannot, without more, prove that Respondent aimed at eliminating hundreds of jobs. To the extent these factors are consistent with such a scheme they cannot be ignored, but this case does not turn on proof of these elements. We come, then, to the alleged "change" in Respondent's irrigation practices.

General Counsel contends that Respondent changed from row irrigation to sprinkler irrigation because row-irrigation requires fewer employees. Respondent contends that there was no significant change in the irrigation method it utilized and that, to the extent there was any change, it merely represented a reversion to sound irrigation practices which preceded the recent drought. Thus, Respondent witnesses admitted that, at least for the months of November, December and January of the 1982-83 pre-irrigation season, it used more furrow irrigation than it had used at least since the 1976-77 crop year. [31/] However, Fred Andrews also testified that he pre-irrigated more acres with sprinklers during the entire 1982-83 crop year than he did during the 1981-82 crop year. (IV:10-12.) According to Andrews, this year he had a much longer time to accomplish pre-irrigation than he had in the immediately preceding seasons because the extraordinarily wet winter of 1982-83 permitted

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31. In January, in a declaration filed in connection with injunctive proceedings that arose out of Case Nos. 83-CE-75-D, Bob Garcia attributed a reduction in Respondent's irrigation employment needs during the current crop year's pre-irrigation season to the increased use of row irrigation. (See GCX 15, p. 2.) John Perez, Respondent's irrigation supervisor testified that Respondent had irrigated approximately 1,000 more acres by row irrigation in December-January of the 1982-83 crop year than it did during the comparable period of the 1981-82 crop year. (11:103.) Fred Andrews also conceded that during the November-December 1982 period the company used more furrow irrigation that it used during the same months of the previous year. (II:103.)

pre-irrigation to take place over a much longer period of time than during the years General Counsel used as a basis for comparison. (IV: 55, 11:83.)[32/]

Although furrow irrigation does require fewer employees than sprinkler irrigation (III:26, 11:166), Respondent's witnesses denied there was any straight line connection between the smaller number of tractor drivers and irrigators used during this crop year and the use of row irrigation. According to Respondent, the November-December peak periods of the previous years were occasioned by a rush to use up its contracted water supply before the end of the calendar year as a hedge against a possible water shortage during the coming water year. (II:21.) By way of contrast, Fred Andrews testified that the preferred time to irrigate Respondent's primary crop, cotton, is January-April, rather than November-December (II:83, 102) and the preferred method, when water is plentiful, is by furrow. (II:113, II:116.) David West, an agronomist called by Respondent as an expert witness, corroborated Andrews' testimony. (V:III, 108.) West also corroborated Andrews' testimony that further pressure to pre-irrigate in November-December would be generated if a farmer had not used his contracted water supply for the calendar year. (V:108.) Thus, Respondent concedes there was a change in its irrigation practices; it contends, however, that the change was not in the type of irrigation used,

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32. I could take judicial notice of the fact that 1982-83 was a record-breaking water year. In any event, Respondent put in precipitation records for the particular water storage district to which Respondent belongs. The months of October-December, 1982 -January-March 1982, indicate considerable rainfall for that period. (RX 4, Ex. p. 2.)

but essentially in the timing of the pre-irrigation season. General Counsel presented no evidence to rebut the testimony of Respondent's witness that over the whole pre-irrigation season (as defined by Andrews) Respondent used more sprinklers this crop year than it used in the past five crop years, or that it only row-irrigated 1,000 more acres in the winter of 1982 than it did in the past few winters. Although General Counsel thus failed to prove that Respondent changed from sprinkler to row irrigation, it remains to be determined whether elimination of the intensive winter pre-irrigation cycle which Respondent concedes (and the evidence plainly shows) was motivated by legitimate and substantial business reasons.

Since Respondent's witnesses identified two independent variables which accounted for the previous years' intensive November-December pre-irrigation practices, we should be able to track the existence of either of them in each of the "crop years" between the drought and the 1982-83 crop year. The records for each of the years should indicate either (1) unused contract water during the months of November-December, or (2) uncertainty about the water supply for the following years. The records which would contain such information are: (1) The "Notices to User[s]" prepared by the Wheeler-Maricopa Water Storage District; and (2) the Records of Water Delivery, Respondent's Exhibits 2 and 3. In fact, they indicate the following --

1976

In late 1976, water users in the water District were notified that it appeared the 1977 water supply would be well below

normal. See RX 2-D. The Record of Water Delivered for that year indicates that Respondent had undelivered contract water for its Lakeview unit for the months of November and December, but that Respondent did not use all its contract water. (RX 3, 1976 Record of Water Delivered Lakeview Unit, p. 2: 870.60 acre feet undelivered.) (Ibid.) Also, for its Santiaga ranches, Respondent used water in excess of its contract entitlement. RX 3, 1976 Record of water Delivered, Santiaga unit, p. 5.

I don't know what to make of the fact that Respondent used less than its Lakeview entitlement. On the one hand, using less than the water available seems inconsistent with Andrews' desire to hedge against an uncertain water supply; on the other hand, as Andrews testified, he only pre-irrigates to a certain depth and there may be no sense in using all the water available. Similarly, I don't know what to make of Respondent's obtaining water beyond its entitlement at Santiaga: although being willing to pay for water beyond contract entitlement is consistent with a desire to pre-irrigate against the anticipated shortage in the next contract year, Andrews did not point to this as an element of his decision-making.

Thus, although I have questions about any role contract deliveries might have played in Respondent's decision-making in the 1976-77 crop year, it is clear that Respondent was facing a water shortage in 1977.

1977

On March 15, 1977, the Water District notified users that it would be unable to deliver full amounts of contracted water in

the 1977 contract year. (RX 3-G.) Although the district was able to acquire some additional water (Ibid.), on May 20, 1977, the district again advised users that the 1978 water supply would be deficient.[33/] (RX 2-J.) In November 1977, the District notified water users that it could give no assurances of water supply in any amount in 1978. (RX 2-N.) In 1977, Respondent had no unused contract water in November and December because it had used 100% of its contract allotment by August 1977. However, it did pre-irrigate Lakeview heavily during October, November and December with additional acquired water, (RX 3, 1977 Record of Water Delivered, p. 7)$_f$ but the records also indicate that Respondent hardly pre-irrigated any of the Santiaga ranches during these months. Once again, although the existence of unused contract water does not appear to have been a factor in the decision to pre-irrigate early, there was clearly an uncertain water supply for the 1977-78 crop year.

1978

Despite gloomy predictions for 1978 water made in 1977, by February 1978/ the water district was predicting that it could deliver approximate contract amounts during the 1978 contract year (RX 2-"0": RX 2-P) and by November 9, 1978, the water district was advising users that there was an 85% chance it could provide full allocations in 1979. (RX 2-V.) In 1978, Respondent had no unused contract water to be delivered in November and December. By the end

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33. Respondent needs 2.5 acre feet/year to grow its crops. (II:90.)

3, 1978 Record of Water Delivered, p. 6.)[34/] Thus, it appears that neither uncertainty over the water supply nor the pressure of having undelivered water could have been instrumental in Respondent's decision making.

1979[35/]

From the beginning of 1979 water users received optimistic predictions that 1979 would be a normal year and by June 1, users learned that they would receive their full contract allocation. (RX 2-AA.) On November 19, 1979, water users were notified of an 85-90% chance that in 1980 the District could deliver 2.0-2.5 acre feet per acre. (RX 2-DD.) However, the November 19, 1979 notice does caution users that "Please be sure to recognize that the above figures are estimates only, and no guarantee as to the amount of water to be available during 1980 can be made at this time." In fact, the notice advises users that only 1.5 acre feet -- well below Respondent's needs – are "nearly assured." (Ibid.) In November and December, Respondent did have unused contract water,[36/] but ended the year using a little less than 90% of its allocation. Once again, I don't know whether use of less than Respondent's current

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34. Part of this additional water came from a carry over from 1977 water which was permitted by the District in 1978. (VI:15.) The 1978 Record of Water Delivery indicates Respondent had 516.68 acre-feet to carry-over, but by November it had used 1600 acre feet more than its allotment. Thus, the 1977 carry-over does not account for all the excess water used.

35. There are two charts for 1979 in RX 3. I am relying on the chart which shows use of the 31376 ac. ft. water allocation.

36. Respondent used "in lieu" water in 1979 which only means it got a preferential rate for water supplied by the District by agreeing not to use water from its wells. (IV:17.)

contract entitlement in a given year indicates that the pressure *to* use unused water was a factor in Andrews' decision-making. Also, uncertainty over water supply could have been instrumental in Respondent's decision about when to irrigate, only if a farmer based his decision on the rather limited assurances of 1.5 acre feet given by the District, rather than on the 85-90% chance of a normal water year. Respondent offered no precise testimony on this point, and therefore, I conclude it has not met its burden of showing that uncertain water supply was a factor in its decision making.

1980

1980 was again a good water year. Beginning in January 1980, users were notified they would receive their full contract amounts. (RX 2-FF.) The outlook remained optimistic throughout the year, and, in October 1980, users were notified of a 75% chance of "full supply plus additional water". (RX 2-KK.) Again, on December 10/ 1980, users were notified of a 90% chance for a full supply of water. (RX 2-LL.) In November and December 1980, Respondent had a fairly large balance of undelivered water but it did not use its entire contract amount for that year; in fact, it ended the year with nearly 1600 acre feet undelivered on Farming Unit 98.1 and it had to transfer some water to its Tenneco West unit, having used its allocation at the Tenneco West unit by the end of October. (RX 3, Record of Water Delivered 1980, Unit 96.1, p. 1 of 6.) Once again, I don't know what to make of the fact that although there was a large balance of undelivered water, Respondent did not use all of it. (RX 3, Record of Water Delivered, Tenneco West Unit, p. 1.) However, it seems clear that uncertainty over future water supply

could not have been a factor in its decision-making.

1981

Beginning in January 1981, water users were notified that there was a 99% chance of a full supply for the 1981 contract year. (RX 2-MM.) However, on October 14, 1981, users were notified of a possible shortage for 1982, because of earth slides (RX 2-UU)—' and on November 16, 1981,[38/] users were notified of only a 40% chance of receiving enough contract water in the following year. (RX 2-W. See also II:21.) Respondent had unused water in November and December 1981 at Farming Unit 98.1, but it also had a balance of undelivered water at year's end. (RX 3, Record of Water Delivered 1981 98.1, p. 1.) It also had a smaller balance of undelivered water at Tenneco West unit. (RX 3, Record of Water, p. 1, Tenneco West Farming Unit, p. 1.) Thus, uncertainty over water supply could have been a factor in Respondent's decision-making. The balance of undelivered water again puzzles me.

1982

Although at the beginning of 1982, the Water District continued to apprise users that there were no firm assurances of full contract supply during 1982, RX 2-22, by April 22, 1982 users

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37. The notice advised users to expect anywhere between 1 2/3 and 2 1/3 acre feet in 1982.

38. The notice bears a typed November 16, 1982 date which has been corrected to read 1981. From the text it appears that the typed date was misdated since this notice describes the conditions for in lieu water use in January and February while it purports to describe 1982 water conditions. Thus, it is highly unlikely that the typed date is correct since there would be little sense in describing past January and February conditions. The handwritten correction to 1981 appears genuine.

were advised that the District believed it could meet all requested water needs for the remainder of the year. (RX 2-AAA.) By mid-December 1982, users were notified that there was a better than 90% chance "of the the District receiving sufficient water to meet all anticipated needs during 1983." (RX 2-FFF.) Respondent apparently used its entire allocation by August 1982 and used unscheduled water between September and December 1982. (RX 3-Record of Water Delivered Farming Unit 98.1.) It also used its entire allocation by October 1982 in its Tenneco West leases. (RX 3, Record of Water Delivered for Tenneco West Unit.)

From the preceding summary, it is clear that in the winters of 1976, 1977 and 1981, Respondent could not be sure of receiving its entitlement in the subsequent calendar year. In 1976 and 1977 the uncertainty resulted from the drought, and in 1981 it resulted from the difficulties in the reservoir system. For these three years, then, at least one of the two conditions which Andrews testified would cause a farmer to pre-irrigate early, plainly existed. The matter is not so clear with respect to the winters of 1978, 1979 and 1980, since for each of those years the District notified users of what, on its face, appears to be a high probability that it could meet anticipated needs. In all these years users were given approximately the same chance of having a good next water year as they received in calendar year 1982 when Respondent changed its irrigation cycle. It is true that the prediction made in 1979 about the next water year appears to be a little "softer" than the prediction made in 1982 about the next water year, in that its 85% prediction of 2.5 acre feet was

qualified by an "assurance" of only 1.5 acre/feet; however, the difference between such a high "estimates" and such a modest "assurances" in a Andrews' decision-making was not explored. It is also true that in 1980 the District only gave "75%" assurances of a full contract supply, which is 15% lower than the "90%" assurances it gave in 1982, but Respondent put on no evidence that would explain at what point the assurances of a "full" water supply became so uncertain it must "hedge" its bets. Thus, I can't conclude that the probability of a good next water year distinguishes the winter of 1982 from the winters of 1978, 1979 and 1980.

Does the existence of undelivered water account for the difference between the early pre-irrigation in these years as compared to 1982? Not in 1978 because, as the records indicate, Respondent had already used its entitlement by the end of October 1978. In 1979 and 1980, however, Respondent did have unused contract water, but did not use all of it. As I have stated, there is not enough evidence for me to conclude what this means. Thus, for at least one year, neither of the two conditions cited by Respondent as dictating intensive pre-irrigation before the end of the calendar year is present and for two others, Respondent has simply failed to present sufficient evidence to explain what the figures it has presented might mean. Accordingly, I conclude that Respondent has not met its burden of showing a legitimate and substantial business reason for the change in its irrigation cycle.

Besides the doubts about Respondent's business reasons generated by a review of these records, there is additional evidence from which to conclude that Respondent decided to stabilize its work

force because it did not want to reinstate the strikers. I have already noted Garcia's testimony that in March of 1982 (before any unconditional offer had been made) Respondent was uncertain about how to treat the strikers. Although throughout the hearing, Respondent's witnesses continually asserted that they had a fixed policy to recall employees on layoff before strikers, in almost the same breath, they also stated that they were uncertain about whom they would recall. This theme of uncertainty runs throughout Garcia's and Andrews' testimony. Thus, Garcia admitted that even after the October 26, 1982 offer, the company was still not sure how it would treat the strikers :

> We didn't know [at the time of the unconditional offer] what our policy was going to be whether — As far as we were concerned there was no positions available. These people were merely on layoff. We didn't know at that time whether we were going to call our current work force that was laid off or the strikers that were on the preferential hiring list.

And Fred Andrews testified similarly:

> Q: Who decided not to rehire all the strikers after . . . the unconditional offer.
>
> A: I think . . . there was a question: We had a work force in place sometime in 1982 . . . when there was talk of rehiring or an offer to come back to work and there was a question as to whether or not that work force was to be considered in addition to the people in place or replace the people in place.
>
> (II:44.)

It appears that Respondent solved its dilemma by deciding, to the extent possible, not to recall anybody, either replacement or striker. Thus, Garcia:

> Q: Did you ever give any instructions on who to hire?

A: As to who to hire -- urn -- I -- I suppose I -- you could answer that question yes, uh -- I instructed them that, uh -- no new employees were to be hired, urn -- that, uh -- when the need arose for additional tractor manpower, un -- they were to un -- confer with me.

And Camarino Esparza testified Garcia told the irrigators the same thing:

Q: (By General Counsel)

Let's go back to the meeting that you said Bob Garcia had.

* * *

Now Mr. Esparza, what was said at that meeting?

A: Just that they had not reached an agreement yet with the union and for us to try to see if we could do the work that we had with the people that we had to do it with.

Q: Who said this?[39/]

A: Bob [Garcia]. (IV:133; see also 132.)

This ostensibly neutral desire to avoid hiring anybody is obviously not "unrelated to labor relations" (N.L.R.B. v. Fleetwood Tractors, supra) and is, moreover, discriminatory in effect because only the strikers were entitled to fill any vacancies that might have become available.

Having found that Respondent violated 1153(c) in this respect, I shall order it to cease and desist from refusing to fill vancancies with returning strikers and to make the strikers whole for all economic losses suffered as a result of Respondent's changing its employment patterns in order to avoid reinstating the striekrs. The class of employees entitled to relief by virtue of

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39. Although Garcia denies saying this, I credit Esparza's testimony. It is consistent with all the events in this case.

this finding will be all those employees not entitled to immediate reinstatement by virtue of possessing sufficient seniority at the time of their unconditional offers to oust their replacements. Since General Counsel only produced the most general kinds of proof as to the size of this class, the precise identity of its members must await compliance.

The number of strikers entitled to backpay in the class should be determined by the average number of employees in the irrigator and tractor driver classifications employed during each week of the 1976-81 seasons. Every employee entitled to work by virtue of possessing sufficient seniority to occupy a position in the class shall be entitled to backpay. Backpay shall be determined by multiplying the amount of time each employee would have worked according to the averages so computed by the appropriate rate of pay for the employee's classification. Respondent will also be ordered to hire all such employees as soon as vacancies became available.[40/]

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

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40. I hereby deny Intervenor's request for attorneys fees and costs. Respondent has already been put to the expense of trying most of this case twice and it seems inappropriate to add further litigation expenses to it.

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 those employees who struck the Company on July 9, 1981, who made an unconditional offer to return to work on October 26, 1982, and January 14, 1983, and who possess the seniority to oust their replacements, to their former positions without prejudice to their seniority or other rights and privileges.

(b) Immediately offer reinstatement as jobs become available to all striking tractor drivers and irrigators not described in the preceding paragraph who possess sufficient seniority to fill one of the average number of positions for the 1976-81 seasons.

(c) 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.

(d) 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.

(e) 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.

(f) 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, convered or removed.

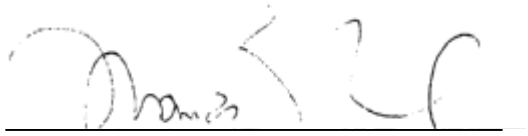
(g) Mail copies of the attached Notice, in all appropriate languages, to all employees who were employed or on strike at any time during the payroll period of July 1981.

(h) 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 and employees may have concerning the Notice or employees' right 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.

(i) 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 29. 1893



THOMAS SOBEL
Administrative Law Judge

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 Agricultural 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[1] 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 interst, 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.