Cherry Valley, California

STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

SUNNY CAL EGG & POULTRY, INC., Respondent, and TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, INDUSTRIAL & ALLIED WORKERS OF'AMERICA, LOCAL UNION NO. 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Charging Party.	Case Nos. 86-CE-2-EC 86-CE-12-1-EC 14 ALRB No. 14

DECISION AND ORDER

On June 24, 1987, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this matter. Thereafter, Sunny Cal Egg & Poultry, Inc. (Respondent or Employer) timely filed exceptions to the ALJ's Decision, along with a supporting brief, and General Counsel timely filed a reply brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions, briefs and reply briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions only to the extent consistent herewith, and to adopt his proposed Order, as modified.

After an election in August 1985, the Board certified the Charging Party, Teamsters, Chauffeurs, Warehousemen, Industrial & Allied Workers of America? Local Union No. 166, International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters or Union) as the exclusive representative of Respondent's agricultural employees. The certification issued on December 31, 1985.

On December 15, 1986, General Counsel issued a First Amended Consolidated Complaint. The complaint alleges that commencing January 3, 1986, the Charging Party requested Respondent to engage in collective bargaining. The complaint further alleges that on that date Respondent refused, and it continues to refuse, to bargain in good faith with the Charging Party, in violation of section 1153(e)[1/] and (a) of the Agricultural Labor Relations Act (ALRA or Act). In addition, the complaint alleges that Respondent discriminatorily discharged employees Jose Alfredo Martinez, Joaquin Martinez, Leonardo Rodriguez,[2/] Ventura Meza, and Pedro Mendoza because of their union activities, in violation of section 1153(c) and (a). In its answer, Respondent denied (1) that it is an agricultural employer, (2) that the alleged discriminatees are agricultural employees, and (3) that it had unlawfully discharged anyone. Respondent admitted that it had refused to bargain with the Charging Party, but denied that it had any obligation to do so.

Refusal to Bargain

At the prehearing conference, General Counsel argued that

[1/] All section references herein are to the California Labor Code

[2/] General Counsel has since abandoned any contentions regarding

because Respondent admitted it had refused to bargain and failed to challenge the Board's jurisdiction in the underlying representation proceeding, it had waived its jurisdictional objections. Respondent, arguing that objections to jurisdiction cannot be waived, contended that it was not an agricultural employer under National Labor Relations Act (NLRA) precedent because its egg processing operation processed a large enough percentage of other producers' eggs to be considered "commercial" rather than "agricultural," and was therefore subject to National Labor Relations Board (NLRB or national board) jurisdiction rather than ALRB jurisdiction.

On the first day of hearing, the ALJ granted General Counsel's motion for summary judgment on the refusal to bargain charge. Respondent then made an offer of proof of changed circumstances, alleging that although it was an agricultural employer at the time of the filing of the petition for certification, it became a commercial operation in January or February 1986 when it began processing other producers' eggs in a volume almost approaching the volume of eggs which it produced itself. However, because Respondent admitted to being an agricultural employer at the time of the-certification, the ALJ reaffirmed his previous ruling.

After the close of hearing, the ALJ decided to reopen his ruling on General Counsel's motion, and he ordered Respondent to show cause why the previous granting of summary judgment should not stand. In response, Respondent submitted business records and two declarations.

The declaration of Marvin Manheim, president of the corporation, states that some of the Employer's jobs relate to the production of eggs (including the feeding of chickens and the cleaning of chicken houses) while other jobs relate to the processing of eggs for sale (including packing eggs, loading trucks with cases of packed eggs, candling eggs, cleaning machinery used to process and pack the eggs, and making boxes). The declaration asserts that each of Respondent's employees performs work related to the processing portion of the business, and no employee works solely in the egg production portion of the business.

The declaration of Respondent's bookkeeper, Glenna R. Wisegarver, states that the first time Respondent processed eggs which were produced by a company other than Sunny Cal Egg & Poultry, Inc., was during the period from April 6, 1986, to May 3, 1986. Her declaration summarizes production reports (attached to the declaration) for the reporting periods from April 1, 1986, to April 6, 1987, and indicates, for each period, what proportion of eggs were produced by Respondent itself and what proportion were processed after being purchased from other producers.

The ALJ concluded that since the statements of Respondent's own declarants clearly indicated that it did not begin-to process other producers' eggs until April 1986, Respondent by its own admission was an agricultural employer at the times the complaint alleged that Respondent committed unfair labor

practices.[3/] Moreover, the ALJ reasoned, section 1160.3 of the Act gives the Board jurisdiction to redress any unfair labor practice that "has" been committed, thus indicating that the Board's jurisdiction is properly invoiced as long as the respondent was an agricultural employer at the time of the alleged unfair labor practice.

Thus, the ALJ again granted summary judgment to General Counsel on the refusal to bargain charge. On the basis of company president Marvin Manheim's strongly expressed antiunion statements, the ALJ found that Respondent refused to bargain solely for the purpose of delay and that a makewhole remedy was therefore appropriate. However, the ALJ also recommended that the standard Board Order be modified to require the Regional Director to investigate whether, and to what extent, any changes in Respondent's operations have altered the scope of the previously certified bargaining unit. If the Regional Director were to find that Respondent was no longer engaged in agricultural operations, Respondent would be relieved of any further obligation to bargain. Such a finding, the ALJ concluded, would also be relevant to the scope of any reinstatement and backpay remedy.

In its exceptions brief, Respondent argues that since it produced documentary evidence that the nature of its business changed from agricultural to commercial commencing April 6, 1996, it raised a triable issue of fact and was entitled to a hearing on

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[3]/The complaint alleged that the refusal to bargain commenced January 3, 1986, and that unlawful discharges occurred during October 1985 and January 1986.

the question of whether it ceased to be an agricultural employer as of April 1986. Respondent cites Austin DeCoster d/b/a DeCoster Egg Farms (1976) 223 NLRB 884 [92 LRRM 1120] *as* holding that an egg processor falls within NLRA jurisdiction if it processes eggs produced by others, and that the amount of other producers' eggs processed is immaterial. Respondent does not contend that the Board cannot hold it responsible for unfair labor practices it committed up to April 6, 1986. However, should the Board uphold the ALJ's Decision and recommendations, the implementation of the recommended remedies -- i.e., reinstatement, makewhole for wages and other economic losses, reading and posting of the notice -- would, according to Respondent's argument, require the continued exercise of jurisdiction by the Board, beyond the April 6 date.

Respondent contends that the jurisdictional question should be settled by convening a hearing for the limited purpose of determining whether Respondent lost its status as an agricultural employer on April 6, 1986. Respondent asserts that such a hearing would provide finality to a case which will otherwise entail additional investigations and hearings.

General Counsel's reply brief argues that the issue of whether Respondent became a nonagricultural employer as of April 1986 should be handled during compliance proceedings rather than in a hearing reopened for that limited purpose. General Counsel cites several NLRB decisions holding that various issues not resolved in unfair labor practice proceedings are appropriate for resolution during compliance.

We affirm the ALJ's conclusion that by its own admission

Respondent was an agricultural employer at least until April 6, 1986. We also affirm his conclusion that the Board has authority to remedy any unfair labor practice that has been committed while a respondent was an agricultural employer. Further, we uphold the ALJ's finding that Respondent herein refused to bargain with the Charging Party upon request, and that it did so without a reasonable or good faith belief that it had no duty to bargain, since Respondent admitted to its agricultural employer status at the time of the bargaining request. Therefore, we conclude that a makewhole remedy is appropriate for the period of January 3, 1986, to April 6, 1986.

For the period subsequent to April 6, 1986, we find that the evidence provided by Respondent's declarations and business records is not sufficient for us to decide whether or when Respondent may have ceased to be an agricultural employer. We further find that the most appropriate place to resolve this question is, as General Counsel suggests, during the compliance stage of these proceedings.[4]/

We wish, however, to give some guidance to the parties and the compliance officer concerning the factors that will need to be considered in determining Respondent's status as either an

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[4]/See, e.g., Bacchus Wire Corporation (1980) 251 NLRB 1552 [105 LRRM 1451], wherein the national board denied the employer's request to reopen the hearing to consider whether its "business reverses" made reinstatement of two discriminatees impossible, and held that the issue should be handled during compliance. Similarly, in Caamano Brothers, Inc. d/b/a Ethnic Produce (1985) 275 NLRB 205 [119 LRRM 1062] the NLRB held that compliance proceedings were the appropriate place for the employer to present evidence on the issue of the discriminatees[1] legal status to work in the United States.

agricultural or a commercial employer. Accordingly, we provide the following brief history of the NLRB's interpretation of the statutory definition of agriculture.

Section 3(f) of the Fair Labor Standards Act defines agriculture in the following terms:

> 'Agriculture[1] includes farming in all its branches and among other thing includes . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market. (29 U.S.C. §203(f).)

In Olaa Sugar Company, Ltd. (1957) 118 NLRB 1442 [40 LRRM 1400] the NLRB announced the rule that in cases where employees spend part of their time in agricultural duties and part in nonagricultural, those employees who perform any regular amount of nonagricultural work are covered by the NLRA with respect to that portion of the work which is nonagricultural. Several years later, in The Garin Company (1964) 148 NLRB 1499 [57 LRRM 1175], the NLRB held that packing shed employees engaged in packing produce grown not only on their employer's fields but also on other growers' fields are not agricultural employees. In finding Garin's employees to be commercial rather than agricultural, the national board noted that the employees did a substantial amount of packing for another grower, i.e., approximately 15 percent.

Several subsequent NLRB decisions held that where a

company is engaged in a single and completely integrated farming operation, its employees are agricultural even though the employer processes some farm commodities which were purchased from independent growers. In Wirtz v. Tyson's Poultry (8th Cir. 1966) 355 F.2d 255, the company's employees assembled, graded, sized, packed and shipped eggs which were obtained from two sources, Tyson's own farms and three independent growers. The Court of Appeals rejected the contention that the involvement of the independent growers rendered the whole operation nonagricultural. Rather, the court held that all the employees ware employed in a single and completely integrated farming operation and were therefore agricultural employees. (See also, N.L.R.3. v. Victor Ryckebosch, Inc. (9th Cir. 1972) 471 F.2d 20 [81 LRRM 2931]; N.L.R.B. v. Strain Poultry Farms, Inc. (5th Cir. 1969) 405 F.2d 1025 [70 LRRM 2200].)

In Austin DeCoster d/b/a DeCoster Egg Farms, supra, 223 NLRB 884 (DeCoster) the employer conducted an egg production and processing operation in which it purchased chicks from an independent breeder and then delivered them to growing farms, some of which DeCoster owned. Upon reaching maturity, the chicks were transported by DeCoster employees to breeder farms, where they were mated with employer-owned roosters. The resulting eggs were transported by the employer's drivers to a hatchery, and the hatched female chicks or pullets[5/] delivered either to the employer's growing farms or contract growing farms. Thereafter,

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[5/] The male chicks were destroyed.

the pullets were transported to laying houses. Approximately 2.4 million pullets were housed in the employer's facilities while 400,000 were housed in contract laying houses. The entire growing, hatching, maturation and laying process was controlled and supervised by DeCoster. The DeCoster laying houses produced approximately 11.5 million eggs per week which were all processed in the egg building prior to sale. The contract farms yielded approximately 2 million eggs per week, of which 1.8 million were shipped unprocessed to a customer of DeCoster. The remaining 200,000 eggs were processed in the employer's plant. Thus, less than 2 percent of the eggs processed by the employer were from its contract farms. Moreover, the employer did not process any eggs from other producers.

The NLRB noted in DeCoster that the U.S. Supreme Court had stated that the Fair Labor Standards Act definition of agriculture was comprised of two distinct branches. The primary meaning refers to actual farming operations, while the secondary meaning refers to practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. The DeCoster egg-processing plant employees were not engaged in direct farming operations. But the national board held that they were not engaged in secondary agricultural practices, either. In so holding, the board relied in part on a U.S. Department of Labor Regulation interpreting the phrase "such farming operations" as contained in the Fair Labor Standards Act definition of agriculture. The Labor Department Regulation provides:

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> No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless all such commodities are the products of that farm. (29 C.F.R. § 780.141 (1974).)

The national board held that this regulation must be read as limiting the exemption to those processors who deal exclusively with their own goods.

While 11.5 million of the 11.7 million eggs processed by DeCoster were laid in DeCoster laying houses, only 200,000 eggs were received from contract farmers. The board noted that NLRB decisions had consistently held that an employer is not a "farmer" as to products which have been raised or produced under contract by independent contract farmers. Thus, although DeCoster would appear to have constituted an integrated egg production and processing operation, the NLRB ruled that because all of the eggs processed by DeCoster were not the products of its own farm, its employees were not engaged in activities falling within the secondary definition of agriculture. Therefore, the agricultural exemption did not apply.

A review of relevant NLRB decisions subsequent to DeCoster reveals that the board has not strictly adhered to the holding of that case that any amount of processing of other producers' agricultural products necessarily makes the processing employees commercial. In fact, subsequent decisions indicate that the national board has continued to apply the rule established in Olaa Sugar Company, Ltd., supra, 118 NLRB 1442 (Olaa) and The Garin Company, supra, 148 NLRB 1499 (Garin) that employees

engaged in the processing of crops will be found to be nonagricultural employees only if a regular and substantial portion of their work consists of processing the crops of a grower or growers other than the grower-employer.[6/]

For example, in Employer Members of Grower-Shipper Vegetable Association of Central California (1977) 230 NLRB 1011 [96 LRRM 1054] (Grower-Shipper), the issue before the NLRB was whether drivers, driver-stitchers, and folders who hauled produce for employer members of a grower-shipper vegetable exchange were agricultural employees. Individual grower members packed and processed differing percentages of their own and other, independent growers' produce. The board did not hold that the processing of any amount of produce from independent growers was enough to make an operation commercial. Rather, the board applied the Olaa and Gar in rule that a grower's processing employees were nonagricultural only if they spent a regular and substantial amount of their working time on crops of independent growers. Thus, the hauling and packing employees of growers who obtained 20 percent, 40 percent, and 80 percent, respectively, of their produce from independent growers were found to be commercial employees, on the basis that their employers were engaged to a substantial degree and on a regular basis in hauling produce

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[6/]Several subsequent cases simply distinguish DeCoster on its facts. For example, in Dairy Fresh Products Co., d/b/a/ Stahmann Egg Farms (1980)" 251 NLRB 1232 [105 LRRM 1202], the NLRB held that the employer's egg processing operation was agricultural although approximately 10 percent of the eggs processed were received from other farms, because those eggs derived from farms of the same employer rather than from independent farmers.

procured from independent growers for processing in their packing and shipping operations. However, the employees employed by companies which grew 90 percent or more of the produce they hauled were found to be agricultural, on the basis that the insubstantial amount of the employers' work with respect to the crops of independent growers was deemed incidental to the employers' primary function of growing, packing and shipping their own produce.

In NLRB v. Karl's Farm Dairy, Inc. (10th Cir. 1978) 570 F.2d 903 [97 LRRM 2747], the 10th Circuit Court of Appeals considered the question of whether a handyman who worked in the employer's milk processing facility was an agricultural employee, where the employer processed its own milk from 400 milk cows and also processed an undetermined quantity of milk from at least one other dairy. The court found that there was no substantial evidence in the record that "foreign" milk represented more than a de minimis portion of the company's operations. The court rejected the NLRB's assertion that when a dairy farm processes milk in any quantity from other farmers, that process becomes a separate commercial operation. The court concluded that the employee's duties came within the secondary meaning of agricultural (i.e., practices performed by a farmer or on a farm incidentally or in conjunction with such farming operations), and that the fact that the employee incidentally worked on commodities of an undisclosed quantity produced by other farmers did not change the nature of his employment.

In Mario Saikhon, Inc. (1986) 278 NLRB 1289 [122 LRRM 1361],

the employer harvested and field-packed agricultural commodities, with more than 50 percent of its harvesting and packing performed for other growers. The NLRB found that the employer's field packing machine employees were commercial. However, in doing so, the national board relied upon the Olaa/Garin rule, as reiterated in Grower-Shipper, that employees will not be found noncommercial agricultural employees when a regular and substantial portion of their work effort is directed towards hauling or processing the crops of a grower other than the grower by whom they are employed.

We conclude that the Olaa/Garin rule continues to be the rule followed by the NLRB, and, pursuant to section 1148 of the Act, is consequently the proper rule for this Board to follow in the instant case as well. In adhering to the NLRB's "regular and substantial portion" rule, we note that a strict application of the reasoning in DeCoster would lead to an absurd result, where all an egg processor would have to do to make its operation commercial would be to purchase a dozen eggs for processing from an independent producer. Furthermore, an employer could slip in and cut of jurisdiction of first the ALRB and then the NLRB by continually adjusting the quantity of eggs it accepted for processing from other producers.

During compliance, the compliance officer (and, later, the ALJ if the matter goes to hearing) will need to consider a number of factors in order to make a determination concerning Respondent's commercial or agricultural status after April 6, 1986. These factors include:

(1) The amount of eggs purchased from other producers, and whether the amount represents a substantial portion of the eggs processed by Respondent;

(2) The reason(s) the Respondent needed to purchase eggs from other producers, including whether due to Respondent's short supply and/or sudden increased demand;

(3) Whether Respondent regularly obtains a substantial portion of its eggs for processing from other independent producers, and to what extent it expects to do so in the future;

(4) Whether eggs purchased by Respondent from other producers come from farms owned by Respondent or from truly independent producers;

(5) What constitutes the usual industry practice regarding the extent to which egg producers process their own eggs;

(6) Whether all or some of Respondent's employees are engaged in "mixed work," i.e., whether they spend' some of their time performing agricultural work and some of their time performing nonagricultural work;

(7) Whether any shop or maintenance employees work solely on equipment in the processing facility; whether any shop or maintenance employees who repair tractors or other feed and mechanical equipment work primarily in the growing operations; and whether some shop or maintenance employees work both in the processing plant and in the agricultural operation;

(8) Whether employees in the processing plant rotate among various tasks performed there, and whether there are

differences in pay or in the required level of skills;

(9) Whether egg production employees and processing employees are separately supervised, and separately hired and terminated;

(10) Whether eggs are transported to the processing plant by employees and equipment utilized solely in the growing operation, or by employees utilized solely in the processing plant, or by employees engaged in "mixed work;"

(11) Whether the processing plant is located on the same premises as the egg production operation;

(12) Whether the Employer is a member of a cooperative, and if so, whether it sells its own eggs to the cooperative; whether the cooperative markets its own brand of eggs, and if so, under what label;

(13) The extent of the Employer's investment in processing plant equipment, and the extent of investment in the egg production operation; and

(14) Whether the Employer is engaged in private labeling and/or packaging for independent growers.

In accordance with our Decision herein, our Order will include makewhole for the period beginning with Respondent's initial refusal to bargain up to April 6, 1986. We hold, however, that makewhole is not appropriate for any period subsequent to April 6, 1986, even if it is determined during compliance proceedings that Respondent continued to be an agricultural employer after that date. Although we do not find DeCoster to be controlling authority for Respondent's contention that it ceased

to be an agricultural employer, we do find that in this difficult area of law, Respondent's reliance on that case demonstrated a reasonable, good faith litigation posture such that makawhole would not be appropriate after the date when Respondent contends it became a nonagricultural employer.[7/]

The Discharge of Jose Alfredo Martinez and Joaquin Martinez

General Counsel's prima facie case depended in large part on the antiunion animus displayed by company president Marvin Manheim. Jose Alfredo Martinez testified that Manheim told a group of employees on election day that if the Union wen, he would not let it in, but would automate his operations in order to be able to discharge fifteen employees. Manheim promised that if they voted in his favor, the employees would have good wages, vacations and benefits. Jose Alfredo's brother, Joaquin Martinez,

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[7/] The Board takes this opportunity to express its belief that "open-ended" makewhole orders may not be appropriate in "absolute" (including "technical") refusal to bargain cases or in "surface" bargaining cases. Open-ended makewhole orders, which run until the parties have reached a bona fide impasse or a contract, tend to "encourage further litigation and discourage reasonable efforts by unions to reach agreement, since the prospect of securing more favorable terms by virtue of an open-ended makewhole order overshadows the negotiation process." (John Elmore Farms (1985) 11 ALRB No. 22, dis. opn. of Members James-Massengale and McCarthy, p. 13.) In a technical or absolute refusal to bargain case, the most appropriate date to terminate a makewhole award is, at the latest, the date of the union's timely acceptance of the employer's offer to bargain with the certified bargaining representative of its agricultural employees. (Joe G. Fanucchi & Sons/Tri-Fanucchi Farms (1986) 12 ALRB No. 8. See also Abatti Farms, Inc. (1988) 14 ALRB No. 8, which has been accepted for review by the California Court of Appeal.) In a surface bargaining case, makewhole may not be appropriate beyond the date of the close of the liability hearing. Any allegation of a failure to bargain in good faith after those dates should arguably not be litigated during compliance but, rather, should be the subject of new unfair labor practice charges.

corroborated the testimony of his brother regarding Manheim's promise of good wages and vacations if the workers would give up the Union, as well as Manheim's statement that if the Union came in, he would automate and be able to discharge people. On cross-examination, Manheim admitted telling employees that he would be able to install automatic feeders if they voted for the Union, and that he would then need only one or two employees. He also admitted telling employees that he knew they had been having union meetings, that he would not let the Union beat him, that he could fight them for a year or two and would not have to give in.

A day or two after the election, Manheim solicited Jose Alfredo Martinez and his brother, also named Jose, to sign a petition to oust the Union. Jose Martinez signed the petition, but Jose Alfredo Martinez refused. Joaquin Martinez was also asked to sign the petition, and he, too, refused.

The Union was certified by the Board on December 31, 1985. On January 4, 1986, Jose Alfredo, Joaquin and two other workers were loading a truck with eggs in the late afternoon. About 5:15 p.m., Manheim arrived, angrily got out of his pickup truck and began to yell that it was after 5 p.m., and the men had still not left, that he was sick and tired of the Union, and that if they wanted work they should ask the Union for it. Kicking the dirt, Manheim cursed the Union and abruptly told Joaquin and Jose Alfredo that they were through. The following day, Joaquin returned to work to see if he and Jose Alfredo had indeed been discharged. According to Joaquin, Manheim replied that yes, they were fired because of the Union.

Manheim testified that on the day he told Jose Alfredo and Joaquin to leave, he had heard that some employees had gotten into the corrals among the cattle, despite having been warned to stay away from the corrals after an employee had been injured there. When he told Jose Alfredo and Joaquin to stay away from the cattle, he claimed, they taunted him and laughed. Manheim stated that he did not mean to fire the two employees at that moment, but made the decision later upon reflecting that they had not been completing their work on time and had generally been behaving improperly.

The ALJ found that General Counsel had established a prima facie case through the evidence of Manheim' s antiunion animus, his threats to get rid of employees if the Union won the election, Jose Alfredo's and Joaquin ' s refusal to sign the petition, and the abruptness of Manheim' s reaction. The ALJ credited the two employees' version of the events and disbelieved Manheim, whom he found to be an "insouciant" and "contemptuous" witness. He concluded that Manheim' s asserted reasons for discharging the employees were entirely pretextual, and that the employees were actually discharged in retaliation for their refusal to sign the petition to oust the Union.

We find that the discharges were not pretextual, in that Manheim had some genuine concern that the employees had been "horsing around" in the corrals or "dragging on the clock" in order to work overtime. Nevertheless, we are convinced that Manheim would not have discharged the employees in the absence of their protected activity. One factor indicating that Manheim was

at least partially motivated by the employees' union activity is the timing of the incident: the employees were terminated only four days after the Union was certified, and perhaps on the very day that Manheim received notice of the certification. Further, Manheim uttered very hostile antiunion statements during the course of the incident, telling the workers he was sick and tired of the Union, cursing the Union and telling the employees they should ask the Union for work. Moreover, one of the other employees working with Jose Alfredo and Joaquin that afternoon was Jose Martinez, who had signed the Employer's petition to oust the Union; Jose Martinez was not discharged that afternoon although he, too, was on the premises later than Manheim thought was appropriate. Finally, both Jose Alfredo and Joaquin had worked for Respondent for quite a number of years (Jose Alfredo for 12 years and Joaquin for 9 years) and we are convinced that Manheim would not have considered their alleged misconduct serious enough to warrant summary discharge in the absence of their union activity. (Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enforced, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513] cert. den., (1982) 455 U.S. 989 [109 LRRM 2779].) Therefore, we affirm the ALJ's finding that Respondent violated section 1153(c) and (a) by discriminatorily discharging Jose Alfredo Martinez and Joaquin Martinez.

We hold that the declarations and business records submitted by Respondent in response to the ALJ's order to show cause did not make a prima facie showing under applicable law that Respondent ceased to be an agricultural employer as of April 6, 1986

Therefore, our Order will direct the Employer to offer reinstatement to Jose Alfredo Martinez and Joaquin Martinez as well as full backpay up to the date of valid reinstatement offers. If it should be determined during compliance proceedings that Respondent became a nonagricultural employer on a date subsequent to April 6, 1986, then the Board would lack jurisdiction to order reinstatement and backpay after such date. The Discharge of Pedro Mendoza

Pedro Mendoza was also approached by Manheim after the election and was asked to sign the petition to oust the Union; Mendoza, too, refused to sign it. On Mendoza's last day of work, October 13, 1985, Manheim told Mendoza and three coworkers to clean up some steer manure in front of the pens in the chicken houses. Each of the workers had his own house to clean out. The men worked at that job from 7 to 9 a.m., and Mendoza was the only worker who did not finish the job within the prescribed time. Manheim testified that he saw Mendoza loafing while the others were working hard, and that Mendoza had completed only about half the job. Manheim further testified that he fired Mendoza because he had not finished, although he had been repeatedly warned in the past that he would have to keep up with the other workers. Mendoza admitted that he had not finished his job.

The ALJ found General Counsel's prima facie case regarding Mendoza somewhat weak, but nonetheless concluded that the Employer's stated reason for discharging Mendoza was pretextual. We overrule the ALJ, and find that General Counsel did not establish a prima facie case. As Respondent's exceptions

brief points out, there was uncontradicted evidence presented at the hearing that Mendoza was the only one of the four workers who failed to finish cleaning out the house to which he was assigned. Unlike the Martinez terminations, the discharge of Mendoza is not closely linked in time to either the election (two months prior to Mendoza's discharge) or the Board's certification of the Union (two months after the discharge). Moreover, General Counsel failed to prove, as he did with respect to the Martinez incident, that any of Mendoza 's co-workers who were not discharged signed the Employer's petition. Despite the ALJ ' s discrediting of Manheim's testimony that he had previously warned Mendoza about working too slowly, we conclude that the evidence does not establish that Manheim discharged Mendoza for any reason other than his failure to finish his work assignment in the prescribed amount of time. As General Counsel failed to establish a causal connection between Mendoza' s protected activities and his termination, we overrule the AL J ' s finding of a violation.

The Discharge of Ventura Meza

Like the other complainants, Ventura Meza refused to sign the Employer's petition to oust the Union. On October 6, 1985, Meza was supposed to report to work at 5 a.m., but was unable to do so because he had been arrested for drunk driving the previous evening. Meza called his foreman Jorge Martinez to tell him what had happened and to explain that he would not be able to return to work until the police released him. Meza arrived at work at 9 a.m., and asked Manheim if he still had a job; Manheim said, "No." He spoke to Manheim again the following day, and Manheim

again refused to put him back to work.

Manheim testified that during Meza's employment history with Sunny Cal, he sometimes was unable to perform his duties because of a drinking problem, and that Manheim had discussed the problem with Meza on many occasions. On the morning he discharged Meza, Manheim claimed, he observed that Meza was intoxicated. He told Meza that he was not taking any more chances with him, that Meza had already had one accident horsing around with the cows and lost a finger. About the drinking, he told Meza, "This was one time too many," and therefore he was fired.

Meza's time sheet for the date in question indicates that he was "arrested, never returned to work." General Counsel argues that the notation on Meza's time sheet that he never returned to work conflicts with Manheim's testimony that Meza was discharged for being drunk. General Counsel asserts that the discrepancy suggests the existence of a concealed and improper motive for the termination -- namely, that Meza was discharged because of his support for the Union.

The ALJ found that General Counsel had established a prima facie case consisting of Manheim's antiunion animus, his threats to lay off employees through automation if the Union won, Meza's refusal to sign the petition, and the shifting reasons Respondent gave for discharging Meza. The ALJ found that Meza's termination provided the strongest dual motive situation among all the complainants, since Meza himself asked Manheim if he still had a job, thus indicating an awareness that Manheim had problems with Meza's drinking. However, based on his severe distrust of

Manheim, the ALJ nevertheless concluded that Respondent failed to meet its burden of proving that it would have discharged Meza in the absence of his refusal to sign the petition.

We find that Respondent had ample legitimate reasons to discharge Meza, and that General Counsel failed to establish a causal connection between his union activity and his termination. Concerning the notation on Meza's time sheet, "Arrested, never returned to work," Manheim testified that he told the company bookkeeper to write, "He's not going to work because he was arrested." Thus, he intended the notation to indicate that Meza would never return to work, not that he did not come back to work. We conclude that the discrepancy between what appeared on the time sheet and what Manheim told Meza is not significant enough to demonstrate a concealed or improper motive for the termination.

Without that element, the remaining evidence does not make out a prima facie case for discriminatory discharge. Meza arrived four hours late for work because of his arrest, and as much as admitted knowing Manheim had previously had problems with his drinking when he tentatively asked Manheim if he still had a job. Further, Meza had previously incurred a serious injury because of an on-the-job accident stemming from carelessness. Moreover, in the absence of evidence that all employees who refused to sign the Employer's petition were fired, Meza's refusal, two months prior to his discharge, does not appear causally linked to his termination.[8/] Similarly, Manheim's generalized antiunion animus

[8/]unlike the discharges of Jose Alfredo and Joaquin Martinez, Meza's discharge was not close in time to the "triggering" element, the Union's certification.

and threats to lay off workers through automation are simply not sufficient to prove a discriminatory motive for Meza's termination. Consequently, we overrule the ALJ's finding of a violation for Meza's discharge.

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board (Board) hereby orders that Respondent Sunny Cal Egg & Poultry, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its agricultural employees, if any, in regard to hire or tenure of employment because they have engaged in union or other concerted activity protected by the Agricultural Labor Relations Act (ACT:).

(b) Failing and refusing to meet and bargain collectively in good faith as defined by section 1155.2(a) of the Act with Teamsters Local 166, as the exclusive bargaining representative of its agricultural employees.

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

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

(a) Offer to Jose Alfredo Martinez and Joaquin Martinez immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Jose Alfredo Martinez and Joaquin Martinez for all losses of pay and other economic losses they have suffered as a result of their discharges, the amounts to be computed in accordance with established Board precedent, plus interest thereon computed in accordance with the Board's Decision and Order in E. W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Upon request, meet and bargain collectively in good faith with Teamsters Local 166 as the exclusive collective bargaining representative of its agricultural employees and, if agreement is reached, embody the terms thereof in a signed contract.

(d) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with Teamsters Local 166, such makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Board's Decision and Order in E. W. Merritt Farms (1988) 14 ALRB No. 5, the period of said obligation to extend from January 6, 1986, until April 6, 1986.

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

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from October 13, 1986, to October 13, 1987.

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

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

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

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

Dated: November 3, 1988

BEN DAVIDIAN, Chairman[9/]

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

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

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office by the Teamsters, Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local Union No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Sunny Cal Egg and Poultry, Inc., had violated the law. Following a review of the evidence submitted by the parties, the Board found that we did violate the law by discharging Jose Alfredo Martinez and Joaquin Martinez, for exercising their rights under the ALRA, and by refusing to bargain collectively with the certified representative of our employees. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all farm workers in California these rights:

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

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

WE WILL NOT refuse to bargain in good faith with your certified exclusive bargaining representative.

WE WILL NOT discharge any employees for exercising their rights under the Act.

WE WILL reimburse the above-named employees for all losses of pay and other economic losses they have suffered as a result of our discriminating against them, plus interest.

WE WILL bargain in good faith with your certified exclusive bargaining representative.

Dated: SUNNY CAL EGG AND POULTRY, INC.

By:
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centre, California. The telephone number is (619)353-2130.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Sunny Cal Egg & Poultry, Inc. (Teamsters)

14 ALR3 Mo. 14
Case Nos. 86-CE-2-EC
86-CE-12-1-EC

ALJ DECISION

General Counsel alleged that the Employer had refused to bargain in good faith with Teamsters, Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local Union No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) and had discriminatorily discharged several employees. The Employer denied that it was an agricultural employer or that it had unlawfully discharged the employees. The Employer admitted that it had refused to bargain with the Union, but denied that it had any obligation to bargain. During a hearing before an Administrative Law Judge (ALJ) the Employer argued that it became a commercial, nonagricultural operation in January or February 1986. However, because the Employer admitted its agricultural status at the time of the certification, the ALJ granted General Counsel's motion for summary judgment on the refusal to bargain charge.

After the close of hearing, the ALJ reopened his ruling and permitted the Employer to submit evidence to show cause why the summary judgment should not stand. The Employer submitted a declaration from the corporation's president stating that some of the Employer's jobs related to production of eggs and some related to the processing of eggs for sale, but that all employees performed some processing work. A declaration from the Employer's bookkeeper stated that the first time the Employer processed eggs which were produced by companies other than Sunny Cal was after April 6, 1986. On the basis of the submitted evidence, the ALJ concluded that by its own admission the Employer was an agricultural employer when it initially refused to bargain. Thus, the ALJ again granted summary judgment to General Counsel on the refusal to bargain charge. The ALJ further concluded that the Employer refused to bargain without a reasonable or good faith belief that it had no duty to bargain, and that a makewhole remedy was therefore appropriate.

The ALJ recommended that the Board order its Regional Director to investigate when, if any all, the Employer ceased to be an agricultural employer, since such a change in status would relieve the Employer of any further obligation to bargain. The ALJ also concluded that the Employer had discriminatorily discharged four employees because of their protected concerted activities. He recommended that the employees be reinstated with backpay.

BOARD DECISION

The Board affirmed the ALJ's conclusion that the Employer had

unlawfully refused to bargain, and concluded that makewhole was appropriate for the period from January 3, 1986 to April 6, 1986. The Board held that the evidence was not sufficient to determine whether or when the Employer may have ceased to be an agricultural employer. The Board found that the most appropriate place to resolve the question was during the compliance stage of the proceeding. The Board provided some guidance to the parties and the compliance officer concerning the factors that will need to be considered in determining the Employer's status as either an agricultural or a commercial employer.

The Board affirmed the ALJ's conclusion that the Employer had discriminatorily discharged Jose Alfredo Martinez and Joaquin Martinez. However, the Board overruled the ALJ's conclusion that Pedro Mendoza and Ventura Meza were discriminatorily discharged, since it found that General Counsel failed to establish a causal connection between their protected activities and their terminations.

* * *

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

* * *

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office by the Teamsters, Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local Union No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Sunny Cal Egg and Poultry, Inc., had violated the law. Following a review of the evidence submitted by the parties, the Board found that we did violate the law by discharging Jose Alfredo Martinez and Joaquin Martinez, for exercising their rights under the ALRA, and by refusing to bargain collectively with the certified representative of our employees. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
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Because it is true that you have these rights, we promise that:

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WE WILL bargain in good faith with your certified exclusive bargaining representative.

Dated: SUNNY CAL EGG AND POULTRY, INC.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (619)353-2130.

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: SUNNY CAL EGG & POULTRY, INC., Respondent, and TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, INDUSTRIAL & ALLIED WORKERS OF AMERICA, LOCAL UNION NO. 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Charging Party.	)	Case No. 86-CE-2-EC 86-CE-12-1-EC

Appearances:

David Smith, Esq. 73255 El Paseo, Suite 11 Palm Dessert, California for the Respondent

Eugene Cardenas 319 Waterman Avenue El Centre, California for the General Counsel

Patricia S. Waldeck Wohlner, Kaplon, Phillips, Vogel, Shelley & Young P. 0. Box 17925 Los Angeles, California for the Charging Party

Before: Thomas Sobel Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

This case was heard by me on January 7, 13 and 14, 1987 in Riverside, California. Pursuant to the usual procedure, General Counsel alleged in a Consolidated Complaint that Respondent, Sunny Cal Egg and Poultry, Inc. refused to bargain with Charging Party Teamsters Local 166, the certified bargaining representative of the Respondent's employees, and discriminatorily discharged Jose Alfredo Martinez, Joaquin Martinez, Leonardo Rodriguez,[1] Ventura Meza, and Pedro Mendoza. By way of answer, Respondent has denied (1) that it is an agricultural employer (2) that the alleged discriminatees are agricultural employees, and (3) that it unlawfully discharged anyone. It has specifically admitted that it refused to bargain, but denies that it had any obligation to bargain.

I. THE REFUSAL TO BARGAIN

After an election in August, 1985 Charging Party was certified as the exclusive representative of Respondent's employees. The Board's certification issued on December 31, 1985. GCX 3. Prior to the election and the certification, Respondent raised no challenge to the Board's jurisdiction.

General Counsel issued his original complaint in this matter on September 19, 1986. The sole violation alleged was that:

[1]General Counsel has abandoned any contention as to Leonardo Rodriguez, see Post-Hearing Brief.

> (8) Commencing on or about January 3, 1986 and at all times thereafter, Respondent did refuse, and continues to refuse to bargain collectively with the Charging Party as the exclusive collective-bargaining representative of all the employees in the unit described above; in that commencing on or about January 3, 1986, and continuing to date, Respondent has refused, and continues to refuse, to meet with the union for the purpose of negotiating or discussing the terms of a collective bargaining agreement. GCX 1.3.

Respondent denied this allegation in its Answer, and denied that it was engaged in agriculture.

On December 15, 1986, General Counsel issued a First Amended Complaint consolidating the foregoing refusal to bargain allegation with new allegations of discrimination which referred to discharges that took place on October 6 and October 13, 1985 and on January 4, 1986. In its Answer to this Complaint, Respondent once again, though more specifically, denied that it was an agricultural employer, denied that it discriminatorily discharged the named employees, and denied that it violated the Act by refusing to bargain; it specifically admitted that commencing on or about January 3, 1986 and at all times thereafter, it refused and continues to refuse, to bargain collectively with the Charging Party as the exclusive collective bargaining representative of all the employees in the unit. Compare GCX 1.8 (First Amended Complaint), GCX 1.9 (Respondent's Answer).

At the Prehearing Conference, General Counsel moved for Summary Judgment on the refusal to bargain allegation on the grounds that, given the general principle that the Board does not

permit relitigation of an issue which has, or could have, been litigated in a prior representation proceeding, see Pittsburgh Plate Glass Co. v. NLRB (1941) 313 U.S. 146, Respondent's failure to challenge the Board's jurisdiction in the representation proceeding, combined with its admission that it had refused to bargain with the certified union, left no triable issue of fact concerning the refusal to bargain allegation. Respondent, on the other hand, contended that it was not an agricultural employer under NLRA precedent because it processed a large enough percentage of other producer's eggs to be considered "commercial" and, therefore, under NLRB jurisdiction. To General Counsel's contention that the Board does not generally permit jurisdictional issues that have been settled in representation cases to be retried in unfair labor practice cases, Respondent replied that objections to jurisdiction cannot be waived. I took the matter under submission and, on the first day hearing, I granted General Counsel's Motion for Summary Judgment.

Upon my granting the Motion, Respondent made an offer of proof of changed circumstances:

> [At] the time of filing of the petition [for certification]. . . that the Respondent [was an agricultural employer but that]
>
> * * *
>
> Commencing about January or February of 1986, the operation of the Respondent changed and the Respondent, as records will show...that Respondent entered into a new type of operation, in that its customers grew and it began to purchase eggs which at times approached almost the volume of eggs which it produced itself. And at that time, I believe it came under the jurisdiction of the National Labor Relations Act. (I: 12)

Respondent further asserted:

> In addition to the previous offers of proof, I would like to make an offer of proof that each and all of the employees of the employer/Respondent...during the time from the filings of the petition for certification worked in the egg processing portion of Respondent's building...and it is our position that since each and every employee worked there at least part of the time, [that] all of the employees would be covered in the National Labor Relations Act. (I: 12)

Although the foregoing offer made it clear for the first time that Respondent was not contending the Board never had jurisdiction in the first place, in view of its admission that at the time of the certification it was an agricultural employer, I reaffirmed my previous ruling.

Having concluded that this ruling was error, by order issued after the close of the hearing, I reopened my ruling on the motion for summary judgment and ordered Respondent to make a detailed showing of the kind required by ordinary summary judgment procedure, why I should not grant General Counsel's motion. Respondent duly replied. For the reasons stated below, and on the basis of the showing made by Respondent's declarants, I again grant summary judgment on the refusal to bargain allegation. I also conclude the Board has jurisdiction over the 1153(c) allegations.

As previously noted, the unfair labor practices alleged in the First Amended Consolidated Complaint took place on October 6 and 13, 1985 and on January 3, and January 4, 1986. Although Respondent originally had not specified a particular date on which it. ceased to be an agricultural employer, in his offer of

proof, Respondent's Counsel asserted that the change in operations which divested ALRB of jurisdiction took place in January or February of 1986.

Respondent's papers now make it clear that on every date the complaint alleges that an unfair labor practice occurred, Respondent was an agricultural employer. Thus, Marvin Mannheim, President of Sunny Gal Egg & Poultry Co., declares that "Commencing on April 1986, and continuing to date, Sunny Cal has processed eggs for sale which it has purchased from other producers. * * * Sunny Cal did not process eggs produced by other producers until April of 1986." Declaration of Marvin Mannheim, dated April 24, 1987, p. 2. Glenna Wisegarver, the bookkeeper for Sunny Cal declares: "During the first three months of 1986 all eggs processed by Sunny Cal were eggs produced by Sunny Cal. * * * The first time that Sunny Cal processed eggs that were produced by a producer other than Sunny Cal was during the reporting period from April 6, 1986 to May 3, 1986." Declaration of Glenna Wisegarver, April 24, 1987, pp. 2-3. Since Respondent's claim to be non-agricultural rests entirely upon its processing eggs other than those it produces, see Austin de Coster d/ba/ De Coster Egg Farms (1976) 223 NLRB 884, and since, taking as true the statements of its own declarants, it is clear that it did not start to process such eggs until April 1986, by its own admission it was an agricultural employer at all pertinent times mentioned in the complaint.

Nevertheless, Respondent continues to press its jurisdictional attack. See Declaration of David Smith, dated April 24, 1987. It appears to be contending that because it is no longer an agricultural employer, this Board cannot hold it accountable for allegedly unlawful acts committed when it was admittedly an agricultural employer. Respondent has cited no authority for this contention which, if pressed to its conclusion, could operate to strip its employees of rights under either the ALRA or the NLRA for, by simply adjusting the amount of eggs it accepts for processing by other producers, Respondent could slip in and out of the jurisdiction of first the state and, then, the federal labor laws.[2] These general principles argue for rejecting Respondent's broad jurisdictional claim, unless it were clear from either the text of the ALRA itself or from NLRA precedent that the Board's jurisdiction is not to be measured at the time of the alleged unfair labor practice.

A literal reading of the Act does not require the result at which Respondent aims: Labor Code section 1160.3 gives the Board jurisdiction to redress any unfair labor practice that "has" been committed, indicating that the Board's remedial jurisdiction is properly invoked so long as Respondent was "once" an agricultural employer at the time of the alleged unfair labor practice. Indeed, this is the way the analagous NLRB section has been interpreted:

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[2]be sure, jurisdiction is sometimes determined by the facts obtaining at the time an action is commenced. Diversity

> Respondent says that it "withdrew" from commerce on or before March 1, 1940, and was not thereafter engaged in commerce. It therefore contends that it was not subject to the Board's jurisdiction after March 1, 1940, and that therefore the Board had no jurisdiction to issue the complaint on May 11, 1940, or to issue the order on April 18, 1942. These contentions assume that, to be subject to the Board's jurisdiction, an employer must be engaged in commerce. The assumption is incorrect. Every employer who has engaged in or is engaging in any unfair labor practice affecting commerce is subject to the board's jurisdiction, regardless of whether or not such employer is engaged in commerce. In this case, it was charged and found, and the finding is supported by substantial -evidence, that respondent engaged in unfair labor practices affecting commerce on July 16, 1937, and continuously thereafter. Therefore the Board had jurisdiction to issue the complaint on May 11, 1940, and to issue the order on April 18, 1942, and had such jurisdiction despite the fact, if it be a fact, that respondent was not engaged in commerce after March 1, 1940. NLRB v. Cowell Portland Cement Co. (1945) 148 F.2d 237, 241:

Since it is clear Respondent was an agricultural employer in January, 1986; that Charging party was duly certified as the representative of Respondent's employees on that date; and that Respondent refused to bargain with Charging Party upon request, *I* again grant General Counsel's motion for summary judgment on the refusal to bargain allegation. Moreover, since the alleged unlawful discharges also took place while Respondent was an

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(Footnote 2 Continued)

jurisdiction, for example, turns on the citizenship of the parties when an action is filed, see, Wright and Miller, Federal Practice and Procedure 2nd Ed. 3608. But such an approach is plainly not compelled. For example, California courts have been given jurisdiction over foreign corporations which have ceasad doing business in the state at the time of the commencement of an action, so long as the cause of action against them arose from business done in the state. Corporations Code §2114.

agricultural employer, the Board has jurisdiction over them as well.

Two issues remain, however: one is the appropriate remedy for Respondent's refusal to bargain and the second is whether the remedial order should be Grafted to require the Regional Director to investigate if, when, and to what extent Respondent's operations have changed.[3] with regard to the first question, and based upon Mannheim's strongly expressed antipathy to the union, see discussion below, I find that Respondent refused to bargain solely for the purposes of delay and therefore recommend contractual makewhole.[4] I also believe the standard Board order should be modified to require the Regional Director to investigate whether, and to what extent, any change in Respondent's operations have altered the scope of the previously certified unit. My principal reason for doing this is not that the Board has no remedial jurisdiction if Respondent's contentions are correct, but that Respondent's claim of changed circumstances

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[3]Respondent's offer of proof and its declarations in support of the re-opened ruling on summary judgment do not obviate the need for investigation on any of these questions. The offer and declarations were taken as true only for the purpose of determining whehter there was any triable issue of fact concerning whether it had improperly refused to bargain.

[4]Although the degree of animus Respondent displayed raises a reasonable suspicion that any change in its business practices might have been motivated to avoid ALRB certification, General Counsel has not moved to amend the complaint to make an issue of Respondent's motive for any such change.

raises questions of the appropriateness of the unit which, if decided in Respondent's favor, might relieve it of its obligation to bargain. See May Department Stores (1970) 186 NLRB 86 [75 LRRM 1308] at n. 5; S & J Ranch, Inc. (1987) 12 ALRB No. 32, pp. 7-8. Accordingly, I shall order an investigation of Respondent's "unit" claims.[5]

II: THE DISCRIMINATORY DISCHARGE

Before considering the circumstances of each of the discharges, a brief background discussion will be useful. In large part, General Counsel's prima facie case depends upon the union animus displayed by company President Marvin Mannheim. In his case in chief, General Counsel's employee witnesses testified about a variety of strongly anti-union statements, including threats, which Mannheim made to his employees prior to the election. Upon cross-examination by General Counsel, Mannheim admitted to making quite a few of them:

(By General Counsel)
Q Mr. Mannheim, on the day of the election do you recall speaking with your employees?
A Yes, sir.

* * *

Did you tell your employees that you were going to put automatic feeders at Sunny Cal?
A Yes, sir.
Q Did you tell your employees that you would put one very night?
A Pardon me, sir?
Q Did you tell your employees that day that you would put an automatic feeder one (sic) each night and then in a month you would have automatic feeders?

[5]Regional Director's findings on this issue are also relevant to the scope of any reinstatement and backpay remedy. As the NLRB

A Yes, sir.
Q Did you tell your employees that if you did that, you wouldn't need anybody down there?
A Yes, sir.
Q Did you tell your employees that you would only have one or two guys down here?
A Yes sir. That's quite common in the industry.
Q Did you tell your employees that all you had to do was go down to the bank that — and tell them that you're going to lay off people, about 15 guys?
A Yes, sir.
Q Did you tell them that you didn't owe any money and that that (sic) would be able put in the automatic feeders if they voted for the union?
A Yes, sir.
Q Did you tell them that you would not let the union beat you?
A Yes, sir.
Q Did you tell them, the employees, on August 22nd, 1985 that you knew they had been having union meetings?
A Yes, sir.

(Footnote 5 Continued)

noted in J. E. Cote (1952) 101 NLRB 1435, 1488, n. 10:

> In this connection, the Respondents have filed a petition requesting the Board to reopen the record for the purpose of adducing evidence to show that, subsequent to the date of the hearing, all of the Respondent corporation's truck delivery routes have been disposed of and the Respondent corporation is now solely a brokerage operation selling to independent distributors and that, accordingly, the Respondent corporation is not now and will not be engaged in interstate commerce and, furthermore, is unable to offer reinstatement to any employee. The petition is denied. The evidence sought to be adduced, except to the extent set forth below, has no bearing on the issue of jurisdiction. Moreover, as to the Respondent corporation's ability to reinstate, the Board does not require the Respondents to do a useless thing. Its order that the Respondents reinstate employees discriminatorily discharged and that the Respondents bargain with the Union, as hereinafter set forth, is conditioned upon the Respondents having in their employ employees in the appropriate unit for which the Union has been certified. The material sought to be introduced by the Respondents is matter to be dealt with in connection with compliance.

Q Did you tell them that if they win they lose, they can never win?
A I don't remember. It's possible, maybe.

* * *

Q Did you tell them, these individuals, the employees on August 22nd, 1985, "No way I'm going to go with the union"?
A Yes, sir.
Q That's what you told them?
A Uh-Huh.
Q Did you tell them that you, "You know I can fight them a year or two, I don't have to give in?
A Yes, sir.

(II: 181-4.)[6]

These statements are properly a part of General Counsel's case since "motive is a persuasive interpreter of equivocal conduct." Pennsylvania Greyhound Lines, Inc. (1937) 1 NLRB 1, -23 [1 LRRM 303], enf'd in part (3rd Cir. 1937) 91 F.2d 178, rev'd (1938) 303 U.S. 261:

> Hostility toward the union was not in itself an unfair labor practice and a presumption that such state of mind once proven was presumed to continue to exist [does] not shift the burden of proving [an] alleged unfair labor practice....
>
> We think the Board properly took judicial notice of [background evidence] for the limited purpose for which it was offered. [Citations] As said by the Supreme Court in Federal Trade Commission v. Cement Institute, 332 U.S. 683 . . . [such evidence] may "nevertheless be introduced if it tends reasonably to show the purpose-and character of the particular transactions under scrutiny." Paramount Cap Mfg. Co. v. NLRB (8th Cir. 1958) 260 F.2d 109, 113 [43 LRRM 2017].

The Discharge of Jose Alfredo and Joaquin Martinez

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[6]After Manheim denied making certain other statements attributed to him by the employees, General Counsel sought to introduce a tape recording of his comments as proof of Mannheim's lack of credibility. Upon objection by Respondent, I refused to permit the introduction of the tape solely on the grounds that the tape

Jose Alfredo Martinez worked for Respondent since 1974. He recalled Mannheim telling a group of employees on the day of the election "If the union won he would not let it in; he would automate; he would be able to fire 15 people so that if the union were to win, they would lose." Mannheim also said "If you vote in my favor, you will have good salaries, vacations, benefits and everything." (I: 29-30) The day after the election, Jose Alfredo and his brother, also named Jose, had a conversation with Mannheim near the kitchen in which Mannheim solicited their signatures on some sort of petition to get the union out. Jose Alfredo refused

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(Footnote 6 Continued)

should have been turned over pursuant to the Board's standard pre-hearing "Giumarra" order. General Counsel contends this was error since the tape was intended to be used solely for impeachment purposes. Respondent contends that the tape recording violated Penal Code section 632(a) and (d) and was inadmissible in any event. My ruling was based solely on Giumarra grounds. In any event, I believe Respondent's argument is mistaken since Penal Code section 632(a) applies only to confidential communications which to my mind a compaign speech is not. So far as General Counsel's contention that the tape recording was primarily for impeachment purposes and, therefore, did not have to be produced under the Board's standard pre-hearing Giumarra order, I do not agree. First, I do not see that Giumarra itself makes the distinction between statements to be used for purposes of impeachment and statements to be used in General Counsel's case-in-chief. See Giumarra Vineyards (1977) 3 ALRB No. 2. Secondly, as is evident from my discussion of the facts relating to the discharges, General Counsel's case leans heavily on Mannheim's union animus. Accordingly, I can see no reason, consistent with the purpose of Giumarra which would justify permitting General Counsel to withhold such potent evidence from his case in-chief while holding it in reserve for rebuttal.

to sign the paper, Jose Martinez signed it. (IV: 6.)[7]

According to Jose Alfredo, he and Joaquin Martinez, were fired on January 4, 1986 under the following circumstances. Jose Alfredo, Joaquin Martinez, Leandro Rodriguez, and the other Jose Martinez were loading *a* truck with eggs about *a* quarter past five in the evening when Mannheim arrived, told them he was sick of them (I: 36-37), they didn't have work anymore and that "if they want work, ask the union for it." He also said, kicking the dirt, "Fuck the union." (I: 35.)

Joaquin Martinez corroborated Jose Alfredo's testimony about the various conversations with Mannheim in which the latter promised raises and vacations if the workers would "give up" the union and in which he also told the employees not to vote for the union or else he would automate. Like Jose Alfredo, he too was asked to sign a petition after the election in order to get the union out and he, too, refused.

He also confirmed Jose Alfredo's account about the events which took place on his last day of work. Acorrding to him, Mannheim came by sometime after 5:00 p.m. got out of his pick-up

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[7]Retaliation for the employees refusal to sign a petition to get the union out is obviously "discrimination...to discourage membership in any labor organization." Labor Code section 1153(c). Thus, Respondent's argument that General Counsel has not provided any evidence of a causal connection between the employee's concerted activity and Respondent's action against them is incorrect.

truck angrily, and started to yell that it was 5:00, the men still had not left; he was sick and tired of the union; the men should leave and see if the union would help them. The next day Joaquin came back to work to see if they had been fired and Mannheim told him yes, he was fired because of the union. He gave Joaquin the final checks for him and his brother.

Mannheim testified that on the day he told Jose Alfredo and Joaquin to leave, he had heard some employees were among the cattle which they had been warned to avoid after an employee had been injured around the corrals. When he told Jose Alfredo and Joaquin to stay away from the cattle, they responded by taunting him and laughing. It was then that he told them they were through, but he did not mean to fire them at that moment; it was only after thinking about it that he decided to get rid of them, principally because they had not been doing their work on time and had generally been horsing around. According to Mannheim, the two had been warned repeatedly about their work.

General Counsel has established a prima facie case consisting of Mannheim's union animus, and specifically, his threats to get rid of employees if the union won, Jose Alfredo's and Joaquin's refusal to sign the petition,[8] and the abruptness

[8]The inference of discrimination to be drawn from the fact that Jose Alfredo and Joaquin refused to sign the petition and were fired and that Jose Martinez signed the petition and was not fired, is somewhat weakened by the lack of evidence about (1) what Leonardo did with respect to the petition and (2) the failure to prove what happened to him. (Compare I: 83; II: 160).

of Mannheim's reaction. All these factors add up to a reasonable inference that the two men were discharged for discriminatory reasons. The burden of proof passed to Respondent to prove that it would have discharged the men even if they had signed Mannheim's petition.

It is clear from Joaquin's feeling the need the following day to ask whether he had been fired, that what Mannheim actually said at the corral was ambiguous enough for the men not to be sure they had been discharged. This seems a likely reaction to the bizarre outburst the employees testify they heard. The ambiguity of the situation is also consistent with at least that part of Mannheim's story that he did not intend to fire the men. Nevertheless, I credit the employees' version because I disbelieve Mannheim's. Mannheim was such an insouciant, even contemptuous witness, that I couldn't avoid the impression that his explanation of his actions was of a piece with the anti-union attitude he expressed to the employees prior to the election and, was, therefore, entirely pretextual. I find Respondent did not meet its burden of proof as to the discharge of Jose Alfredo and Joaquin Martinez.

The Discharge of Pedro Mendoza

Pedro Mendoza was hired by Respondent in May, 1984. After the election Mannheim also approached him to sign a petition to get rid of the union which he refused to sign. Mendoza's last day of work was October 13, 1985. He and three co-workers, Angel

Gutierrez, Hector Gutierre2 and a man named "Chino" were told by Mannheim to clean up the steer manure in front of the pens. Each man had his own house to clean up. According to Mendoza, Mannheim approached him and abruptly fired him, saying he no longer had a job: "He said – he told me. "You did pay attention to me. Here's your check. There is no more work for you." (II: 102.) Mendoza admits he had not finished his job before He was fired.

Mannheim testified he fired Mendoza for not finishing his job and that he had previously warned him repeatedly about slacking off.

General Counsel's prima facie case consists of the same elements as those previously discussed with respect to the discharge of Jose Alfredo and Joaquin Martinez, except that the evidence of disparate treatment from which forbidden motivation can be reliably inferred is more attenuated with regard to this incident since General Counsel did not prove, as he had with respect to the previous incident, that any of Mendoza's co-workers who were not fired signed the petition. Moreover, Mendoza admitted he had not finished his job. Thus, the General Counsel's prima facie case is weaker with respect to Mendoza's termination than it was with respect to that of the Martinezes.

Still despite Mendoza[1]s not having finished his job the episode smacks of pretext. As stated earlier, I have no confidence in Mannheim's testimony that he had previously warned Mendoza: it was offered without conviction, tossed off, as though

not even believed by the witness himself. Accordingly, I find that Respondent did not meet its burden of proving that it would have fired Mendoza in the absence of his refusing to sign the anti-union petition.

The Discharge of Ventura Meza

Ventura Meza was supposed to report to work at 5:00 a.m. on October 6, 1985, but he was unable to do so because he had been arrested the previous evening for drunk driving. According to him, he called his foreman, Jorge Martinez, that morning and told him why he wasn't going to be on time. Martinez told him it was all right. When he did report at 9:00 a.m. he saw Mannheim, and asked him if he still had a job and Mannheim said, no. The next day he again asked Mannheim to put him back to work and Mannheim again told him no. Like the others, Meza refused to sign a petition to get out the union that Mannheim was circulating.

Mannheim testified Meza was still drunk when he reported to work and Mannheim told him it was one time too many. However, instead of indicating that he was fired, Meza's time sheet indicates he did not return to work.

Again, General Counsel's prima facie case consists of the elements previously discussed with the addition of Respondent's shifting reasons, namely, the notation on Meza's time sheet that he never returned to work and Mannheim's testimony that he was fired because he was drunk.

Of the three sets of discharges, this is the strongest dual motive situation since Meza himself testified that when he

got out of jail he tentatively asked Mannheim if he still had work which appears to indicate he knew Mannheim had problems with his being drunk. Nevertheless, based on my severe distrust of Mannheim I still cannot find Respondent met its burden of proving that he would have fired Meza in the absence of his having stated his pro-union preference by refusing to sign the petition.

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent SUNNY CAL EGG AND POULTRY CO., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment in order to discourage union activity.

(b) Failing and refusing to meet and bargain collectively in good faith as defined by Section 1155.2(a) of the Agricultural Labor Relations Act with Teamsters Local 166, as the exclusive bargaining representative of its agricultural employees.

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

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

(a) Offer to Jose Alfredo Martinez, Joaquin Martinez, Pedro Mendoza and Ventura Meza immediate and full reinstatement to

their former or substantially equivalent position without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Jose Alfredo, Joaquin Martinez, Pedro Mendoza and Ventura Meza for all losses of pay and other economic losses he suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(c) Upon request, meet and bargain collectively in good faith with Teamsters Local 166 as the exclusive collective bargaining representative of its agricultural employees and, if agreement is reached, embody the terms thereof in a signed contract.

(d) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondents failure and refusal to bargain in good faith with Teamsters Local 166, such makewhole amounts to be computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from January 6, 1986 and continuing until the date of this Order and thereafter until such time as Respondent commences good faith bargaining with the Teamsters Local 166 or until the date if any, that the unit for collective bargaining was no longer appropriate because of changed circumstances.

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

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from the October 13, 1986 to the date of issuance of this Order.

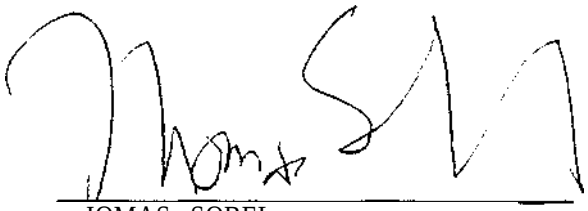
(h) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional

Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

DATED: June 24, 1987



IOMAS SOBEL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that SUNNY CAL EGG AND POULTRY COMPANY, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging Jose Alfredo Martinez, Joaquin Martinez, Pedro Mendoza, and Ventura Meza for exercising their rights under the ALRA and by refusing to bargain collectively with the certified representative of its employees.

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

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

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

WE WILL NOT refuse to bargain in good faith with your certified exclusive bargaining representative.

WE WILL NOT discharge any employee for exercising their rights under the Act.

WE WILL reimburse the above-named employees for all losses of pay and other economic losses he has suffered as a result of our discriminating against them, plus interest.

WE WILL bargain in good faith with your certified exclusive bargaining representative.

DATED: SUNNY CAL EGG AND POULTRY COMPANY

By: _____
(Representative) (Title)

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question, contact the Board at 319 Waterman Avenue, El Centro, California, (619)353-2130.

DO NOT REMOVE OR MUTILATE.