Visalia, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CALIFORNIA VALLEY LAND COMPANY, INC., and WOOLF FARMING COMPANY OF CALIFORNIA, INC., Respondent, and SALVADOR RUIZ, an Individual; RUBEN VILLAGRANA, an Individual; and MIGUEL GONZALEZ, an Individual; Charging Parties.	)	Case Nos. 89-CE-54-VI 89-CE-58-VI 89-CE-61-VI 17 ALRB No. 8

DECISION AND ORDER

On March 29, 1991, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent timely filed exceptions to the ALJ's Decision, with supporting points and authorities. The General Counsel filed an answering brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and the briefs, and has decided to affirm the rulings, findings, and conclusions of the ALJ, as modified herein, and to adopt her recommended Order, with modifications.

This case involves various allegations of discriminatory threats, interrogation, suspension, discharge, and delay in recall from layoff. The Board affirms the decision of the ALJ with respect to employees Salvador Ruiz and Ruben Villagrana. They will not be discussed further here. The layoff and recall of

three tractor drivers (Drivers), Miguel Gonzalez, Jose Villagrana and Luis L. Jimenez, is discussed below.

BACKGROUND

Respondent adopted a handbook with layoff procedure in 1986. The handbook, in English and Spanish, was distributed to the Drivers and remained unchanged at the time of this incident. It provided, in pertinent part:

> Layoffs - Regular work will be provided as far as practical. However, because of the seasonal nature of our business, there are times when layoffs are necessary. If a layoff should become necessary, employees will be laid off on the basis of skill, ability, attendance and production records. In cases where there is little or no difference in performance standards, length of service may be the determining factor.
>
> All departments will try to schedule work so that employees who must be laid off can be given adequate advance notice. However, it is recognized that there are times when crop conditions make it impossible to give such advance notice. Every effort will be made to call laid off employees back to work as soon as possible. An employee who declines recall to his regular job will be considered to have quit.[1/]

On June 9, 1989,[2/] the day following the withdrawal of the United Farm Workers of America, AFL-CIO (UFW or Union) petition for certification, the Drivers were laid off. The General Counsel did not allege that this was a discriminatory practice. There was evidence that Respondent issued its "Layoff Notice" in the following format:

> You are hereby being notified that due to a decrease of normal work load you are being laid off. If you wish to

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[1/]General Counsel did not allege a discriminatory layoff. As is shown below, this language is included for its assistance in assessing Respondent's recall policy.

[2/]All dates hereafter are 1989 unless otherwise indicated.

be considered for re-employment, you must notify the company of changes in where you can be contacted. Failing to contact the company, if recalled, within 1 week/3 weeks - the company will assume you are no longer interested in employment with this company.

The notices also provided space for the employee's address.

Although the layoff notices specifically given to the Drivers were not placed in evidence, we infer from the record that they were identical to the notice quoted above which was admitted into evidence. Driver Gonzalez testified that on layoff, "They're given a piece of paper that says if one does not go back or present him back [sic] within three weeks, then he's going to be considered not interested anymore." (RT 11:9.)[3/] He further testified that he went back within the required time, although he could not recall a specific date, and was told he would be informed when work started.

Driver Luis L. Jimenez testified that he sought work after the layoff from foreman Jesus Guizar, and that Guizar said he would let him know if there was anymore work. (RT 11:46.) No date was specified by Guizar, nor was any indication of the basis for rehire given. The record was silent as to any action taken by driver J. Villagrana.

Guizar recalled only one meeting with Jimenez and Gonzalez, the one on June 26 when they were accompanied by Union

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[3/]Citation to the reporter's transcript of the hearing is by RT, followed by volume, page number and, where appropriate, by line. General Counsel's, Respondent's and Joint Exhibits are denominated "GCX", "RX", and "JX", respectively, followed by the exhibit number. The Administrative Law Judge's Decision is denominated "ALJD".

representative Virginia Sanchez. (JX2; RT 111:12:25-28.) He did not recall J. Villagrana being present at that time. J. Villagrana testified that he went back to the company to ask for work, "When they began to call the people, and they wouldn't call us." (RT 1:164:20-28.) J. Villagrana placed this on or after the 20th of June.

JX3 showed that the recall of tractor drivers began on June 19 with the hiring of Jose Carrillo, who could also drive dozers and graders, and Manuel Moreno, Guizar's brother-in-law. Respondent argued that Carrillo was hired first because he served as backup for two other positions, those of dozer driver Gillermo Sandoval and road grader Alejandro Lopez. Three additional drivers were hired on June 26. At approximately 4:30 p.m. on that date Drivers Gonzalez, Jimenez, and possibly J. Villagrana, in the company of UFW representative Virginia Sanchez, contacted Guizar at the company.

From this point forward there were significant differences in the testimony. According to Guizar, Gonzalez stated he was "ready to go to work". Guizar responded that there was no work available and Gonzalez would have to come back later. Guizar denied saying anything further, challenging the group to a fight, or calling them troublemakers, lazy bums, or "cabrones." According to Guizar, no one else spoke at the meeting. In explaining his basis for hiring the first five drivers as indicated above, Guizar stated he had discretion in hiring, and that he hired on the basis of need, e.g., Jose Carrillo, a grader operator, nepotism, e.g., Efren Moreno, his brother-in-law and

Rigoberto Mora, brother of another foreman, and dependability, e.g., David Cordova and Manuel Montero. (RT 111:15-16.) Dependability was mentioned as a factor in each instance except in the hiring of Carrillo. Guizar testified that seniority did not play a role in the rehire of the first five positions. (RT 111:17.)

The Drivers' version of the June 26 meeting differs from Guizar's. Two of the three, Jimenez and J. Villagrana, attributed to Guizar vulgar remarks, threats, and the statement that there was "no work for Chavistas."[4/] The Drivers raised the issue of seniority in hiring with Guizar, albeit indirectly. According to these witnesses, his response was to the effect that he had orders to employ whomever he wanted, there was not any work, and if they did not like his choice, they could challenge him to a fight. (RT 11:31-32.) Jimenez interpreted this to mean that Guizar did not have to follow seniority. However, they all acknowledge that seniority was not a basis for recall. (See RT 1:171:17-27 (J. Villagrana); RT 11:17:16-24 (Gonzalez); and RT 11:48:6-8; 51-51 (Jimenez).)[5/]

On June 28, an unfair labor practice charge was filed by Gonzalez. On July 5 or 6, Guizar hired Augustine Lara as a grader operator. There was, however, no proof that other tractor

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[4/]The ALJ, largely based upon demeanor, credited the Drivers' version of these events. We affirm that credibility resolution.

[5/]Gonzalez also admitted that the portion of his declaration about the Drivers being the only members of the tractor crew who were not recalled was incorrect. This was known to him at the time he made the declarations.

driver positions were available. Gonzalez, J. Villagrana, and Jimenez were placed on the night shift, as were all tractor drivers hired after them. In fact, half of all the recalled tractor drivers went on the night shift. The Drivers had worked the night shift in the past, with one of them having worked the night shift in 1989. (See RT 11:38:3-12 (Jimenez); RT 11:10:13-18 (Gonzalez); RT 111:167:7-10 (J. Villagrana).) Nightshift received a ten cent per hour pay differential. Of all the tractor drivers laid off, two were not recalled. Within a month of recall, J. Villagrana was returned to the day shift.

As will appear below, we find that the General Counsel successfully established a prima facie case and that Respondent's proffered business justification for the order in which the alleged discriminatees ultimately were recalled to work was not pretextual. Accordingly, the remaining question before the Board is whether Respondent, by a preponderance of the evidence, has carried its burden of demonstrating that it would not have altered the dates on which Gonzalez, Jimenez, and J. Villagrana were actually assigned to work even if they had not engaged in any protected activity.

ANALYSIS AND CONCLUSIONS

In cases of discrimination in employment under Labor Code section 1153(c) and (a), General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union activity was a motivating factor in the employer's action which is alleged to constitute a violation of the Act. General Counsel must show, by a preponderance of the evidence, (1)

that the alleged discriminatee(s) engaged in activity in support of the union; (2) that the employer had knowledge of such conduct; and (3) that there was a causal relationship between the employees' protected activity and the employer's adverse action (in this instance, the alleged failure to timely recall the discriminatees). (See, e.g., Verde Produce Company (1981) 7 ALRB No. 27.)

Where it is clear that the employer's asserted reasons for its actions can be viewed as wholly lacking in merit, i.e., pretextual, the presentation *of* General Counsel's prima facie case is in itself sufficient to establish a violation of the Act. In 1980, the National Labor Relations Board (NLRB or national board) acknowledged that in certain cases, in which the record evidence disclosed an unlawful as well as a lawful cause for the employer's actions, the classic or traditional pretext case analysis proved unsatisfactory, and decided that such cases should not depend solely on the General Counsel's prima facie showing. In order to devise *a* standard approach for what came to be characterized as "dual-motive" cases, the NLRB modified the traditional discrimination analysis. Thus, in Wright Line, A Division of Wright Line, Inc. (Wright Line) (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert, den. (1982) 453 U.S. 989 [109 LRRM 2779], as approved in NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857], the national board established the following two-part test of causation in all cases of discrimination which involve employer motivation:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (Wright Line, supra, at p. 1089.)

We begin the application of the foregoing rules to this matter with an examination of the prima facie case. The Board accepts the ALJ's conclusion that (1) the Drivers engaged in protected union activity and (2) the employer had knowledge of this activity. Moreover, General Counsel proved anti-union animus based upon the comments attributed to Guizar. There is also sufficient evidence in the record to establish that Respondent's policy following layoff did not require laid-off employees to apply for recall. Instead it appears that employees were contacted when work became available. This conclusion is based on three factors. First, the Drivers testified that Respondent told them they would be notified when work became available. On June 26, consistent with this testimony, the Drivers went to Guizar not to apply for work, but to complain about others being recalled before them. Second, Respondent never argued that the Drivers failed to follow any policies with regard to recall. Third, and most persuasive, is the language of the layoff notice Respondent provided to employees quoted supra.

The only reasonable construction of the layoff notice is that the company policy is to contact laid off employees when suitable work becomes available. The employees' responsibility is to notify the Respondent if there is a change in where they can be

contacted and to respond to the recall notification within one to three weeks. Thus, there was no need for the Drivers to apply for recall. Therefore, any failure to formally request work is of no importance in this case.

In establishing discrimination, the General Counsel must show that the alleged discriminatees were not considered on an equal basis with other like employees vying for the same position, and that the dissimilar treatment affected the conditions of their employment. (Passaic Daily News v. NLRB (D.C. Cir. 1984) 736 F.2d 1543 [116 LRRM 2721].) Here the tractor drivers were recalled in stages: two on June 19, three on June 26, one each on July 7 and 10, and three on July 17, 1989. This is consistent with normal agricultural requirements. Moreover, although General Counsel's complaint alleges employees "less proficient or no more proficient" than Gonzalez, J. Villagrana and jimenez were recalled first, the record proof does not support this. Only J. Villagrana testified as to his proficiency, admitting that he was not good at making straight rows, but was otherwise the same as the other tractor drivers. The record as to the other alleged discriminatees is silent on this issue, except to the extent their time on the job was reflected in JX3. However, all three of the Drivers admitted that after Respondent's adoption of its handbook in 1986 seniority was not a factor in layoffs.[6/] If seniority was a factor in recalls, then the General

[6/]The ALJ acknowledged that the company did not necessarily follow seniority after 1986, but concluded that the workers expected the company to use seniority. This inference was drawn from testimony. (RT 1:172; 11:17; and 111:48). The testimony at the first two references does not support the ALJ's conclusions while the third does not discuss seniority at all.

Counsel was obligated to establish it, particularly if seniority was equated with proficiency. He has not done so.

The General Counsel's claim that the Drivers were discriminatorily affected in their employment once recalled by virtue of their assignment to the night shift is similarly lacking in support. Half of all the recalled tractor drivers went on the night shift. The alleged discriminatees did represent 60 percent of the night shift group, but one of the discriminatees had worked night shift on and off during 1989, and the others had worked night shift in the past.[7/] Further, the shift carried a ten cent per hour wage differential and none of the discriminatees affirmatively stated that the shift was less desirable.

In this case the ALJ's credibility resolutions largely determined the Wright Line analysis. Some of the ALJ's credibility resolutions, such as those relating to Guizar's anti-union statements and threats, were based on the witnesses' demeanor. The Board will not overrule this type of credibility resolution unless the clear preponderance of all the relevant evidence demonstrates that it is incorrect. (Standard Dry Wall Products, Inc. (1950) 91 NLRB 544 [26 LRRM 1531]; David Freedman & Co., Inc. (1989) 15 ALRB No. 9.)

Others, however, were based on such factors as reasonable inferences, the consistency of witness testimony, whether a witness's alleged behavior comported with common experience, and

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[7/]RT 11:38:3-12 (Jimenez); RT 11:10:13-18 (Gonzalez); RT 111:167:7-10 (Villagrana).

the presence of corroboration. The pertinent example is the ALJ's discrediting of Guizar's explanation for rehiring the first or main backup driver, Carrillo, when another grader driver, Lara, was hired when a backup was needed. (RT 111:29-30.) Guizar's inconsistency was the apparent reason for the ALJ's credibility determination as there was no indication that demeanor or bias was a factor. The inconsistency, however, is real only if one assumes that it is inherently improbable for the Respondent to want more than a single backup grader operator. Respondent had two nontractor driving positions that needed coverage, the grader and the dozer. None of the Drivers could perform these tasks. The pace of work was just starting to pick up at the time Carrillo, the alternate grader operator/tractor driver was retained. The foreman's rationale for hiring the four remaining nonclaimants was not questioned. It was dismissed, rather, as difficult to verify.

The Respondent's layoff policy, which may be logically applied in rehiring, permitted recall based on the "availability" of work, as well as the proficiency of the operator. The ALJ emphasized Respondent's use of Carrillo for other tractor work at the time Lara was employed, and inferred from that the availability of work which could have been performed by any of the Drivers. This, however, disregards the flexibility Carrillo afforded Respondent, and the absence of any showing by the General Counsel that the position was filled by someone who performed "less proficiently or no more proficiently" than the Drivers.

The negative determination of Guizar's credibility on the

order of recall was also based on the testimony of foreman Agundez that the company's operations were not any slower or busier in 1988 than in 1989 but about the same (RT 1:9:18), and the testimony of the Drivers concerning Guizar's negative response to their request for rehire at the company's shop in late June. Agundez's testimony was offered to show an inconsistency in Guizar's statement to the effect that only night shift work was available. Agundez's statement, however, was very general, and was subject to the inference that the level of business activity described by Agundez was not inconsistent with the specific needs of Guizar's unit. Further, Guizar's position was corroborated in part by Jimenez's testimony that he worked night shift in prior seasons and in 1989 prior to layoff.

In credibility resolutions of the type outlined above the Board is not constrained, as it is in the case of demeanor-based determinations, and may reject the ALJ's findings in favor of its own when the ALJ's findings conflict with well supported inferences from the record considered as a whole. (Mann Packing Co. (1990) 16 ALRB No. 15 at p. 9, Krispy Kreme Donut Corp. v. NLRB (6th Cir. 1984) 732 F.2d 1288, 1290 [116 LRRM 2251], NLRB v. Mt. Vernon Telephone Co. (6th Cir. 1965) 352 F.2d 977, 980 [60 LRRM 2505], NLRB v. Elias Brothers Big Boy, Inc. (6th Cir. 1964) 327 F.2d 421, 427 [55 LRRM 2402].) In NLRB v. Pyne Molding Corp. (5th Cir. 1955) 226 F.2d 818, 819 [37 LRRM 2007] the court stated the applicable standard for rejection of a trial examiner's credibility determination as follows:

> Although the Board may not overrule its Trial Examiner

> by discarding the positive credible testimony of a witness in favor of an inference drawn from tenuous circumstances * * * it may refuse to follow its Trial Examiner in crediting testimony where it conflicts with well supported and obvious inferences from the rest of the record. Such refusal is particularly justified where the testimony in question is given by an interested witness and relates to his own motives.

Accordingly, we overrule the ALJ's discrediting of Guizar in so far as it pertains to the basis of the hiring sequence rather than to the existence of anti-union animus. This has been done not because of any single conflict, as with the conflicting declarations in Mann Packing, supra, but because of the cumulative effect of the evidence in the record as a whole, in demonstration, we turn to Respondent's proof of its affirmative defense under Wright Line.

Respondent adopted an employee handbook in 1986 specifying its layoff procedures. While the handbook is silent on recall procedures, it would be illogical to conclude that the criteria used in recall would be at variance with those employed for layoff. Thus, applying the relevant layoff rule, recall was to be based on "skill, ability, attendance, and production records." Only where there was "little or no difference in performance standards" was length of service to be "the determining factor". With respect to each of the five tractor drivers hired in advance of the alleged discriminatees, Guizar provided a reason for their earlier employment which fell within the above criteria, e.g., skill, or a nondiscriminatory reason that is not prohibited by the Act, e.g., nepotism, or both. Guizar's testimony, moreover, that he had discretion in hiring was

consistent with the handbook.

With respect to seniority, Guizar testified that it was not a factor in any of the first five rehires. The ALJ concluded that the Drivers "expected the Company would basically use seniority in calling them" (ALJD at p. 17), but the transcript references cited by the ALJ fail to support this conclusion. Furthermore, each of the Drivers acknowledged that seniority was not the primary factor in recall. The Drivers based this conclusion either on their reading of the handbook or their experience with Respondent's practice after 1986.

The fact that Guizar hired the Drivers for the night shift is consistent with his statement that there was no work available on June 26, and with recalling them when work was both available and suitable. The General Counsel failed to prove that the other hires were less proficient, and only in the case of J. Villagrana is there evidence that he was as proficient as those hired. At the same time, the record shows that the Drivers lacked the skill to perform alternate work in the form of grader or dozer operations. Thus, given the Drivers' skills, Guizar's statement that there was no work available for them until they were hired on night shift remains unrebutted.

The General Counsel undertook to prove that night shift work constituted a change in the conditions of employment or an example of disparate treatment. (See complaint at paragraph 25.) Although the ALJ states, "The three of them described the night shift as less desirable even though it paid ten cents more per hour than the day shift," (ALJD at p.14), our review of the record

supports the finding that the night shift paid more, but produced no evidence that it was less desirable. In total, five individuals were hired for the night shift. The alleged discriminatees did represent over half of this group, but one of the three Drivers had worked the night shift on and off during 1989. Moreover, the other two had worked the shift in the past. Both J. Villagrana's testimony and the complaint show that the night work concluded on or about July 25. While something of the night shift's desirability may possibly be inferred from the fact that two of the three drivers had not worked it for some time, in the Board's experience, such desirability or attractiveness is largely a matter of personal preference. (See Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].)

Finally, there is no indication that the rehiring process represented a sudden, unexplained departure from the usual practice. In fact, the record does not show any change in the layoff section between the adoption of the handbook in 1986 and 1989. Further, the General Counsel has provided no history of favorable work records for the Drivers which would support their earlier rehire. J. Villagrana, the only driver testifying on this point, did not hold himself out as better qualified. (RT 1:179-180.) Guizar's testimony with regard to dependability, therefore stands unrebutted. The record also shows that the Drivers were not offered reinstatement until after the charges were filed on June 28. At first glance, this may suggest that Respondent was not motivated to rehire until faced with the threat of an unfair labor practice charge. This ignores, however, the

absence of any need for additional drivers until July 7 and Respondent's prior knowledge that two other union activists had previously filed charges, viz., Ruiz on May 19 and Ruben Villagrana on June 19. If Respondent had been merely trying to mitigate, it is reasonable to suppose that it would have hired all of them at once.

In sum, we believe that the ALJ erred in finding that Guizar's explanation of the hiring of a back up grader driver, Carillo, is contradicted by evidence that another employee, Lara, was assigned to drive *a* grader on one occasion when a back up was needed. Without further explanation of the circumstances of that occasion, we cannot agree that it undermines Guizar's explanation for Carillo's hiring. Second, Guizar's stated reliance on nepotism and dependability in the other hires, while perhaps vague and difficult to verify, is unrebutted, plausible, and consistent with the discretion he was given in hiring. Third, other factors, such as the fact that two other drivers were not recalled at all and that there was no showing that night work was less desirable, militate against a finding that the recall was discriminatory in nature. Lastly, there was no evidence that Respondent deviated from past practice, or that the alleged discriminatees had superior work records or other attributes that would support their expectation of being recalled first.

In conclusion, we find that Respondent, as required by Wright Line, has set forth a legitimate business justification for its rehiring sequence. That justification demonstrates that the order of recall would have been the same even in the absence of the Drivers' union activity. While Respondent's showing was

not fully developed, it was nevertheless sufficient to cause the General Counsel to go forward with rebuttal, which was not forthcoming.[8/]

ORDER

Pursant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent California Valley Land Company, Inc. and Woolf Farming Company of California, Inc. (Respondent), its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Threatening agricultural employees with reprisals for engaging in the exercise of their rights guaranteed by Section 1152 of the Act;

b. Interrogating agricultural employees about their union sympathies;

c. Unlawfully suspending, discharging, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in activity protected by Section 1152 of the Act;

[8/]As noted previously, we rely on the credited testimony of Luis Jimenez who described a visit to Guizar to seek work along with Gonzalez and J. Villagrana but was told there was no work for "Chavistas." When examined under an objective standard, that comment would constitute a threat to employees that Respondent would not provide work for union supporters and thus, would serve to interfere with, restrain and coerce employees in the exercise of their Labor Code section 1152 rights. Since the facts of the matter were fully litigated, the Board may, and hereby does, find that the statement comprises an independent violation of section 1153(a) of the Act. Accordingly, we will remedy the violation in the standard manner by ordering Respondent to cease and desist from such conduct. For the same reason we affirm the ALJ's finding that foreman Pizana impermissibly interrogated Luis Jimenez.

d. In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Act.

2. Take the following affirmative actions designed to effectuate the policies of the Act;

a. Offer Salvador Ruiz immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment.

b. Offer Ruben Villagrana immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment.

c. Make whole Salvador Ruiz for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful discharge. Loss of pay is to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharge. The award also shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

d. Make whole Ruben Villagrana for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful suspension and discharge. Loss of pay is to be determined in accordance with established Board precedent.

The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful suspension and discharge. The award also shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

e. Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the back pay or make whole amounts due under the terms of the remedial order.

f. Sign a Notice to Employees embodying the remedial order. After its translation by a Board agent into all appropriate languages, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order.

g. Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

h. Post copies of the Notice in all appropriate languages in conspicuous places on Respondent's property, including places where notices to employees are usually posted, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy

or copies of the Notice which may be altered, defaced, covered or removed.

i. Upon request of the Regional Director, mail copies of the Notice in all appropriate languages to all employees employed by Respondent during the period from May 12, 1989, the date of the first violation, to May 12, 1990, one year thereafter.

j. Provide a copy of the signed Notice to each employee hired by Respondent during the twelve (12) month period following the issuance of the remedial order.

k. Arrange for a Board agent or a representative *of* Respondent to distribute and read the Notice in all appropriate languages to Respondent's employees assembled on Respondent's time and property, at times and places to be determined by the Regional Director. Following the reading, a 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 employee rights under the Act. All employees are to be compensated for time spent at the reading and question-and-answer period.

1. Notify the Regional Director, in writing, .thirty (30) days after the date of issuance of this remedial Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically

thereafter in writing what further steps have been taken in compliance with the remedial Order.

DATED: August 29, 1991

BRUCE J. JANIGIAN, Chairman[9/]

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JIM NIELSEN, Member

[9/]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.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by Salvador Ruiz, Ruben Villagrana, and Miguel Gonzalez, the General Counsel of the ALRB issued a complaint which alleged that California Valley Land Company, Inc. and Woolf Farming Company of California, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by discharging Salvador Ruiz and by suspending and discharging Ruben Villagrana. The Board also found we violated the law by interrogating Mr. Ruiz and Mr. Jimenez about their beliefs regarding the United Farm Workers of America, AFL-CIO (Union) and threatening the workers with adverse consequences to their employment because of their support for the Union.

The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

We also want you to know 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, and 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 you have these rights, we promise that;

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

WE WILL NOT threaten, interrogate, or otherwise interfere with, restrain, or coerce you if you chose to do or not to do any of the things listed above.

WE WILL NOT suspend, discharge, or otherwise discriminate against any employee, because he or she has supported the Union or engaged in Union activity.

WE WILL offer to reinstate Salvador Ruiz and Ruben Villagrana to their previous positions and reimburse them, with interest, for any loss in pay or other economic losses they suffered because we suspended and/or discharged them.

Dated:

CALIFORNIA VALLEY LAND COMPANY, INC. and WOOLF FARMING COMPANY OF CALIFORNIA, INC.

By: _____
(Representative) (Title)

If you have questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is location at 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995.

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

California Valley Land Co., Inc. (UFW)

17 ALRB No. 8
Case Nos. 89-CE-54-VI
89-CE-58-VI
89-CE-61-VI

Background

In 1989 five employees of California Valley Land Co., Inc. and Woolf Farming Co. of California Inc., a single integrated business enterprise and a single employer, spearheaded a UFW organizing drive. Each of these employees subsequently experienced changes in his employment which he attributed to discrimination by his employer. Salvador Ruiz, who had been an irrigator on an hourly basis, was rehired as an irrigator on a piece rate basis. When he failed to complete the assignment, he was first laid off and then terminated. Ruben Villagrana, also an irrigator, was suspended and thereafter terminated for allegedly drinking on the job. Gonzalez, Jimenez and Jose Villagrana, tractor drivers, were laid off, and after a delay in being recalled, were assigned to the night shift for a period before being returned to day work. Based on the preceding facts, unfair labor practice charges were filed, a complaint issued, and the matter proceeded to hearing in September of 1990. With one exception all witnesses were either alleged discriminatees or representatives of the employer. The documentary evidence consisted of declarations, portions of the employee handbook, the employer's layoff notice, and a tractor driver list.

ALJ Decision

The employee organizers recounted interrogations and anti-union statements by those in management positions, who in turn denied any such conduct. The ALJ credited and discredited testimony on both sides, drew inferences from the testimony, and the sequence of events, and concluded that violations had occurred. Absent from the record were unaligned witnesses, clear inconsistencies in testimony, or major testimonial conflicts with prior declarations.

Board Decision

The Board adopted the ALJ's determinations with respect to Salvador Ruiz and Ruben Villagrana. The Board also accepted the ALJ's conclusion that (1) the three tractor drivers engaged in protected union activity, (2) the employer had knowledge of this activity; and (3) there was union animus. However, the Board did not accept either the ALJ's total discrediting of the foreman Guizar or her application of the Wright Line causation test. The Board found Guizar's testimony on the rehiring process credible in spite of his anti-union animus. This was based on an

examination of the record as a whole and the fact that the ALJ's conclusions were reached on factors other than demeanor. The ALJ's conclusions with respect to seniority and the undesirability of the night shift were not supported by the record. The Board also found that the employer had established an economic basis for its actions which justified its delay in recalling the tractor drivers even in the absence of the employees' union activities. The Board relied on (1) a long standing recall policy without precipitous changes, (2) the foreman's showing that his recalls were based on skill, dependability, or nonprohibited motivations such as nepotism, (3) a staged recall process consistent with the Board's understanding of agricultural practices, and (4) the General Counsel's failure to rebut this showing by proof of the discriminatees' superior qualifications or the undesirability of night shift work.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: CALIFORNIAVALLEYLANDCOMPANY., INC., and WOOLF FARMING COMPANY OF CALIFORNIA, INC., Respondent, and SALVADOR RUIZ, an Individual; RUBEN VILLAGRANA, an Individual; and MIGUEL GONZALEZ, an Individual; Charging Parties.	Case Nos. 89-CE-54-VI 89-CE-58-VI 89-CE-61-VI

Appearances:

Stephanie Bullock
Visalia, California
for the General Counsel

Cal B. Watkins, Jr.
Jory, Peterson & Sagaser
Fresno, California
for the Respondent

Before:
BARBARA D. MOORE
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge:

This case was heard by me in Huron, California, on September 18-20, 1990. It arises from three charges filed with the Agricultural Labor Relations Board ("ALRB" or "Board") by Salvador Ruiz, Ruben Villagrana and Miguel Gonzalez, employees of California Valley Land Co., Inc. and Woolf Farming Co. of California, Inc., Respondent[1] herein. Based upon its investigation of the charges, the Board's General Counsel issued a complaint, and, thereafter, a First Amended Consolidated Complaint ("Complaint") issued on April 30, 1990.[2]

As amended, the Complaint alleges that the Company violated sections 1153(a) and (c) of the Agricultural Labor Relations Act ("ALRA" or "Act") by laying off Mr. Ruiz, not recalling him when work first became available and, thereafter, recalling and discharging him? by discharging Mr. Villagrana; by delaying the recall of Mr. Gonzalez and two of his co-workers, Jose Villagrana and Luis Jimenez; and by various supervisors making threats and anti-union remarks, and interrogating Ruiz and Jimenez, all because the five men engaged in an organizing

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[1]It is undisputed that the two named entities are a single employer or joint employer; thus, they are referred to collectively herein as "Respondent," "Cal Valley" or "Company."

[2]At the Prehearing Conference held in this matter, I granted General Counsel's motion to amend the Complaint, and, on September 14, 1990, the General Counsel issued a document entitled "Amendments to the First Amended Consolidated Complaint" incorporating the changes made at the Prehearing Conference.

campaign at the Company to bring in the United Farm Workers of America, AFL-CIO, ("UFW" or "Union").

Respondent filed its Answer on May 3, 1990, denying it had violated the Act. Pursuant to Title 8, California Code of Regulations, section 20230, it is deemed to have denied the additional violations alleged at the Prehearing Conference.

All parties were allowed full opportunity to participate in the hearing. Both the General Counsel and Respondent filed post-hearing briefs. Upon the entire record[3], including my observation of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following findings of fact and conclusions of law.

I. JURISDICTION

As admitted, Respondent is an agricultural employer, the Union is a labor organization; and the five named discriminatees are agricultural employees within the meaning of sections 1140.4(c), (f) and (b) of the Act, respectively. The charges and pleadings were all timely filed and properly served.

At the times material herein, Nick Agundez was Respondent's Personnel Manager; Gustavo Duarte was foreman of the tractor drivers and irrigators in the tomatoes; Jesus Guizar was foreman of the heavier tractors; and Salvador Cortez was foreman

[3]References to the hearing transcript will be denoted: volume number;page number. General Counsel's, Respondent's and Joint exhibits will be .denominated OCX, RX, and JX, respectively, followed by the exhibit number.

of the irrigators in crops other than the tomatoes. They are all supervisors within the meaning of section 1140.4(j) of the Act.

Respondent denied that its assistant foremen, specifically, Alfredo Cortez, Javier Moreno and Alfonso Pizana, are supervisors. Based on their duties and authority, I find they are supervisors under the Act.

The assistant foremen do not perform any of the same work as the members of the crews they oversee; rather, their primary task is to oversee and direct the work of the crews. They have authority on their own to order workers to correct work done improperly. When the foremen are absent, they act in their stead. (1:14,17.)

They use independent judgment in directing the crews. For example, they can decide whether to move workers from one field to another based on soil conditions. If equipment breaks down, they decide whether it is better to move the crew to another field rather than try to make repairs on the spot. (1:16.)

II: COMPANY OPERATIONS

Conditions at the Company were essentially the same in both 1988 and 1989.[4] In both years, the Company grew cotton, tomatoes, onions, garlic, grapes, pistachios and almonds. (1:9.) The period of April through August was the growing season for most crops, although harvesting of tomatoes began in June or July, and almonds were harvested in August. (1:10.)

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[4]All dates hereafter are 1989 unless otherwise indicated.

The Company directly employed seven or eight crews totaling 120 to 140 workers as well as approximately 400 weeders who were supplied by a labor contractor. (1:11.) All of the foremen, assistant foremen and alleged discriminatees involved in this case were directly employed by Respondent. (1:11-13.)

III. UNION ACTIVITY

In the latter part of April, the five alleged discriminatees constituted themselves a committee and began an organizing campaign to elect the UFW.[5] From then until early June, they wore Union buttons to work and distributed Union authorization cards and asked fellow workers to sign them.

They were the first to wear Union buttons to work, and, at most, five other workers later did so.[6] No one except the members of the Committee, however, actually distributed cards or otherwise helped organize the workers.[7] (I: 57, 61, 76, 84, 105-106, 108-110, 124, 150-151, 159, 173-175; 11:26.) Their activity resulted in a petition for certification being filed by the UFW on June 5, which was withdrawn a few days later on June 8 because the showing of interest was insufficient. (1:7.)

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[5]This was the first effort to bring in the Union since an earlier campaign in 1985 failed. None of the alleged discriminatees had taken an active role in the earlier effort.

[6]Jose Villagrana acknowledged on cross-examination that the foremen would likely have seen anyone wearing a Union button on the job.

[7]Luis Jimenez solicited signatures at workers' homes and in front of the labor contractor's office. The others distributed cards at the Company itself during non-work time at the shop where all the workers gathered before work and in the fields during lunch and breaks. (1:25-26, 54, 104, 185-186; II;25.)

IV. EMPLOYER KNOWLEDGE OF UNION ACTIVITY

At the time of the organizing campaign, Respondent was already aware of the pro-Union sympathies of Miguel Gonzalez® and Salvador Ruiz.[9] It also learned of the pro-Union stance of the other three.

The Villagrana brothers credibly testified that numerous foremen saw them wearing their Union buttons. (1:108,124,157-158,173;) The supervisors named by Jose[10] and Ruben[11] did not contradict their testimony. In fact, Guizar and Agundez acknowledged they saw Jose wearing a Union button. (II:86;III:23.) Similarly, Mr. Agundez acknowledged he knew that Jimenez wore Union insignia. (11:86,98.)

Everyone except Jimenez testified to at least one occasion when one or more supervisors were nearby and visible while they were passing out authorization cards. (1:26,104-105, 155,186.) Moreover, Ruben testified that on two such occasions Duarte and Guizar were not only present, they also went over and

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[8]Mr. Gonzalez has worked for the Company since 1979 and has worn a UFW button and/or cap to work virtually every day since the 1985 organizing campaign.

[9]In 1988, foreman Jose Guizar saw Ruiz picketing in support of a UFW boycott at a store in a nearby town. (1:29,78.) Sometime thereafter, foreman Gustavo Duarte saw Ruiz eating lunch at the Company and chided him for eating grapes calling him a "God damn supporter of Chavez." (1:30.) Additionally, Agundez saw a UFW membership card when Mr. Ruiz was presenting identification papers at the time he was initially hired.

[10]Jose Guizar, Gustavo Duarte, Alfredo Cortez, Salvador Cortez and Alfonso Pizana.

"Salvador Cortez, Alfonso Pizana and Guizar did not dispute Ruben. Duarte thought he had not seen Ruben wearing one, but was not sure.

talked to the very workers to whom Ruben had just spoken. (1:105-106;122-123.)

Duarte denied he saw Ruben gathering signatures but not that he saw him talking to workers and then himself spoke to those same workers. Guizar denied he ever saw Ruben talking to a group of workers and denied he saw Jose or Gonzalez collecting signatures but admitted he saw the latter two talking to workers at the shop in the morning before work. (111:21-23.) Pizana did not refute the testimony of Salvador Ruiz that he was in the area on one occasion when Ruiz was collecting signatures. (1:26,57.)

I find that Respondent's supervisors observed the men, except Jimenez, engaging in organizing activity. Supervisors were close enough on various occasions to see them talking to workers and passing out Union authorization card. I find it improbable that supervisor's in the vicinity would not notice such activity.

V. SALVADOR RUIZ

Salvador Ruiz began working for Respondent on February 13, 1988.[12] When his foreman, Gustavo Duarte, first saw Ruiz wear his Union button to work a few days before Duarte laid him off Duarte looked surprised, and then his face "changed color." (1:27-28, 59.) Duarte did not say anything about the button, and simply gave Ruiz work instructions. (1:28.)

About the same time, however, Ruiz testified, Duarte asked him in front of a co-worker, Manuel Pacheco, what he

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[22]His work history is detailed in JX1.

thought of the Union. When Ruiz said he thought the Union was good, Duarte angrily said it wasn't any good. (1:30; 63.)

Duarte denied the first incident occurred, stating he first saw Ruiz with a union button when Ruiz came to ask for work on May 15. (11:154-155.) He did not deny the second incident.

I credit Ruiz' account of both incidents based on demeanor. Duarte was often vague in his answers except when it came to his denials and was not a convincing witness.

The Layoff

On Friday, May *12,* both Ruiz and his co-worker, Manuel Pacheco, were laid off by Duarte, their foreman, after their work cultivating and fertilizating the tomatoes finished. (11:146; 153.) Duarte knew that Pacheco had worked for Jose Guizar previously, so he told Guizar he was laying off Pacheco and said perhaps Guizar could use him.[23] (II:149.)

Pacheco went to work for Guizar on Monday, May 15 performing land planing, work which Ruiz had not done for the Company. (1:58.) In addition to Pacheco, Guillermo Sandoval, Alejandro Larez[14] and Ignacio Cuevas worked while Ruiz was on layoff. They also performed work which there is no evidence Ruiz had done for the Company. (1:90; 111:30-35.)

[13]He did not say anything about Ruiz to Guizar or any other supervisor because he believed that other than working for him, Ruiz had worker only for Guizar for one day and for Alvarez on a one-time assignment with Alvarez for several months in 1988. (11:144,149-150.)

[14]Larez' employee number is lower than Ruiz' indicating Larez had more seniority.

Duarte testified he had a pipe crew working, but would not displace anyone by bringing Ruiz in because it would be bad for morale. (11:153.) The only specific evidence regarding pipe crew work is the work history of Salvador Cortez' crew.

Three of the four members whose work was detailed had worked in the crew for years—long before Ruiz was at the Company. The fourth, Jesus Amador, was hired on June 8 while Ruiz was on layoff, but he was performing row irrigation which Ruiz did not know how to do. (1:77-78; 111:38-40.) Furthermore, at this time, Cortez, who alone made the decision which workers to put in his crew, did not know Ruiz was on layoff. (111:41.)

The Shop Incident

On May 15, Ruiz went to the shop where workers gathered to report for work and asked Duarte to put him to work. Ruiz testified that Duarte called him a derogatory name (meaning literally "beast of burden") and told him there was no work for him because of his damn Union button. (1:31.)

When Ruiz protested that there were other people working, Duarte called him an S.O.B. and told him that he was not going to tell Duarte what to do. Duarte then said he (Duarte) had already started with Ruiz and needed three more "S.O.B.'s or troublemakers," apparently a reference to Ruiz' fellow Union organizers, Ruben Villagrana, Miguel Gonzales and Jose Villagrana.[15] (1:33-35.)

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[15]The transcript refers to "Jose Agundez" being present. (1:137.) This is one of several places where the names of the alleged discriminatees are transcribed incorrectly. My notes indicate that Ruben testified it was Jose Villagrana, and the

The three corroborated Ruiz' testimony that they were nearby during this exchange. Each testified he heard at least part of the exchange and corroborated the basic thrust of the conversation as related by Ruiz, adding several vulgar and obscene remarks that Duarte made which Ruiz did not mention. (1:117-120,161,189-191.)

Duarte acknowledged that Ruiz asked him for work on May 15, but denied that any workers were near enough to have heard them. (1:152.) He also denied that he became angry with Ruiz or called him any bad names. (11:151.) Rather, he only told Ruiz he did not have any work and would call him when he did. (Id.)

I credit the four workers. They each testified credibly and supported one another's testimony without the testimony sounding contrived. The minor differences in their versions are consistent with the fact that people often remember the tenor of a conversation the same way, but will focus on different parts.

The Recall and Discharge

In late July, Salvador Cortez told his son, Alfredo Cortez, who was working as his assistant foreman, that he needed someone to move 8 irrigation lines. Alfredo mentioned that Ruiz was on layoff, and it was agreed he would be recalled.

Ruiz maintains that when he went to the office to sign up to return to work he spoke to Alfredo and Agundez, and Alfredo

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transcript is hereby corrected accordingly.

told him he would have to move 12 lines. He responded he could move only 4 lines. First, he testified Alfredo replied that he should only move the ones he could, and then he testified Alfredo agreed that he could move only 4 lines.

Ruiz gave various reasons for only being able to move 4 lines. His testimony was confusing and contradictory. He kept changing the time frame, giving reasons why he originally objected and then referring to being too tired after actually moving the 4 lines. (1:40-42,67-69,80-82,85-87.)

Cortez contends he told Ruiz the job was moving 8 lines, not 12, and he never agreed Ruiz could move just 4 lines. (111:125-127.) He maintains the issue first arose when he went to the field, and Ruiz said he had moved 4 lines and could move no more.

At that point, Ruiz asked if there was any hourly work. Cortez replied there was no other work available[16] and told Ruiz go to the office so Cortez could give him a layoff slip. (11:127-128.) Cortez said, "Go to hell" as Ruiz left.[17] (1:46.)

Ruiz went to the office and talked to Cortez, Agundez and Alvarez. They asked Ruiz why he could not do the job, and he

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[16]That very morning, however, Salvador Cortez hired a new worker, Antonio Del Castillo, to start the next day and gave Del Castillo hourly work on the lines. (GCX5) Salvador's attempts to explain why Del Castillo was given hourly work when he had been hired to move lines, paid piece rate, were unconvincing. (111:42-43.)

[17]Cortez was not asked whether he made the statement. Thus, he did not deny he did so, and Ruiz' testimony stands unrebutted.

repeated that he had moved the number of lines agreed upon and he couldn't do more. (1:47.)

Despite the fact Cortez had sent him to get a layoff slip, they gave him a form (GCX1) that said he was quitting.[18] He refused to sign it, protesting he was not quitting, and then left since, he said, there was nothing else to say. (1:48-49.)

Agundez and Alvarez discussed the situation and decided that since Ruiz had said he was unable to move the lines they should see if there was a medical problem. So, about two days later, Agundez telephoned Ruiz and said he wanted him to take a physical exam.

Ruiz said he would let Agundez know about the physical. He did not do so, and Agundez called again and spoke to Ruiz' brother who was living with him. Agundez mistakenly thought it was actually Ruiz and became angry and told the brother he was not playing games and had made an appointment for Ruiz to take a physical. Ruiz' brother became annoyed at Agundez' manner and hung up.

Thereafter, Agundez checked with the hospital and was told Ruiz had not been in. He sent Ruiz a letter (GCX 2) dated August 8 telling Ruiz an open appointment had been made so he could go in for the physical any time through August 11.

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[18]This discrepancy was not specifically explored, although Agundez did testify it was Company practice to consider a worker who was unable or refused to perform an assignment as a voluntary quit. Cortez' reference to layoff was unguarded, whereas Agundez' testimony was defending the action taken. I believe Cortez' statement is more reliable.

Ruiz received the letter on August 10, and the next afternoon got a neighbor to translate it. By that time, the time for the appointment had passed. (1:51-52, 74.) Ruiz maintains he telephoned Agundez that same afternoon to explain what had happened and to ask if he could still take the physical. Agundez says it was the 15th. In any event, Agundez said the time had passed, and Ruiz no longer had a job. (1:53.)

Ruiz had no further contact with the Company until late September when he returned to the office and asked Agundez for the bonus paid to employees who had worked a minimum number of hours which was commonly called "vacation pay." Ruiz testified that Agundez replied that for "the goddamn followers of Chavez" there were no vacations. (1:54.) Agundez denied he made any such remark and testified he makes it a point not to swear when speaking to workers. He testified he merely told Ruiz he did not qualify. Ruiz did not contest the point but simply said "Okay" and left.[19]

I do not believe Cortez agreed that Ruiz could move fewer lines. It defies logic that he would do so, thereby leaving certain necessary work undone. The confused reasons Ruiz gave for his inability to move more than 4 lines causes me to believe he came up with them after the fact and to credit Cortez' account of how and when this became an issue.

I also do not believe Ruiz' account of the meeting with Agundez in September. Although I find below that Agundez made a

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[19]General Counsel does not contend that Ruiz was entitled to the bonus pay.

negative comment about the Union to Miguel Gonzalez on two occasions, they were quite mild and made right after the organizing campaign ended when feelings often are running high. Although he was annoyed with Ruiz at the time he ceased working for the Company, from observing him at hearing, I doubt that some two months later he would have made such a sniping remark. [20]

VII. THE RECALL OF GONZALEZ, JOSE VILLAGRANA, AND JIMENEZ

Miguel Gonzalez, Jose Villagrana and Luis Jimenez were tractor drivers and were laid off by their foreman Jose Guizar on June 9. The layoff is not at issue, only their recall.

Guizar began recalling drivers just 10 days later. He recalled five drivers to the day shift. Thereafter, he recalled Gonzalez, then Jimenz, and then Villagrana and two others drivers to the night shift. (See, JX2.) The three of them described the night shift as less desirable even though it paid ten cents more per hour than the day shift.

Gonzalez had not worked the night shift for about eight years, and it had been about three years since Villagrana had worked nights. (I:167;II:10.) Jimenez readily acknowledged he worked the night shift quite often, including in 1989. (11:38.)

After 1986, the Company did not necessarily follow seniority when laying off and recalling employees, which the workers knew, but they nonetheless expected the Company would basically use seniority in recalling them.(1:171-

[20]This incident is similar to Agundez' remarks to Gonzalez discussed below, both showing a tendency to react with annoyance to irritating circumstances. Here, Ruiz had been gone and was no longer a concern to Agundez.

172;II:17;III:48.) The Company handbook (JX3) provides that length of service may be the determining factor where there is little or no difference in the performance standards of affected employees.[21]

Guizar gave mostly subjective and conclusory reasons why he recalled the five drivers before Gonzalez, Jimenez and Villagrana, so it is difficult to test their veracity.(Ill:15-17.) The one verifiable reason does not withstand scrutiny. He testified he hired Jose Carrillo first because he was the main back-up driver on the dozer and grader. Since none of the three alleged discriminatees had experience on both pieces of equipment, and there was grader and dozer work going on at the time Carrillo was recalled, this sounds reasonable.[22] However, the only time someone other than the primary operators of these pieces drove them, it was not Carrillo but another worker,

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[21] If the Company had recalled based on length of service as measured by hire date, JX2 shows that Gonzalez should been hired on June 19, meaning he would have lost 9 days' work instead of a month's. Villagrana would have gone back to work on June 26 instead of July 17, and Jimenez would have been rehired on July 7 instead of July 10. Using hire date makes more sense than employee number as can be seen in the case of Efren Mora, who apparently he had been away from the Company for more than a decade since his hire date is 3/23/88 and his employee number indicated he must have been hired quite some time before Rigoberto Moreno whose number is 538 and whose hire date is 4/28/79.

[22] Even though he was not operating the equipment, he was nonetheless available to back-up Guillermo Sandoval, who drove the dozer, and Alejandro Larez who operated the grader should they be unavailable. (1:18,33-34.) The transcript erroneously refers to Guillermo Mendoza. My notes indicate it was Guillermo Sandoval whom the parties later stipulated operated the dozer from at least May 18 through at least August 6. The transcript is corrected accordingly.

Augustine Lara. Carrillo was doing other tractor work such as the three alleged discriminatees performed. Guizar had no explanation for this fact which causes me to disbelieve his proffered reason for hiring Carrillo. (111:29-30.)

The Request for Rehire

General Counsel asserts Guizar's real reason for the order of recall was a discriminatory one and is reflected in the exchange between Guizar and the three named discriminatees when they asked him why others were being rehired before them. According to Jimenez and Villagrana,[23] this incident occurred in late June when they went to the shop before work one morning accompanied by UFW representative Virginia Sanchez.

Guizar was angered at their inquiry. He called Ms. Sanchez "a nosy old busybody woman" and demanded to know why she was with those "lazy bastards," referring to the three men. (1:165, II:30-31;48.) Sanchez replied that he should not talk that way because the men were only asking for work.

He told the three men that he would not hire them back and that he had orders from the ranch to hire whomever he pleased. Jimenez recalled Guizar telling Sanchez there was no work for "Chavistas", for those...wearing the [UFW] button. (11:31.)

Then, Guizar challenged the three men saying that if anyone didn't like what he was doing, whoever felt man enough

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[23]Gonzalez recalled virtually nothing about when or where he asked for work.

could "duke it out" with him.[24] The three men simply told him they did not intend to fight and left.

Villagrana readily acknowledged that Guizar had never before or since this incident ever threatened to fight with him. (1:177.) Similarly, Jimenez testified that some time prior to this incident, he had gone alone to Guizar's house to ask for work. At that time, Guizar simply told him there was no work available, and he would let him know when there was. (11:46.)

Guizar denies making any of the remarks alleged by Jimenez and Villagrana. According to him, the only thing he said during the entire exchange was that he did not have work for them, and they would have to come back later. (111:13.)

Thus, on cross-examination, he testified he and Virgina Sanchez did not speak one word to each other, not even in greeting. He maintained she was not even present during the conversation, but went over to speak to some other workers. (111:19.) Further, he testified he never answered the question of why other workers had already been recalled, explaining he didn't think it was a serious question. (111:21.)

I credit Jimenez and Villagrana over Guizar. Jimenez especially had a convincing manner. He willingly rather than reluctantly acknowledged matters that were more favorable to the Company than to the General Counsel's position.[25] In his

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[24]The interpreter indicated that the translation does not adequately convey the vulgar and insulting meaning the words have in Spanish. (1:166; 11:32.)

[25]See discussion below for other specific examples of his candor.

testimony regarding Pizana, he appeared to take great pains to fairly describe what occurred and not to exaggerate Pizana's remarks.

Villagrana also appeared to be trying to answer questions forthrightly and not to overstate matters. He readily acknowledged that he had never had such an encounter with Guizar such as the one with Sanchez present.

Guizar, on the other hand, was more hesitant in his responses and more guarded. This was especially so in his statements about Sanchez. His version is also logically improbable. Sanchez arrived and left with the three men, and obviously came to assist them in their effort to return to work. I do not believe that she absented herself while they discussed the very matter about which she had come to help.

Further, his testimony that he did not answer the question of why other workers had already been recalled because he did not believe the men really wanted to know is disingenuous. Both his manner and his answers were evasive.

I find the likely explanation for his behavior on this occasion is that after the employees had just recently lost their bid to bring in the UFW, Guizar was mightily annoyed that they brought a UFW representative and questioned his prerogative to recall whomever he wished in front of her. This element was not present when Jimenez previously approached Guizar.

The Agundez and Gonzalez Incident

Mr. Gonzalez testified that when he went to the office to pick up his check after being laid off and again when he went

to sign up for work after being recalled, Mr. Agundez asked if he weren't ashamed to come into the office still wearing the Union hat. (1:188-189) The first occasion occurred immediately after the UFW withdrew its petition; the second was just a month later. Mr. Agundez denies he made any such remarks. (11:85-86.)

I credit Gonzalez. He testified credibly on this point and on others. Given the timing and the nature of the remark, it is quite believable. Nor, given these circumstances, do I find it particularly significant that there is no evidence Agundez had made any comment to Gonzalez previously about his hat.

The Pizana and Jimenez Incident

Luis Jimenez testified that before he was laid off, Alfonso Pizana asked about his Union sympathies. Jimenez responded he thought the Union was good, and Pizana stated it would not be good if the Union came in because the Company would fire all the workers, and, later, when it needed more workers, it would have to get them from the Union.[26] (11:28, 42-45, SI-53).

Mr. Pizana, on the other hand, testified it was Mr. Jimenez who asked him what he thought of the Union, which Mr. Pizana kept referring to as "the strike," and that he never asked Jimenez' opinion about the Union. (111:6-8.) Initially, Pizana denied telling Jimenez the Company would not hire him anymore, but when asked to repeat his exact words he answered: "I told

[26]Jimenez was definite that he did not understand Pizana to be explaining how a union hiring hall worked. Further, he said there was no hiring hall in Huron. (11:40, 44-45.)

him...that if the strike (sic) won there that he was not going to be hired there in the ranch. By the office. He would have to go to the office of the strike (sic) to be hired back." (111:8-9.)

I credit Jimenez, except that based on his declaration and his testimony on cross-examination,[27] I find Pizana said there would not be any more work at the Company if the Union came in rather than specifically saying the workers would be fired. Jimenez was an especially credible witness. He had a sincere manner. He did not exaggerate testimony to buttress his case, and he did not hesitate to acknowledge points adverse to his or his companions' interests.[28]

He readily testified that he had not worn his Union button in front of Pizana, that Pizana was not angry during their discussion, and that Pizana seemed to be giving his opinion. (11:40, 43-44.)[29] I had the sense he was trying very hard not to overstate matters.

VII: RUBEN VILLAGRANA

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[27]Mr. Jimenez' declaration (RX3) states that Mr. Pizana said there would be no more work if the Union came in and uses a Spanish verb that is different from the one he used when testifying. (11:52-53, 57-59.) However, when Respondent's counsel on recross examination asked him if Pizana possibly had said "there would be no work," Mr. Jimenez quickly agreed, "That there wasn't going to be any work." I conclude Mr. Jimenez used the two expressions to mean the same thing, and I do not consider his declaration as impeaching his testimony.

[28]For example, he declined to corroborate his companions' testimony about the incident involving Ruiz and Duarte at the shop on May 15, saying he was not close enough to hear it. (11:37-38.)

[29]Other examples of his candor appear at 11:48-49, 51-52.

Ruben Villagrana began working for Respondent in May 1983. He was suspended on June 10 from his job as an irrigator in Duarte's crew and was discharged on June 12.

Duarte and Ruben Villagrana

Ruben Villagrana testified that on one occasion during the organizing campaign, Duarte came to the fields after Villagrana sent word that there was a problem with irrigating. Duarte told Villagrana he did not care about the difficulties with the conditions and that as long as Ruben was wearing the Union button he was going to "have problems with [the Company]." (1:109.) Duarte testified he could not recall whether he saw Ruben wear a Union button and denied he made the alleged remarks. (II: 152-153.)

I credit Villagrana. He testified in a credible manner, and, overall, I found him more believable than Duarte who was not a very convincing witness. Also, Duarte's remark is in the same vein as other anti-Union comments I have found he made.

Villagrana's Suspension and Discharge

Alfredo Cortez, the assistant foreman supervising Villagrana and his co-worker Murillio Melgoza, testified that about 4:30 p.m. on Friday, June 9th,[30] he went to the field where the two were working. He chatted with them for a bit, and they offered him a beer, commenting that the "big bosses" (Frank Alvarez and Gustavo Duarte) had left. Cortez declined saying,

[30]It will be recalled that this is the day after the Union withdrew its petition.

". . . we can't drink because we were (sic) on Company time and we're still on working hours . . . ." (11:105.)

In addition to the can each worker was drinking from, Cortez testified he saw two other cans, and one of the workers said they had a six pack. (11:105-106.) Cortez did not order them to stop drinking, to pour out the beer, to give him the cans, or do anything else to insure they would not continue drinking. Nor did he warn them of possible disciplinary action. He simply gave them some work instructions, including telling them to cap off a line so they could irrigate a third field. (11:107.)

When they had not returned to the shop by 6:30, Cortez went to find them because, he testified, they normally returned about 5:30 or 5:45 p.m.[31] He found them in the field next to where they were supposed to cap the line and irrigate. Cortez testified that Villagrana's eyes were red and his speech was slurred; nonetheless, Cortez did not comment on his condition but only said he would see Villagrana at the shop. (11:110-111.)

Villagrana and Melgoza drove to the shop on their ATV's which are a kind of motor bike. According to Cortez, Melgoza's eyes and face were red, he hit the shop door as he was parking the ATV, and Cortez saw him take out 3 or 4 empty beer cans. (11:111-112, 129.)

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[31] In fact, in the week and a half before this incident, they often had worked until 6:30 or later. Cortez' efforts to explain the discrepancy between his testimony and this fact was halting and unconvincing. (11:134,136.)

Still, Cortez said nothing to them but simply locked up and went home. He did not even check on their work until he made rounds the next morning when he discovered they had not capped the line which caused two fields to be over watered and the third field to be irrigated twelve hours late. (11:112.)

After he completed his rounds, he went to the office and told Nick Agundez and John Woolf, one of the Company owners, what had happened. Later, Agundez told him to suspend both workers until Monday when Frank Alvarez, the superintendent, would be back to investigate and decide what to do. (11:113-116.)

Cortez filled out suspension notices for both workers. (11:116-118.) He went to the California Market in Huron where he saw the Villagrana brothers. Ruben came over to Cortez, while Jose stayed in the truck some 25 feet away. Cortez asked why Ruben had not come to work, and Ruben said he had "a few too many" the night before. (11:120-121.)

Cortez gave him the suspension notice, explained what it was, and asked Ruben to sign it. Ruben signed it without comment. Cortez gave him a copy and told him to talk to Duarte on Monday. Ruben just said, "OK" and left. (11:120-122.) Cortez said neither of them was angry, they were not talking loudly, and he doubted Jose could hear them. (11:123.)

On Sunday, Cortez told Alvarez and Duarte what had occurred, and they said they would look into the situation. Cortez testified he had no further involvement in the matter.[32]

Neither Alvarez, who supposedly was going to decide what would happen, nor Duarte testified about this matter. Further, although the Company produced the suspension notice Cortez allegedly gave to Melgoza, it did not produce a termination notice.

Agundez basically corroborated Cortez' account of their meeting on Saturday. (11:81-85.) He also testified that about 3:00 or 4:00 p.m. Villagrana telephoned him and asked why he was "laid off." Initially, he testified that Villagrana twice stated he had not been drinking on the job, but then changed his testimony and said Villagrana did not deny anything, and only said he would see Agundez on Monday. (11:84-85, 99.) Villagrana could not remember if he talked to Agundez on Saturday. (1:150.)

Villagrana testified that he was not drinking on the job. He admitted they did not cap the main line but testified that was because a supervisor had to be present to note the numbers on the meter, and they did not have a cap for the line and some other tools they needed. (1:114-115, 133-135.)

He understood Cortez to say they would do the job when Cortez returned. Cortez never returned, nor did he say anything about it when Villagrana saw him at the shop at the end of the

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[32] But then he testified that Melgoza was terminated along with Villagrana. (11:124.) There is no evidence he has any first hand knowledge of this fact.

day. (1:114-115.) Although Cortez testified that it was not necessary for him to be there to cap off the line, he acknowledged on cross-examination that more often than not he would be present when such a job was being done. (11:131.) He further testified Villagrana and Melgoza had the tools needed to do the task assigned them.

Villagrana admitted he was absent on Saturday which he said was due to car trouble and stated he did not notify the Company because previously he had not called in, and nothing had been said about it. He later admitted that in April he had received a disciplinary notice for being absent for two days without an excuse but maintained there were other occasions when he had not been reprimanded for being absent without notifying the Company. (1:144-145.)

His version of the encounter at the California Market is corroborated by the other four Committee members and is dramatically different than Cortez' account. According to them, Cortez came to the market about 3 or 4 p.m. and told Villagrana he had an absence slip (GX4) for Villagrana to sign. Villagrana signed it without reading it. Cortez wrote on the notice and gave Villagrana a copy.[33] (11:111.)

Then, Cortez laughed mockingly, called Villagrana a Spanish word translated variously as "fool," "bastard" and

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[33] According to Villagrana, he did not find out fully what the notice said until his daughter read it for him later. I do not find this at all implausible as suggested by Respondent. Frequently we are given forms to sign that no one expects us to read and which we do not read.

"S.O.B." and told him he had just signed the papers for him to be fired. Cortez then said Duarte had given him orders before he left for the weekend that Villagrana should not still be at the Company when Duarte returned because Chavistas were like a kick from a mule to Duarte.[34] (1:38-40,67,110-113, 163-164;II:5-9,34-36.) Cortez then called them "lazy bums (translated elsewhere as "lazy bastards") and "troublemakers." (1:112.)

Villagrana complained that what Cortez was doing was not fair. Cortez told him to go to the office to talk to Duarte on Monday. (1:150.)

Despite the fact that Agundez and Woolf had said there would be an investigation as provided for in the Company handbook, the Company does not dispute Villagrana's testimony that no one from the Company ever talked to him about Cortez' allegations. (1:146-148.) Instead, when he went to the office on Monday, Duarte told him he was terminated. (1:146-147.)

On balance, I credit Villagrana and his co-workers. Notwithstanding my discrediting their testimony about Cortez' admission, I generally found them credible,[35] especially

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[34]Cortez denied saying this. Duarte was not asked whether he made the alleged remarks. I do not credit the workers' testimony. Villagrana's declaration (RX2) was taken shortly after the incident and does not contain Cortez' admission. I do not believe such an incriminating comment would be omitted from a declaration taken so soon after the event. Moreover, the workers' demeanor was not convincing on this point. I had the distinct impression at hearing that their testimony was exaggerated and smacked of overkill.

[35]The fact that workers who are still employed are willing to testify against their employer supports their credibility because of the potential adverse consequences to them for doing so. (Georgia Rug Mill (1961) 131 NLRB 1304.)

Jimenez.[36] Their version is somewhat corroborated by Agundez' testimony that Villagrana telephoned shortly after the time they said the alleged incident took place to ask why he was being suspended (although he may have used the word "layoff") and denied he had been drinking. [37]

I find their rendition of events substantially more plausible than Cortez' version. His account requires me to believe that the very day after it became clear the Union did not have enough support to cause an election, the only member of the organizing committee still on payroll, a worker with over *6* years at the Company with no previous problems, got drunk on the job and failed to do his work.[38]

Cortez' account further requires me to believe that he did nothing to stop the two men from continuing to drink on the job site, did not check on their condition until the end of the day, and, observing them both to be under the influence, made no comment and did not check to see if the water in the fields was set correctly.

I find such behavior improbable. It is especially unlikely that Cortez, having found them drunk when he went to the

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[36]He previously failed to corroborate Ruiz about an incident, and I see no reason he would change character and do so here if he did not observe what he said he did.

[37]I find Agundez' initial admission that Villagrana did deny this fact more credible than his later retraction.

[38]I discount the disciplinary notice for unexcused absence as not being in the same category as this alleged episode.

field as he alleges, would not have checked the work given how important overwatering or underwatering fields is.

There is also the fact that no one involved in the actual decision to fire Villagrana testified thereby, of course, preventing cross-examination on this issue. There is not even anyone with first hand knowledge of Melgoza being fired who testified, and no discharge slip was produced.

ANALYSIS AND CONCLUSIONS

A. Threats, Interrogations, and Anti-Union Remarks

General Counsel alleges that the various anti-union remarks, threats and interrogations discussed above violate section 1153(a) of the Act which prohibits employers from interfering with, restraining or coercing employees in the exercise of their rights guaranteed by section 1152 thereof. In conformity with basic legal principles, the standard for determining whether such statements violate the statute is objective not subjective.

The intent of the employer and the actual effect of the statements are not determinative. Rather, the issue is whether the employer's conduct "may reasonably be said to have a tendency to interfere with the free exercise of employee rights." (El Rancho Market (1978) 235 NLRB 468 [98 LRRM 1153], enf'd. sub nom El Rancho Market v. NLRB (9th Cir. 1979) 104 LRRM 2612; Lawrence Scarrone (hereafter Scarrone) (1981) 7 ALRB No. 13.)

1. Pizana's Remarks to Jimenez

Applying the foregoing legal principles, Jimenez' ambiguous statement that he was not sure Pizana's remarks were a

threat but maybe a "preventative measure" is irrelevant since it is a subjective observation. Pizana's interrogation of Jimenez is unlawful even though the exchange was not hostile.
(Tom Bengard Ranch, Inc. (1978) 4 ALRB No. 33.)

Pizana's declaration that there would be no more work because the workers would not be hired by the Company but would have to go through the Union is similarly unlawful. The United States Supreme Court in NLRB v. Gissel Packing Co. (hereafter Gissel) (1969) 395 US 575 [71 LRRM 2481] cautioned that statements of employers;

> must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. (at p. 617.)

The Court distinguished permissible "predictions" from unlawful threats saying: "[a] prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." (at p. 618..)

A union hiring hall does not automatically flow from a union winning a representation election. It is not a matter outside the employer's control since it must be negotiated. Where, as here, there is no evidence that a union would make certain demands, much less that they would come to pass, the employer has stepped over the line of prediction and the statement is a threat of adverse employment consequences. (Ed Chandler Ford, Inc. (1981) 254 NLRB 851 [107 LRRM 1101], enf'd.

in pertinent part, NLRB v. Ed Chandler Ford, Inc. (9th Cir. 1983) 718 F. 2d 892 [115 LRRM 2543].)

2. Duarte's Statement to Ruben Villagrana

The statement that Villagrana would have "problems" at the Company so long as he wore the Union button is clearly an unlawful threat of adverse consequences to his employment because of his protected union activity. Statements indicating that the employer looks unfavorably on employees who support a union are coercive because they discourage employees from exercising their statutory rights. (The Berry Schools (1979) 239 NLRB 1160 [100 LRRM 1115].)

3. Guizar's Statements to Gonzalez, Jimenez, and Villagrana

Guizar's statements that he would not rehire the three men because of their support for the Union and his challenge to fight are classic threats and violate the Act for the reasons set forth above. The fact that he ultimately did rehire them does not detract from the coercive nature of the threat when it was made.

4. Duarte's Statements to Ruiz

Duarte's statement on May 15 that he would not recall Ruiz because of his Union support, and his derogatory name-calling and insulting remarks were illegal. Clearly, he was threatening Ruiz' with a loss of employment opportunity. His interrogation of Ruiz' stand on the Union is unlawful for the reasons set forth in the discussion above regarding Jimenez and Pizana.

5. Agundez' Comments to Miguel Gonzalez

Unlike the preceding incidents, Agundez' comments were not part of a threat. Based on this Board's decision in Gourmet Harvesting and Packing, Inc., and Gourmet Farms (1988) 14 ALRB No. 9, *I* find no violation.

B. Suspensions, Discharges, Layoffs, and Refusals to Recall

In order to prove that an employer has violated section 1153(c), and, derivatively, section 1153(a), by discriminatorily discharging, suspending, or laying off an employee, the General Counsel must prove by a preponderance of the evidence that the employer knew or believed that the employee engaged in protected union activity, and the employer discriminated against the employee for that reason. (Scarrone) Where the allegation is an unlawful refusal to recall or rehire, General Counsel must also prove there was work available, and the employees applied for work or it was the employer's practice to recall the workers. (Anton Caratan & Son (hereafter Caratan) (1982) 8 ALRB No. 83.)

Once the General Counsel has made a prima facie case, the burden shifts to Respondent to prove it would have taken the adverse action even absent the worker's protected activity. (NLRB v. Transportation Management Corp. (1983) 462 US 393 [113 LRRM 2857]; Wriqht Line (1980) 251 NLRB 1083[105 LRRM 119], enf'd. NLRB v. Wright Line (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].)

I have already found that Respondent knew of the Union support of all five Committee members. The issue is whether the

Company took the various actions complained of because of the workers' pro-Union stance.

1. The Recall of Gonzalez, Jimenez and Villagrana

General Counsel does not contest the validity of the June 9 layoff, but contends the men were recalled later than they should have been. There was work available that the three could have been given, and there are several factors which support the General Counsel's contention that the reason their recall was influenced by their support for the Union.

The strongest, of course, is Guizar's specific threat not to recall them because they were "Chavistas." Such an admission is uncommon and is powerful evidence.

Timing is always a critical factor, and these events occurred shortly after the organizing campaign. Further, Guizar recalled the three to the less desirable night shift. Finally, the fact it was not Jose Carrillo who drove the dozer on the one occasion someone other than the primary operators was called on to do so undercuts Guizar's testimony on this point.

General Counsel had amply met its burden of establishing a prima facie case. The burden shifts to Respondent to establish it would not have recalled the workers any earlier even if they had not engaged in Union activity.

I have discredited Guizar's proffered rationale for recalling Carrillo first because he failed to explain the discrepancy between his reason and the actual work Carrillo performed. Respondent also provided no explanation as to why suddenly this year only night work was available for the three

alleged discriminatees when two of them had not worked that shift for years. This is especially significant given Agundez' testimony that conditions in 1989 were much the same *as* they had been in 1988.

The remaining reasons Guizar gave were primarily subjective and conclusory and, given the foregoing, I do not credit them. Consequently, I find Respondent has not met its burden of proof and conclude the recall of the three men was discriminatory and violated section 1153(c) and, derivatively, section 1153(a) of the Act.

2. Salvador Ruiz

a. Layoff

I find insufficient evidence to support General Counsel's claim as to the layoff and recall of Mr. Ruiz. Although General Counsel has established Union activity, Company knowledge thereof, and anti-Union animus, I am not persuaded there is a causal connection between Ruiz' union activity and Respondent's conduct.

I find no evidence to refute the Company's claims that the work Ruiz and Pacheco had been doing was over and that at the time it laid him off there was no work available which the Company knew Ruiz could do. Nor has the General Counsel established that there was work to which he should have been

recalled prior to July 28 when Alfredo Cortez contacted him.[39] Thus, I recommend this allegation be dismissed.

b. Discharge

With regard to Ruiz' termination of employment, I have found that Ruiz failed to move the 8 lines he was assigned. General Counsel argues that the fact that on that same day a new worker, Del Castillo, was assigned only 6 lines evidences discriminatory conduct toward Ruiz. I do not agree. Del Castillo's work was to begin the following day. The difference in the number of lines assigned may signify nothing more than different irrigation needs on different days.

There is a related fact that I find more significant. Del Castillo was assigned hourly work on July 30 the very day after Alfredo told Ruiz no such work was available even though Alfredo usually knew what type of work was coming up several days or even a week in advance. This supports an inference of unlawful motive especially since Salvador. Cortez was unable to give a clear explanation for the assignment since Del Castillo supposedly was also hired to move lines.

Another significant fact is that Alfredo Cortez sent Ruiz to the office so he could lay him off. It is not clear

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[39]Although Jesus Amador was brought into Salvador Cortez' crew on June 14, at least part of the time he was performing row irrigation which Ruiz admittedly did not know how to do. There is no showing Amador did not know how to do such work. Although Amador did not perform row irrigation from July 22 to 29, he was already in the crew, and there is no evidence to suggest that under these circumstances Respondent would normally displace him to recall someone on layoff such as Ruiz.

whose decision it was to treat the situation as a voluntary quit by Ruiz. Nor is there any explanation for the discrepancy.

I have found Cortez" unguarded reference to laying off Ruiz a more reliable indicator of typical Company practice than Agundez' defense of the action taken in Ruiz' case. Agundez repeatedly avoided answering General Counsel's questions about normal procedure and kept referring only to Ruiz' case. All of this suggests an unlawful motive.[40]

Alvarez'and Agundez' decision to have Ruiz take a physical to see if he was unable to perform the assignment clearly suggests they were concerned they had acted precipitously.[41] Precipitous adverse action is a common basis for inferring unlawful conduct especially where, as here, the action is the functional equivalent of discharge, "the industrial equivalent of capital punishment."[42] This is especially so when Company policy is to investigate a situation before taking disciplinary action.[43]

Again, General Counsel has established a prima facie case. Because Respondent did not adequately explain the

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[40]The inference arises from Respondent's dissembling, not from an obligation to give Ruiz the type of work he requested.

[41] Beyond this, the physical exam issue is a red herring. Either the Company was justified in ending Ruiz' employment on July 29, or it was not. If its reason was unlawful, Ruiz was under no obligation to submit to a physical to get his job back.

[42]Griffin v. Automobile Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485].

[43]See, Company handbook JX3, p.4.

discrepancies set forth above, it has not met its burden of proof of showing it would not have treated Ruiz as it did but for his Union activity.[44] I conclude that when Ruiz provided a plausible reason for getting rid of him, Respondent seized the opportunity to divest itself of a Union supporter and thereby violated sections 1153(c) and (a) of the Act.

3. Ruben Villagrana

Timing is always one of the most important elements to consider in evaluating an allegation of illegal discharge. The timing of his suspension and discharge, immediately after it was clear the Union did not have a sufficient showing of support to require an election, is highly probabative of an unlawful motive.

The severity of the disciplinary action is also an important factor to evaluate, and discharge is the ultimate sanction. The Company handbook (JX3) provides that in situations such as this, involving alleged violation of a major work rule where discharge is the result, there will be a thorough investigation.

There was no such investigation even though Agundez and Woolf told Alfredo Cortez to suspend Villagrana pending one. Instead, Villagrana was summarily discharged when he went to the

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[44]Respondent argues in its defense generally that the fact that it had known of Ruiz' and Gonzalez' Union support and had never done anything about it means it would not have taken the actions complained of herein for discriminatory reasons. This fact is certainly to be taken into account, and I have done so. However, there is a big difference between tolerating evidence of Union support when there is no Union activity and one's response when it is accompanied by an organizing campaign.

office on Monday. Duarte, who had warned Villagrana he would have "problems" apparently was involved.

Additionally, I have not credited Cortez' explanation of the reason Villagrana was fired for the reasons explained above. Thus, no basis for his discharge has been established.

All of these factors suggest an unlawful motive. General Counsel has established a strong prima facie case which Respondent must rebut.

Respondent provided no answer as to why it did not follow its policy of investigating such incidents, nor why there was no documentary nor even first hand testimonial evidence of the discharge of Melgoza. It's only defense is that Melgoza and Villagrana committed a dischargeable offense, and I have discredited the testimony on which this defense is based.

Respondent has failed to rebut General Counsel's case. I find Villagrana was suspended and discharged because of his Union activity. By its conduct, Respondent has violated section 1153(c), and, derivatively, section 1153(a) of the Act.

Based on the entire record, the findings of fact and conclusions of law set herein, and pursuant to section 1160.3 of the Act, I .hereby issue the following recommended:

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent California Valley Land Company, Inc., and Woolf Farming Company of California, Inc., (Respondent) its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Threatening agricultural employees with reprisals for engaging in the exercise of their rights guaranteed by Section 1152 of the Act;

b. Interrogating agricultural employees about their Union sympathies;

c. In any like or related manner interferring with, restraining or coercng agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Act;

d. Unlawfully suspending, discharging, or refusing to or delaying recall, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in activity protected by Section 1152 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

a. Offer Salvador Ruiz immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment.

b. Offer Ruben Villagrana immediate and full rein-statement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment.

c. Make whole Salvador Ruiz for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful discharge. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharge. The award also shall include intrest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

d. Make whole Ruben Villagrana for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful suspension and discharge. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful suspension and discharge. The award also shall include intrest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

e. Make whole Miguel Gonzalez, Jose Villagrana and Luis L. Jimenez for all wage losses or other economic losses they have suffered a a result of Respondents' unlawful delay in recalling them. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful delay. The award also shall include intrest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

f. Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay or makewhole amounts due under the terms of the remedial order.

g. Sign a Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order.

h. Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

i. Post copies of the Notice in all appropriate languages in conspicuous places on Respondent's property, including places where notices to employees are usually posted, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed.

j. Upon request of the Regional Director, mail

copies of the Notice in all appropriate languages to all employees employed by Respondent during the period from May 12, 1989, to the date of mailing.

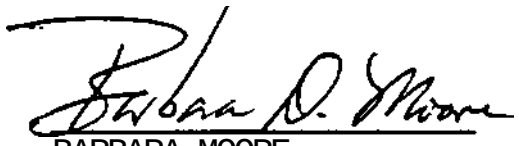
k. Provide a copy of the signed Notice to each employee hired by Respondent during twelve (12) month period following a remedial order.

1. Arrange for a Board agent or a representative of Respondent to distribute and read the Notice in all appropriate languages to Respondnet's employees assembled on Respondent's time and property, at times and places to be determined by the Regional Director. Following the reading, a 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 employee rights under the Act. All employees are to be compensated for time spent at the reading and question-and-answer period. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees to compensate them for time lost at this reading and question-and-answer period.

m. Notify the Regional Director, in writing, thirty (30) days after the date of issuance of a remedial order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with the remedial order.

n. Such other relief which is deemed just and proper by the Board.

DATED: March 29, 1991



BARBARA MOORE
Adminstrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board [ALRB or Board] by Salvador Ruiz, Ruben Villagrana, and Miguel Gonzalez, the General Counsel of the ALRB issued a complaint which alleged that California Valley Land Company, Inc. and Woolf Farming Company of California, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by discharging Salvador Ruiz; by suspending and discharging Ruben Villagrana; by delaying in recalling Miguel Gonzalez, Jose Villagrana and Luis Jimenez. The Board also found we violated the law by interrogating Mr. Ruiz and Mr. Jimenez about their beliefs regarding the United Farm Workers of America, AFL-CIO (Union) and threatening all five workers with adverse consequences to their employment because of their support for the Union.

The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

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

1. To organizer yourselves;
2. To form, join, and 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 you have these rights, we promise that;

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

WE WILL NOT refuse to recall or rehire, or suspend, discharge, or otherwise discriminate against any employee, because he or she has supported the Union or engaged in Union activity.

WE WILL offer to reinstate Salvador Ruiz and Ruben Villagrana to their previous positions and reimburse them, with interest, for any loss in pay or other economic losses they suffered because we suspended and/or discharged them.

We will reimburse Miguel Gonzalez, Jose Villagrana and Luis Jimenez, with interest, for any loss of pay or other economic losses they suffered because we delayed in recalling them.

Dated:

CALIFORNIA VALLEY LAND COMPANY, INC..and
WOOLF FARMING COMPANY OF CALIFORNIA, INC,

By: _____
(Representative) (Title)

If you have questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is location at 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995.

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