STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

OASIS RANCH MANAGEMENT, INC., a California Corporation, Respondent, and ONION DE TRABAJADORES AGRICOLAS FRONTERIZOS; and MANUEL ANGEL RAMIREZ, JOSE LUIS ESTRADA, JORGE CHAVEZ, OSCAR SALAZAR, RIGOBERTO MARTINEZ JAUREGUI, and MIGUEL RODRIGUEZ, Individuals, Charging Parties.	)	Case Nos 90-CE-20-EC 90-CE-21-BC 90-CE-34-EC 90-CE-34-1-EC 90-CE-55-EC 90-CE-58-EC 90-CE-59-EC 90-CE-61-EC 90-CE-70-EC 90-CE-72-EC 90-CE-74-EC 90-CE-75-EC 90-CE-91-EC 90-CE-98-EC 90-CE-115-EC 18 ALRB No. 11 (November 16, 1992}

DECISION AND ORDER

On February 26, 1992, Administrative Law Judge (ALJ) Barbara D. Moore issued a decision in which she found that Oasis Ranch Management, Inc. (Respondent or Company)[1] committed various unfair labor practices against employees who had supported a union organizing campaign. Specifically, the ALJ found that Respondent engaged in several acts of unlawful interrogation of employees concerning their union sympathies,

[1]The parties stipulated that Oasis Ranch Management, Inc. is the successor to Jensen Family Trust, dba Sea View Ranch, and that the caption of the case should be changed accordingly. The ALJ accepted the stipulation, but did not reflect the change in her decision or order. Respondent pointed out the oversight in its exceptions and the General Counsel has not voiced any disagreement. Consequently, the caption is revised to show that the sole respondent in this matter is Oasis Ranch Management, Inc.

made unlawful promises of benefits during the organizing campaign, made threats of adverse changes in working conditions if the union won, unlawfully ceased providing transportation, and engaged in discrimination with regard to layoffs, recalls, and working conditions.

Respondent timely filed exceptions to the ALJ's decision, along with a supporting brief, and the General Counsel filed a brief in response. Respondent does not except to several of the violations and, with regard to those, the ALJ's findings and conclusions are adopted pro forma.[2]

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached decision of the ALJ in light of the exceptions and briefs filed by the parties and has decided to adopt the findings, rulings, and conclusions of the ALJ, to the extent consistent herewith, and to adopt her Recommended Order, as modified. Specifically, the Board reverses the findings that Respondent committed unfair labor practices by making illegal promises of wage increases, unlawfully discontinuing transportation, and acting in

[2]There were no exceptions filed to the conclusions that Foreman Enrique Estrada unlawfully ordered employees to stop organizing, and that Estrada threatened adverse changes if the union won. Respondent did argue in its exceptions that its foremen are not statutory supervisors, but, as discussed below, that exception has no merit. Respondent also did not except to the finding that Ranch Manager Dennis Maroney unlawfully promised a wage increase during the organizing campaign. However, the Board chooses to address that issue because, as discussed below, we find that the promise of the wage increase was promptly cured by rescission and appropriate notice to employees.

retaliation against protected activity with regard to the recall of Jose Luis Estrada and the layoff of three employees on June 29.[3] The Board also reverses in part the finding that Respondent engaged in unlawful interrogation of employees. In addition, we also modify the mailing and posting requirements contained in the Recommended Order.

BACKGROUND

In early 1990, Respondent employed 18 to 25 steady workers in the classifications of irrigator, tractor driver, general laborer, and date palm worker (known as a palmero). There were two foremen, Jesus Salazar, who oversaw the work of the palmeros, and Enrique Estrada, who supervised the remainder of the workforce.

In early February, the Union de Trabajadores Agricolas Fronterizos (UTAF) began an organizing campaign. UTAF coordinator Ventura Gutierrez testified that he held two or three meetings at the duplex on Respondent's ranch where several of the employees lived. He also held several meetings at the UTAF office in Coachella. About 12 or 13 employees usually attended the meetings and 13 of them signed authorization cards. On March 6, Gutierrez filed a petition for certification which the Regional Director dismissed on March 16.[4] The organizing

[3]All dates refer to 1990 unless otherwise specified.

[4]Labor Code section 1156.2 provides that units appropriate for collective bargaining under the Agricultural Labor Relations Act (ALRA or Act) will be comprised of all the agricultural employees of the employer. Gutierrez sought a unit of year-round employees to the exclusion of the seasonal harvest

effort essentially ceased after the dismissal of the petition.

Ranch Manager Dennis Maroney testified that when he learned of the organizing campaign he hired an attorney and two labor consultants to educate him about the law and to conduct what he described as an anti-union campaign. The consultants conducted a two day seminar for Maroney and the two foremen, Salazar and Estrada. Later, in the presence of the foremen, Maroney instructed the consultants to ask the workers what kind of problems they had with their working conditions. The foremen escorted the consultants on their trips to the fields. The consultants reported back to Maroney and told him of the complaints expressed by the workers.

DISCUSSION

Interrogation BY Labor Consultants and Supervisors

The ALJ found that the labor consultants hired by Respondent unlawfully interrogated employees on three occasions and that Estrada did so on two occasions. Oscar Salazar testified that on about March 5 the labor consultants asked him why they wanted a union. He told them it was because of bad treatment by the foremen and low salaries.

The two other examples of interrogation by the labor Consultants were not alleged in the complaint, but the ALJ entertained them because they had been fully litigated. (George Lucas & Sons (1978) 4 ALRB No. 86.) First, Vidal Lopez and

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employees and, further, supported the petition with a showing of interest in an election demonstrated by only the "steady" employees.

Jorge Chavez testified that the consultants came by one day in March while a group of workers were working in the palms and told the group that they were from the state and understood that the workers had problems with the Company. In addition, the consultants stated that they came to see if they could resolve those problems. One or more of the workers responded that their problems were with the foremen and the Company, so these men could not help them. Second, Juan Resendiz testified that, after Estrada told him that two men wanted to ask him questions, the consultants said they knew there were problems with the Company. Resendiz responded that there were many problems. The testimony of the workers with regard to these three incidents was uncontroverted, as neither the consultants nor foreman Salazar testified and Estrada did not mention these issues in his testimony.

Pedro Lugo and Miguel Rodriguez testified that on March 8 Foreman Estrada[5] said to them that the Company knew that Rodriguez was the union leader. The final example of

[5]Respondent included in its list of exceptions the ALJ's finding that the foremen were supervisors, but the supporting brief is silent on the issue. The failure to state the grounds for an exception, as required by California Code of Regulations, Title 8, section 20282, subdivision (a)(1), is a sufficient basis for its dismissal. S & J Ranch. Inc. (1992) 18 ALRB No. 2; Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co. (1983) 9 ALRB No. 65.) While the failure to provide supporting argument renders the exception technically defective, the exception has no merit in any event. The ALJ's factual findings with regard to the foremen's duties and responsibilities are supported by the record and satisfy the statutory definition of "supervisor."

alleged interrogation involves Estrada asking Rigoberto Martinez "man to man, not like foreman to employee" on March 12 if he had signed the union petition. Martinez replied that he had. Estrada said that he had orders to lay off six people, but Martinez would have the opportunity to stay on. Martinez was eventually laid off, but not until August. There was no allegation that his layoff was unlawful and an allegation that he was unlawfully refused rehire was dismissed by the ALJ and not excepted to.

The ALJ found the consultants' questions concerning problems that the workers might have to constitute an unlawful effort to ascertain their union sympathies, for which there were no mitigating circumstances. She expressed similar conclusions as to the two interrogations involving foreman Estrada, finding that they were designed to identify union adherents. The ALJ's conclusions with regard to the inquiries made by the labor consultants were also based on the principle that an employer is prohibited from soliciting grievances in response to or in opposition to a union organizing campaign where there is an implied promise to correct them. (Giumarra Vineyards (1981) 7 ALRB No. 24.)[6]

Respondent excepts to the findings of unlawful interrogation on two grounds: 1) the workers did not know who the consultants were and did not believe they were from the

[6]However, such soliciting of grievances is permissible if the employer was simply acting consistent with an established practice of soliciting grievances.

Company, so their conduct could neither be attributed to Respondent nor have created fear of retaliation by Respondent, and 2) when the proper totality of the circumstances test is applied, the conduct cannot be viewed as coercive. Respondent points out that the National Labor Relations Board (NLRB) has expressly rejected a per se approach to interrogation, even with regard to employees who are not open and active union supporters, and instead analyzes the surrounding circumstances to determine if the conduct was coercive. (Sunnyvale Medical Clinic. Inc. (1985) 277 NLRB 1217 [122 LRRM 1036].)[7]

Early in its history, this Board adopted an approach consistent with the rule announced in Sunnyvale Medical Clinic. Inc. In Maggio-Tostado, Inc. (1977) 3 ALRB No. 33, the Board held that interrogation is not per se violative of the ALRA, but instead must be analyzed in light of surrounding circumstances to determine whether it would tend to restrain or interfere with the exercise of protected rights. We take this opportunity to reaffirm that holding. Therefore, in all cases, the surrounding circumstances must be examined to determine if the interrogation would tend to be coercive. Some of the relevant factors to be considered are the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the history, if any, of employer hostility

[7]Previously, in Rossmore House (1984) 269 NLRB 1176 [116 LRRM 1025], the NLRB expressly rejected a per se approach with regard to the questioning of open and active union supporters, relying on Blue Flash Express (1954) 109 NLRB 591 [34 LRRM 1384].

towards or discrimination against union supporters. In addition, whether the employee is an open and active union supporter remains one of the many factors to consider. (Sunnyvale Medical Clinic. Inc. 277 NLRB at 1218.)

When examined in light of all the surrounding circumstances, we believe that two of the allegations of interrogation involved here were not sustained. All five allegations will be discussed in turn below.

In the first instance, the labor consultants were found to have asked a group of workers why they wanted a union. The visit to the fields by the labor consultants took place less than a day after the election petition was filed, the consultants did not identify whom they represented,[8] the questioning was done in a rather formal manner during work time and the record does not reflect that Salazar was at that time an open and active union supporter. In addition, though not determinative by itself, the questioning was directly related to union sympathies. While this is a close question, when all the relevant circumstances are considered, we believe this questioning would tend to have a chilling effect on the exercise

[8]Just one day later, on March 7, Salazar learned that the two individuals were labor consultants working for the Company. In our view, the unlawfulness of the interrogation does not turn on whether the chilling effect was immediate. Consequently, our analysis would not differ even if we were to assume that the chilling effect of the interrogation did not arise until March 7 when Salazar learned of the identity of the labor consultants. We therefore reject Respondent's contention that the interrogation could not be unlawful because at the time it took place it was not known that the two men represented the Company.

of protected activity.

The interrogation testified to by Lopez and Chavez must also be viewed as unlawful. Though the consultants did not directly ask about union sympathies, they misrepresented that they were from the state and said that they wanted to resolve any problems the workers had with the Company. This subterfuge was obviously designed to elicit information from the workers that they would not freely offer to a known representative of the Company. This misrepresentation, coupled with the other surrounding circumstances listed above with regard to the interrogation of Salazar, strips the questioning of Lopez and Chavez of any innocent veneer it might have had if the workers were simply asked by management what problems they had with the Company.

In contrast, the evidence reflects that the questioning of Resendiz was within the bounds of what we consider to be lawful under Sunnyvale Medical Clinic. Inc,. supra. Here, the labor consultants did not misrepresent themselves or offer to resolve grievances, but merely asked what problems the workers had with the Company. In our view, in preparing for an impending election campaign, an employer should be allowed to determine the concerns of the employees that led to the desire for an election. Open communication between management and employees is generally a positive development. However, employers must be very careful, particularly during the period directly before an election, not to make inquiries in a

way that would tend to chill their employees' exercise of protected rights. Though admittedly the line between lawful and unlawful questioning of employees is not a bright one, in this instance we find that the inquiry described by Resendiz did not cross that line.

Similarly, though also a close question, we find no illegality with regard to foreman Estrada asking Rigoberto Martinez on March 12 if he had signed the petition for the union. There is nothing in the record which would cause this inquiry to be threatening or to interfere with the free exercise of Martinez rights under our Act. The inquiry was done in a casual manner not unusual for a supervisor talking to an employee with whom he shares a friendly relationship. In addition, the record reflects that Martinez was not present on any of the occasions prior to March 12 where Estrada or the labor consultants engaged in unlawful conduct. The facts of Sunnyvale Medical Clinic. Inc,. supra, are similar. There, the NLRB found no unlawful interrogation where a personnel director, in a friendly and casual manner, asked an employee why she joined the union and why the employees had not come to her first with their problems. Moreover, right after Martinez replied Lliat he had signed the petition, Estrada mentioned that he had orders to lay off six people, but that Martinez would not be one of them.[9] We view this as an assurance to Martinez that his

[9]Though Martinez was laid off five months later, there was no allegation that it was discriminatory. In addition, the ALJ dismissed an allegation that a later failure to rehire Martinez

affirmative answer to the question would not result in adverse consequences. This greatly reduces the tendency for such an inquiry to have a chilling effect on future protected activity.[10]

Lastly, the allegation that Estrada told Rodriguez and Lugo that the Company knew Rodriguez was the union leader, as Respondent points out, is not factually in the nature of an interrogation. The ALJ apparently considered the statement to be an attempt at ascertaining Rodriguez' union sympathies, but we find insufficient evidence to support that conclusion. However, the comment has other legal implications. While the statement that the Company knew Rodriguez was the union leader does not necessarily carry the implied threat of adverse consequences, it does carry the message that Respondent was keeping track of Rodriguez[1] union activities. It is well-established that creating the impression of surveillance has an unlawful chilling effect on the freedom to engage in protected activity. (S & J Ranch. Inc., supra; Alpine Produce (1983) 9 ALRB No. 12; Hendrix Mfg. Co. v. NLRB (5th Cir. 1963) 321 F.2d 100 [53 LRRM 2831].) In our view, Estrada's statement to Rodriguez unlawfully created the impression of surveillance. On

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was unlawful.

[10]Though we find no unlawful interrogation on the specific facts demonstrated here, we again caution that in many circumstances such inquiries do carry a grave risk of chilling protected activity. Therefore, the result here should not be read as an invitation to engage in such questioning and all such conduct will be closely examined by the Board to determine if it would tend to interfere with protected rights.

this basis, we affirm the ALJ's conclusion that the statement was unlawful. Promises of Benefits

On March 7, Maroney held a meeting with approximately 18 steady workers so they could express any complaints they had against the Company. The palmeros asked that their pay be raised to what it was previously and Maroney agreed. However, Maroney spoke to the consultants and then rescinded the increase, telling the workers that the consultants had explained to him that he could make no such promises during an organizing campaign. The general laborers asked that they be paid the same as the palmeros when they did that work. Maroney claimed that he agreed to that because it was already the existing company policy. Vidal Lopez, whom the ALJ credited, claimed that Maroney instead said that he would talk to his boss about it. Based on the well-established principle that an employer may not promise or grant a wage increase during an organizing campaign unless it is a regularly scheduled increase, the ALJ found that Maroney committed violations by promising the wage increase to the palmeros and promising to consider the request of the general laborers.

Respondent does not except to the finding of a violation based on the wage increase for the palmeros and provided no argument for its exception to the violation based on a promise to consider the request of the general laborers. Despite these failures by the Respondent, for two reasons we

find it appropriate to address both findings. First, we consider the findings to be incorrect as a matter of law. Second, this provides us with an opportunity to point out to parties under the Board's jurisdiction the virtues of promptly rescinding actions which would otherwise constitute unfair labor practices.

In J.R. Norton Company (1984) 10 ALRB No. 7, the Board adopted the NLRB's standard for effective disavowals of unlawful conduct. To effectively avoid liability, the employer's repudiation of the unlawful conduct must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. Furthermore, the repudiation must be adequately published among the affected employees and the repudiation should give assurances that no future interference with protected rights will take place. (Passavant Memorial Area Hospital (1978) 237 NLRB 138 [98 LRRM 1492].)

Here, since the wage increase for the palmeros was promptly rescinded and it was explained to the workers that it was improper to make such promises during an organizing campaign, any chilling effect on organizational rights was negated. In such circumstances, no violation should be found. In our view, employers should be encouraged to quickly acknowledge and correct unlawful conduct. Where the requirements of Passavant are met, the unlawful effects of the conduct are sufficiently removed so that there remains no basis for liability. This is far better result for all concerned than

taking no corrective action, thus precipitating a formal legal process that inevitably takes a great deal of time, effort and money before any remedy is carried out.[11]

The ALJ's finding that Maroney promised to consider the request of the general laborers does not appear to be supported by the record. If Maroney is to be believed, he merely agreed to what was already company policy. Since that would represent no change from the status quo, it could not constitute an unlawful promise of benefits. If Lopez is to be credited instead, as is the view of the ALJ, then Maroney merely said he would talk to his boss. In our view, this does not equate to making a promise to consider the request and is insufficient to constitute an unlawful promise of benefit.

Failure to Recall Jose Luis Estrada

Though the ALJ dismissed the allegation that Jose Luis Estrada (J. Estrada) was unlawfully laid off on April 6, she found that the record demonstrated a violation with regard to his recall.[12] In early May, Respondent sent a certified letter of recall to J. Estrada at the Calexico address that he had

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[11]The ALJ found that Respondent unlawfully laid off six workers on March 12. The Board affirms that finding. After an unfair practice charge was filed the next day, Respondent consulted with its attorney and, on March 14, the six were reinstated with back pay. While Respondent is to be lauded for taking prompt action to reinstate the six workers, this does not obviate the need for nonmonetary remedies, as the record does not contain evidence of repudiation of the layoff that would be sufficient to meet the Passavant standard.

[12]This allegation was not contained in the complaint, but the ALJ concluded that a violation could be found, presumably because the matter was fully litigated.

previously provided to Respondent on an immigration form. It appears that Estrada did not respond to the notice within the specified period (within three days of the recall date). Though the ALJ states that J. Estrada apparently did not receive the recall notice, the record does not establish whether he did not receive it or merely failed to respond.

Maroney testified that the normal practice for recalling workers was to personally notify those who lived on the ranch and, for others, post a notice on the company bulletin board and send a notice by certified mail. J. Estrada testified that he lived on the ranch until some time in July. The ALJ found a violation based on her conclusion that Respondent deviated from its normal practice because the record failed to show that Respondent attempted to notify J. Estrada personally or post a notice on the bulletin board. She also relied on her earlier conclusion of unlawful motive with regard to an April 6 layoff.[13]

Respondent excepts to the ALJ's findings on two main grounds. First, Respondent argues that it was denied due process because it was never placed on notice that it had to defend against such an allegation. Second, Respondent argues that the record evidence is insufficient to sustain the allegation. Specifically, Respondent maintains that it was not

[13]The ALJ found no violation with regard to the April 6 layoff because Respondent successfully rebutted the General Counsel's prima facie case with evidence that the layoff was consistent with J. Estrada's seniority and Respondent's labor needs.

shown that it deviated from established practice in recalling J. Estrada, especially since it was reasonable for Maroney to believe that he was no longer living at the ranch house at the time of the recall. Furthermore, Respondent argues, the ALJ improperly shifted to it the burden of proving that normal procedures were followed. We believe Respondent's arguments have merit.

The Board has held that it may address matters not alleged in the complaint if they are closely related to matters which are in the complaint and the matter is fully litigated in the hearing. (George Lucas & Sons, supra. 4 ALRB No. 86.) However, implicit in such a rule is the recognition that to satisfy due process principles, the respondent at some point must be put on notice that it has to defend against the new allegation. There need not be a formal amendment to the complaint, as sometimes notice may be apparent from the circumstances of the hearing and/or both parties will address the issue in their post-hearing briefs.[14]

Here, the record reflects that there was no amendment to the complaint, nor any other circumstance which would have put Respondent on notice that the legality of the recall of J. Ectrada was at issue. In the post-hearing briefs, the recall

[14]That is exactly what happened with regard to the two additional allegations of interrogation by the labor consultants which were not in the complaint. The matter was thoroughly pursued at the hearing by both parties and addressed in their post-hearing briefs. Accordingly, Respondent did not challenge the propriety of addressing those allegations.

was addressed only as background evidence going to the legality of the layoff. There is no indication in the General Counsel's brief that it sought a ruling on the recall. In these circumstances it would offend due process principles to find Respondent liable for this violation.

Even if due process were not an issue, the record evidence is insufficient to establish such a violation. First and foremost, it was properly the General Counsel's burden to establish that the manner in which J. Estrada was recalled was discriminatory. It does not appear that the burden was met. For example, no one asked J. Estrada if he actually received the notice or saw it on the bulletin board. Nor was Maroney asked if he made any effort to notify J. Estrada personally or if he posted a notice. It would be improper to rely on these gaps in the record to establish that Respondent did not follow its normal procedures. Since the record is unclear, we must conclude that the General Counsel failed to meet its burden of proof.[15]

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[15]In addition, the evidence shows that Maroney could have reasonably believed that J. Estrada was no longer living at the ranch house at the time of the recall. Respondent's layoff notices to those living at the ranch house state that the employee has two weeks to vacate the premises. In this instance, that date would have been April 20. J. Estrada testified that he spoke with Maroney on April 30 and Maroney told him he could not continue to live at the ranch house. Thus, in early May, when Maroney sent the recall notice, J. Estrada should have already moved out of the ranch house. Assuming that J. Estrada was still at the ranch house, there is no evidence in the record to show that Maroney was aware of that. Therefore, it would have been reasonable for Maroney to assume that there was no reason to attempt to notify J. Estrada personally at the ranch house.

Cessation of

The ALJ credited four workers who testified that foreman Estrada regularly drove the general laborers from the shop where they gathered to their work sites. Though Respondent denies that there was such a formal practice,[16] it does not deny that whatever practice it had was discontinued at the beginning of May. Maroney insisted that the practice was stopped because of concerns about transporting workers in the back of a pickup truck. This concern purportedly arose after Maroney attended an insurance seminar in late April. According to the ALJ, the concern about insurance was not mentioned in Respondent's answer or at the pre hearing conference. She concluded that it was an after the fact justification.

The ALJ had earlier found that Estrada had unlawfully threatened adverse changes in terms and conditions of employment, one of which was the cessation of transportation, if the union won. This, coupled with the Respondent's "shifting rationales," led the ALJ to conclude that the cessation of transportation was in retaliation for the workers' earlier

[16]Estrada claimed that two or three times a week he would give a worker a ride if he was going to the worker's worksite, but did not regularly go to the shop to pick up workers. However, in a declaration responding to an allegation that he denied transportation to irrigator Vidal Lopez, he declared that he transported the general laborers but never the irrigators.

organizing activity.[17]

Though Respondent denies that there was a regular practice of transporting the general laborers, the main thrust of its exceptions is that ordering it to re-establish the practice would force it to violate state law which prohibits the transportation of workers in the back of a pickup that does not have seatbelts and federal law which requires seats for each worker and protection from the weather. The General Counsel argues in his response that this is simply a red herring and yet another after the fact justification.

The record evidence is sufficient to establish that Respondent had a regular practice of transporting the general laborers from the shop to their worksites. However, we find that the cessation of transportation was not discriminatorily motivated. This is based primarily on our conclusion that the record does not support the view that Respondent provided shifting rationales or that its justification for the cessation of transportation was After the fact.

There is no requirement that a respondent specifically articulate all of its defenses in its answer to the complaint (though a failure to plead an affirmative defense may be deemed a waiver of such defense). While the Board's regulations require the parties to be prepared to discuss their factual and

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[17]The ALJ did not find it significant that the earlier threat was conditioned on the union winning an election that never took place. We disagree to the extent that we believe the conditional nature of the threat does make any connection to the later cessation of transportation more attenuated.

legal theories at the pre-hearing conference, this does not prohibit the arguing of substantially the same or related theories at hearing. At the pre-hearing conference, Respondent stressed its view that there was no formal policy of providing transportation and stated that it would produce a document reflecting a company policy against workers riding without seatbelts. Though Respondent's defense has varied in its specifics, at all pertinent times the defense was based in part on safety concerns and or legal constraints as a basis for discontinuing any transportation policy that it had. In our view, this does not constitute "shifting" rationales sufficient to raise an inference of discrimination.

Isolation of Oscar Salazar

Oscar Salazar and Ruben Sotelo were laid off on June 13 after refusing to spray sulfur on the date palm trees because they claimed they were not provided the proper safety equipment to do so. The ALJ dismissed the allegation that the layoff was unlawful because Respondent successfully showed that there was no other work at that time. The two workers were recalled after the sulfuring was completed.

Salazar testified that when he was recalled he was reread to work alone for two or three weeks. This was a problem because there needed to be someone in the area in case his ladder fell. Moreover, he testified that this work ("papering" the trees) was normally done in pairs. This work was assigned by foreman Jesus Salazar, his brother. Oscar stated that when

he complained to his brother about this, Jesus replied that he had no choice because Maroney ordered him to do it. Jesus Salazar did not testify. However, Maroney acknowledged the need to have someone in the area but claimed that Company records show that irrigator Juan Resendiz was also working in the area at that time. Those records were not produced by Respondent to corroborate Maroney's testimony.

The ALJ credited Oscar's testimony and drew an adverse inference from Respondent's failure to produce the records to support Maroney's testimony. She therefore concluded that Oscar was forced to work in isolation during the period in question and that it was due to a retaliatory motive on the part of Respondent.

Respondent denies that Salazar was isolated, claiming that others were working at the same ranch at that time. Respondent also asserts that it was improper for the ALJ to draw an adverse inference from its failure to introduce records to support Maroney's testimony because the General Counsel also had those records in its possession and could have introduced them. In Respondent's view, the adverse inference should at minimum cut both ways. Respondent also asserts that exhibit 6.C. 9, which covers part of the period at issue, shows that Salazar was working at Marita Ranch, not at Santa Rosa Ranch as he claimed. Therefore, Respondent argues, his entire testimony is incredible.

While Respondent may be correct that it was improper

under these circumstances to draw an adverse inference from its failure to corroborate Maroney's testimony with work records, the documents it now relies on shed little, if any, light on this matter. According to Salazar's testimony, the period of isolation would have begun on approximately June 27 and lasted two or three weeks. Exhibit 6.C. 9 shows Salazar working at Marita Ranch on July 5 and 6, but that does not necessarily mean that he worked there throughout the two or three week period. The Company records attached to Respondent's brief show that Vidal Lopez and Manuel Ramirez worked at Marita on Thursday and Friday of the previous week. The same document shows Juan Resendiz working as an irrigator each day that week, but does not reflect on which ranch he was working. Therefore, the documents Respondent relies on in its brief fail to show whether or not anyone worked at the same location as Salazar.

What we are left with is the conflicting testimony of Salazar and Maroney. The ALJ expressly credited Salazar based largely on demeanor. There appears to be nothing in the record that would undermine that finding.[18] Moreover, we note that foreman Jesus Salazar was not called by Respondent to deny telling his brother that he was sent to work alone on orders from Maroney. Consequently, we affirm the ALJ's conclusion that

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[18]The Board will not disturb an ALJ's credibility determinations, particularly those based largely on demeanor, unless the clear preponderance of the evidence establishes that they are incorrect. (David Freedman & Co.. Inc. (1989) 15 ALRB No. 9; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531], enfd. (3d Cir. 1951) 188 F.2d 362.)

Salazar was forced to work in somewhat onerous and unsafe conditions in retaliation for his and Sotelo's refusal to sulfur the dates palms without additional safety equipment.

The June, 29 Layoffs

Three employees, Becerril, Mondragon, and Ramirez, were laid off on June 29. Becerril testified that foreman Estrada said it was because there was no work, though Ramirez testified that Estrada gave no reason.[19] Maroney testified that the layoff took place because it was very hot and the Company tries to minimize hard physical labor under those conditions. He stated, however, that the summer continued to be very hot. Becerril and Ramirez were recalled on July 10 but were laid off again the next day.[20] They were given no reason for the layoff. Maroney testified that it was because the men had worked into an area that recently had been sprayed with pesticides and was not yet safe to enter.[21]

The ALJ found that the General Counsel had established a prima facie case, primarily on the basis of earlier findings which reflected a pattern of unfair labor practices directed at most of the employees who were active in the organizing effort. However, it appears the ALJ relied principally on her disbelief

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[19]While both men stated that they saw various workers with less seniority working after the layoff, the record reflects that those workers were irrigators rather general laborers. Therefore, the ALJ attached no significance to this testimony.

[20]Mondragon was recalled on July 9 but did not return.

[21]The ALJ credited this explanation and dismissed the allegation that the July 11 layoff was discriminatory.

of Maroney's explanation that hot weather was the reason for the layoff. She found that explanation implausible given the testimony that the weather remained hot and the fact that no one else was laid off until August 3. She therefore concluded that Respondent had failed to rebut the General Counsel's prima facie case.

Respondent argues that the ALJ erred in finding that the General Counsel established a prima facie case and in finding that it was not rebutted. Respondent asserts that no evidence of anti-union animus was presented nor was it shown that there was any work available during the layoff or that anyone else was hired to do that type of work. With regard to its defense, Respondent accuses the ALJ of improperly substituting her business judgment for that of Respondent in concluding that the layoffs were not necessary. In addition, Respondent claims that the ALJ had no basis for her conclusion that there were no layoffs in 1989.

We find insufficient evidence in the record to raise an inference of unlawful motive as to this layoff. The ALJ's analysis relies primarily on the findings of numerous other violations, many of which we do not affirm. Moreover, we do not find Maroney's explanation for the layoff to be inherently implausible. We therefore find insufficient evidence specific to this layoff to establish the requisite causal connection to protected activity. We therefore conclude that the General Counsel failed to establish a prima facie case.

Refusal to Rehire Vidal Lopez

In early May, Lopez' car broke down and he was no longer able to transport himself to sites of his irrigation work. Maroney told him he could return as an irrigator when his car was fixed. In the meantime, he worked for Respondent as a general laborer and continued in that capacity at the time of the hearing. On July 3, he informed Maroney that his car was fixed and he was ready to return to irrigating.[22] Lopez testified that Maroney then claimed that he had quit and told him to go see if his friend Ventura (the union representative) had any irrigation work for him. Maroney then said there was no more irrigation work for him. Jorge Chavez corroborated Lopez' testimony and Maroney did not specifically deny it. Therefore, the ALJ credited Lopez' version of events.

Respondent insists that this allegation must fail because the record is insufficient to establish that Lopez was denied any available irrigation work. However, we agree with the ALJ that while it is unclear how much irrigation work was available after July 3, the record is sufficient to show that some irrigation work was available. We therefore affirm the ALJ's conclusion that the failure to rehire Lopez as an xrxigator was unlawful. Determination of the exact amount of irrigation work discriminatorily denied Lopez is an appropriate matter for compliance.

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[22]The two jobs pay the same but irrigators work more hours.

Additional Rycaptions

a. Failure to Exclude Witnesses

Respondent asserts that the ALJ improperly refused to exclude the General Counsel's witnesses, thereby allowing them to hear each other's testimony and tailor their own accordingly. This, Respondent claims, tainted the hearing to the extent that a new hearing is required. A review of the record demonstrates that Respondent's claims are groundless. At the beginning of the hearing, after reference to an apparent agreement to exclude witnesses, the ALJ made an exception for the three employee witnesses present who were charging parties. Those three witnesses, Vidal Lopez, Jorge Chavez, and Manuel Ramirez, were then identified. Respondent's counsel did not object on the record to the ALJ's ruling that named charging parties need not be excluded.

Only two of the witnesses, Lopez and Chavez, testified that day. There is no indication that any charging parties were present during the remaining two days of hearing. With regard to material evidence used to bolster a finding of liability, we have found only one instance where the presence of another witness could have theoretically affected subsequent testimony. Tliat testimony consisted of Chavez corroborating the content of the conversation between Lopez and Maroney on July 3. However, while Chavez' testimony is consistent with that of Lopez, there is no indication that the testimony was mimicked or otherwise the result of anything other than independent knowledge.

Moreover, the testimony of Chavez was not indispensable to the findings of the ALJ.

The Board's regulations are silent on the sequestration of witnesses. Therefore, it is left to the discretion of the ALJ. While we believe it is a better practice to exclude anyone not a party to the proceeding[23] or the designated representative of a party, here there was no showing of actual prejudice nor abuse of discretion.

b. Roneconomic Provisions of the Proposed Reaedy

Respondent asserts that various aspects of the proposed remedy are punitive. Generally, Respondent claims that the mailing, reading and educational requirements recommended by the ALJ are appropriate only where there is evidence that employees acquired knowledge of the unlawful conduct (or where such knowledge may be inferred). Citing M. B. Zaninovich, Inc. v. ALRB (1981} 114 Cal.App.3d 665, Respondent claims that such remedies are not appropriate in this case.

However, in Zaninovich the court acknowledged that such remedies were usually appropriate, but held that in the particular circumstances of that case, which involved a "single, isolated and rather technical act which occurred in the privacy of a supervisor's office," such remedies would be punitive. Here, we have a case where several violations involving anti-union animus have been found and the conduct cannot be construed

[23]The charging parties did not seek to formally intervene as parties to the proceeding.

as isolated. Therefore, mailing, posting and educational remedies are appropriate in this case.

Respondent also excepts to the specifics of portions of the proposed remedy. First, Respondent claims that the remedy should apply only to its steady employees, who were the only ones involved in the matters at issue and who consist of only 12% if its peak workforce. Similarly, Respondent suggests that requiring mailing to all those employed from March 1, 1990 to the date of mailing, allowing the Regional Director to determine the length of the posting period, and having to provide copies of the notice to all employees hired during the 12 months after the posting, would be overly burdensome.

The normal Board practice is to provide for a mailing period of one year and a posting period of 60 days. Therefore, these provisions of the proposed order will be modified accordingly. The provision of notices to all employees hired for 12 months after the posting and the extension of the remedy to all of Respondent's employees reflect the Board's normal practice and we find no reason to deviate from that practice here.

CONCLUSION

In sum, the Board reverses in part the ALJ's findings that Respondent unlawfully interrogated employees, and reverses the findings that Respondent made illegal promises of wage increases, unlawfully ceased providing transportation, and discriminated in the recall of Jose Luis Estrada and the layoff

of Becerril, Mondragon, and Ramirez on June 29. We also modify the recommended mailing and posting requirements.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Oasis Ranch Management, 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 activities and/or sympathies in a manner that discourages the exercise of protected concerted activity;

c. Creating the impression of surveillance of protected concerted activity;

d. Segregating workers because they engaged in protected concerted activity;

e. 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;

f. Unlawfully laying off, refusing or failing to reassign workers to their prior work duties, 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 Vidal Lopez immediate and full reinstatement to his former position of employment as an irrigator, 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. Make whole Vidal Lopez for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful refusal to assign him irrigation work. 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 interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5.

c. 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.

d. 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.

e. To facilitate compliance with paragraphs (f) and (i) below, 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 the peak season have begun at the time the Regional Director requests peak season dates, 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.

f. Post copies of the Notice in all appropriate languages, for sixty (60) days, in conspicuous places on Respondent's property, including places where notices to agricultural employees are usually posted, the period and places of posting to be determined by the Regional Director. Exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed.

g. 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 March 8, 1990, to March 8, 1991.

h. Provide a copy of the signed Notice to each agricultural employee hired during the twelve month period following the issuance of this Order.

i. 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 tine 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 quest ion-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 quest ion-and-answer period.

j. Notify the Regional Director, in writing, within thirty (30) days of issuance of this Order of the steps taken to comply with its terms. Upon request of the Regional

Director, notify him/her periodically thereafter in writing what further steps have been taken in compliance with the remedial order.

DATED: November 16, 1992

BRDCE J. JANIGIAN, Chairman[24]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[24] 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.

OASIS RANCH MANAGEMENT, INC. 90-CE-20-EC, et al.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we, Oasis Ranch Management, Inc., 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: (1) laying off employees Hermenegildo Mondragon Becerril, Miguel Mondragon Becerril, Manuel Angel Ramirez, Miguel Rodriquez, Jose Luis Estrada and Rene Martinez on March 12, 1990; (2) refusing to reassign Vidal Lopez to his former duties as an irrigator; (3) creating the impression of surveillance of protected concerted activity; (4) threatening workers with adverse consequences because they engaged in Union activities; (5) isolating a worker because he engaged in protected concerted activity; and (6) interrogating workers as to their union activities and/or sympathies in a manner that discourages the exercise of protected concerted activity.

The Board has directed us to post and publish this Notice.

The Agricultural Labor Relations Act is the law that gives you and all other farm workers in California these rights:

1. To organize themselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
4. To bargain with your employer about your wages and working conditions through a bargaining representative 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.

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 layoff, discriminatorily assign work duties, isolate or segregate employees, or otherwise discriminate against any employee, because she or he has engaged in union activity or supported the union or otherwise engaged in protected concerted activity.

WE WILL NOT interrogate workers as to their union activities and or sympathies in a manner that discourages the exercise of protected concerted activity, create the impression of surveillance of protected concerted activity, or threaten workers with adverse consequences because they engage in union or other protected concerted activities.

WE WILL make all employees whole for any economic losses resulting from the acts the Board found unlawful.

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at:

319 Waterman Avenue
El Centre, California 92243

Telephone No.: (619) 353-2130

DATED:

OASIS RANCH MANAGEMENT, INC.

By: _____
Representative

_____
Title

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

OASIS RANCH MANAGEMENT, INC.
(UTAF, etc.)

18 ALRB NO. 11
Case Nos. 90-CE-20-EC
90-CE-21-EC
90-CE-34-EC
90-CE-34-1-EC
90-CE-55-EC
90-CE-58-EC
90-CE-59-EC
90-CE-61-EC
90-CE-70-EC
90-CE-72-EC
90-CE-74-EC
90-CE-75-EC
90-CE-91-EC
90-CE-98-EC
90-CE-115-EC

Background

In early February of 1990, the Union de Trabajadores Agricolas Fronterizos (UTAF) began an organizing campaign among the 18 to 25 steady workers employed by Oasis Ranch Management, Inc. (Respondent). About 13 workers signed authorization cards and UTAF filed an election petition on March 6, 1990. The petition was dismissed on March 16 due to an inadequate showing of support, since an appropriate unit also would have included Respondent's harvest employees.

Upon learning of the organizing campaign, Respondent hired an attorney and two labor consultants to assist in conducting an anti-union campaign. The labor consultants were instructed to ask the workers what kind of problems they had with their work, which they did, and later reported their findings to Respondent's ranch manager. Numerous unfair labor practices were alleged, including interrogation by the labor consultants and various threats and acts of retaliation by Respondent occurring both prior to the dismissal of the election petition and for many months thereafter.

The ALJ's Decision

The ALJ found that on three occasions on or about March 6 the labor consultants unlawfully interrogated employees. In the first instance, the labor consultants asked why the workers wanted a union. In the second instance, the consultants claimed to be from the state and offered to help resolve any problems that the workers had. In the third instance, the consultants simply asked about problems they heard that the workers had with Respondent. The ALJ concluded that the questioning was unlawful because it was designed to ascertain the workers' union sympathies and constituted the solicitation of grievances with the implied promise to correct them.

The ALJ also found that Foreman Enrique Kstrada twice engaged in unlawful interrogation. First, he asked Rigoberto Martinez if he had signed the union petition and, second, he told Miguel Rodriguez that Respondent knew Rodriguez was the union leader. As with the interrogations discussed above, the ALJ concluded that these two incidents reflected an effort to identify union adherents.

Additionally, the ALJ found that Respondent made unlawful promises of benefits while the election petition was pending, discriminatorily altered its recall procedures in recalling Jose Luis Estrada and, in retaliation for the workers' union activities, ceased providing transportation to its general laborers, isolated Oscar Salazar for several weeks, laid off three employees on June 29, 1990, and failed to rehire Vidal Lopez as an irrigator. The ALJ also found that Foreman Estrada unlawfully ordered employees to stop organizing and threatened adverse changes in working conditions if the union won. Respondent did not except to these last two findings of the ALJ. In addition to its exceptions to the findings of violations, Respondent also excepted to the ALJ's refusal to exclude witnesses who were charging parties and to various aspects of the proposed remedy.

The Board's Decision

The Board first agreed with Respondent that the appropriate rule is that set out by the NLRB in Sunnyvale Medical Clinic. Inc. (1985) 277 NLRB 1217 [122 LRRM 1036], that all interrogation, including that of employees who are not open and active union supporters, should be examined in light of all the surrounding circumstances to determine if the interrogation would tend to be coercive. In applying this rule, the Board affirmed in part and reversed in part the findings of the ALJ.

In the Board's view, the first instance of interrogation was unlawful because the questioning was directly related to union sympathies, was less than a day after the election petition was filed, the labor consultants did not identify themselves, the questioning was done in a rather formal manner, and the employee questioned was not at that time an open and active union supporter. The second instance was also found unlawful because, in addition to the factors listed above, the consultants misrepresented that they were from the state and wanted to help resolve any complaints the workers had. The Board found the

third instance to be within the bounds of legality because the consultants merely asked what problems the workers had. However, the Board cautioned that employers must take great care to ensure that such questioning does not chill the exercise of protected rights.

The Board found the inquiry of Martinez by Foreman Estrada if he had signed the union petition to be similar to the situation in Sunnyvale Medical Clinic. Inc. because the inquiry was done in a casual manner and Estrada assured Martinez that he would not be included in upcoming layoffs. Again, the Board noted that this was a close question and that in other circumstances, there is a great risk that such inquiries would chill protected activity. Though the Board did not find the statement to Rodriguez that the company knew he was the union leader to be factually in the nature of interrogation, the Board nevertheless found the statement unlawful because it created the impression of surveillance.

Even though Respondent did not except to the findings of unlawful promises of wage increases, the Board reversed the ALJ's findings because one of the promises was promptly rescinded and repudiated (Passavant Memorial Area Hospital (1978) 237 NLRB 138 [98 LRRM 1492]) and the other "promise" was not factually supported by the record. The Board contrasted this situation with another violation which it affirmed, the layoff of six workers on March 12. The Board lauded Respondent for promptly reinstating the six with back pay after Respondent consulted with its attorney, but noted that the unlawful layoff was not repudiated so as to fit within the Passavant standard.

The Board reversed the finding that Respondent discriminatorily altered its procedures in recalling Jose Luis Estrada. The Board found that this allegation, which was not in the complaint, did not fall within the fully litigated standard of George Lucas & Sons (1978) 4 ALRB No. 86 because the record reflects no circumstances that would have put Respondent on notice that the legality of the recall was at issue. The Board also concluded that, even if there were no due process problems, the record was insufficient to sustain a violation.

The Board reversed the finding that the cessation of transportation was done in retaliation for protected activity. The Board's conclusion was based primarily on its disagreement that an inference of unlawful motive was raised because

Respondent's justification was based on shifting or after the fact rationales. Contrary to the ALJ, the Board found no significance in the fact that Respondent's answer did not reflect its argument that continuing the transportation would have violated state and federal safety laws because there is no requirement that all defenses be articulated in an answer. Moreover, Respondent's defense as expressed at the prehearing conference, that it would show that the transportation was against company policy for workers to ride without seatbelts, was not so inconsistent with its argument at hearing to constitute shifting rationales.

The Board affirmed the ALJ's finding that Salazar was isolated in retaliation for concerted activity in making a safety complaint. Though the Board agreed with Respondent that it was improper to draw an adverse inference from Respondent's failure to introduce work records which the General Counsel also had possession, the credited testimony of Salazar was sufficient to sustain the allegation.

The Board reversed the finding that Respondent discriminatorily laid off three employees on June 29, concluding that the evidence was insufficient to establish a prima facie case. Unlike the ALJ, the Board did not find Respondent's proffered justification inherently implausible and put less emphasis on evidence of a pattern of retaliatory actions.

The Board affirmed the finding that Vidal Lopez was unlawfully denied irrigation work, rejecting Respondent's argument that the record was insufficient to show that Lopez was actually denied any irrigation work.

The Board rejected Respondent's exception that it was prejudiced by the ALJ's failure to exclude witnesses who were also charging parties, finding no showing of actual prejudice nor abuse of discretion. In response to Respondent's exceptions with regard LO LW proposed remedy, the Board limited the mailing period to one year and the posting period to sixty days. However, the Board rejected Respondent's arguments that mailing, posting and educational remedies were not appropriate, and that the provision of the remedy to all of Respondent's employees and the provision of notices to all employees hired for one year would be overly burdensome.

Case Summary: Oasis Ranch Management
Case No.: 90-CE-20-EC, et al.

* * *

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: JENSEN FAMILY TRUST, a business trust, dba SEA VIEW RANCH, ROLAND J. JENSEN, TRUSTEE; HELEN M. JENSEN, TRUSTEE; and OASIS RANCH MANAGEMENT INC., a California Corporation, Respondents, and UNION DE TRABAJADORES AGRICOLAS FRONTERIZOS; and MANUEL ANGEL RAMIREZ, JOSE LUIS ESTRADA, JORGE CHAVEZ, OSCAR SALAZAR, RIGOBERTO MARTINEZ JAUREGUI, and MIGUEL RODRIGUEZ, Individuals, Charging Parties.	Case Nos. 90-CE-20-EC 90-CE-21-EC 90-CE-34-EC 90-CE-34-1-EC 90-CE-55-EC 90-CE-58-EC 90-CE-59-EC 90-CE-61-EC 90-CE-70-EC 90-CE-72-EC 90-CE-74-EC 90-CE-75-EC

Appearances;

Eagene Cardenas, Esq.
for General Counsel

David Smith, Esq.
for Respondent

Ventura Gutierrez
for Intervenor
Union de Trabajadores Agricolas
Fronterizos

February 26, 1992

DECISION OF ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge: This case was heard by me in El Centre, California, from April 23-25, 1991. It arises from 15 charges filed with the Agricultural Labor Relations Board ("ALRB" or "Board") by the Union de Trabajadores Agricolas Fronterizos ("Union" or "UTAF") and by several agricultural workers of Sea View Ranch ("Sea View") and Oasis Ranch Management, Inc. ("Respondent," "Company," or "Oasis") alleging various unfair labor practices in violation of the Agricultural Labor Relations Act ("ALRA" or "Act").

The charges were consolidated for hearing, and based on the foregoing charges the Regional Director issued a Complaint, a First Amended Consolidated Complaint and, on February 27, 1991, a Second Amended Complaint ("Complaint") alleging unlawful threats, interrogations, promise of benefits, layoffs, discharges, refusals to rehire and cessation of transportation all in retaliation for workers supporting an organizing campaign of the Union and engaging in other protected concerted activity. Respondent filed its Answer on February 21, 1991, wherein it denied any wrongdoing. The charges and pleadings were timely filed and properly served.

The Union intervened but neither presented any evidence nor questioned any witnesses. All parties had the opportunity to participate fully in the hearing, and the General Counsel and Respondent filed post-hearing briefs.

Upon the entire record,[1] including my observation of the witnesses, and after careful consideration of the arguments and briefs submitted, I make the following findings of fact and conclusions of law.

I. JURISDICTION

Respondent Oasis is an agricultural employer, the alleged discriminatees are agricultural employees, and the UTAF is a labor union within the meaning of sections 1140.4(c), 1140.4(b) and 1140.4(f), respectively, of the ALRA. Respondent admits that Mr. Dennis Maroney, manager or general foreman of Oasis, is a supervisor within the meaning of section 1140.4(j) of the Act but denies that foremen Enrique Estrada or Jesus Salazar are statutory supervisors.

II. COMPANY OPERATIONS

Oasis is a California corporation with its principal place of business in Tustin, California. On or about March 1, or March 21, 1990,[2] Oasis purchased the assets of Sea View Ranch ("Sea View") and at all times material herein has continued to operate the business in basically unchanged form at the same location

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[1]A11 references to the official hearing transcript will be denominated: "volume number"; "page number." Exhibits will be identified by number, preceded by "GCX," "RX," "JX," or "ALJX," for General Counsel, Respondent, Joint and Administrative Law Judge, respectively. GCX7 is hereby admitted based on Respondent's letter (ALJX1) confirming that the date of GCX7 is "10-28-90."

[2]The transcript says March 1, (I:10), but the Pre-Hearing Conference Order herein (of which I take administrative notice) states March 21.

and, at least initially, with a majority of the workers previously employed by Sea View.[3] Oasis both provides ranch management services to other ranches and farms its own land.

At the time of the hearing, Dennis Maroney had been general manager of first Sea View and then Oasis for about 5 years. In this capacity, he supervised the various crops which consisted of dates, grapes and citrus (lemons, tangerines, oranges, grapefruit and kumquat).

Mr. Maroney estimated that Sea View farmed approximately 800 acres in 1989. The amount of acreage increased in 1990 by at least 150 acres and perhaps by as much as 230 acres. (Compare I:17-18 with III:92-93.)

In February 1990,[4] Oasis employed approximately 18 to 25 regular or steady workers consisting of irrigators, tractor drivers, date palm workers (known as palmeros), and general laborers. (I:15, 25.) There were two foremen Jesus Salazar and Enrique Estrada; Salazar oversaw the work of the palmeros, and Estrada was in charge of the remaining workforce.

III. THE SUPERVISORY STATUS OF FOREMEN ESTRADA AND SALAZAR

1. Facts;

Mr. Maroney acknowledged that the foremen supervised the employees' work in the sense that they told the workers what to do, checked to make sure their work was done properly, and, if it

[3]General Counsel and Respondent stipulated that Oasis is the legal successor to Sea View, the original respondent herein.

[4]All dates hereafter are 1990 unless otherwise indicated.

was not, instructed them on how to do it. (I:13-15.) The workers were told to follow the directions and obey the orders of the foremen. (I:14.) The workers commonly received their orders from the foremen and only occasionally from Maroney.

Several workers confirmed Maroney's testimony and added that Estrada and Salazar held themselves out as foremen. Salazar did not testify, and Estrada'described his position as being "...in charge of the ranch and all that is done there." (II:92.)

According to Maroney, he usually hired people who had been recommended to him. He testified that both Estrada and Salazar could recommend that he hire people and mentioned a specific worker he hired on the recommendation of one of them. (I:14.) Both could recommend to him that workers be fired or laid off. There was no testimony as to how often he followed those recommendations. (I:43; III:86)

Four workers testified they were hired by Estrada and described their individual situations. (I:147; II:44, 86-87, 101.) Neither Estrada nor Maroney denied any of these specific incidents.

Maroney testified the foremen could not give workers time off even if it were for less than a day. Several workers, however, testified they had asked their respective foreman for days off at various times and were given the time off without them or the foremen having to talk to Maroney.[5] (Re Estrada,

[5]This finding is made without consideration of the workers' testimony regarding their obtaining time off to testify at the hearing since Mr. Maroney testified he gave Mr. Estrada a list of

see, I:75, 99-100, 121-122, II:34; Re Salazar, see (II:65-66.) Mr. Estrada did not rebut the testimony about giving the workers time off, and Salazar did not testify. I credit the workers.

2. Analysis;

Based on the foregoing, I find that both Salazar and Estrada are supervisors within the meaning of section 1140.4(j) of the Act. Estrada hired several workers which is sufficient to make him a statutory supervisor.

He and Salazar were the primary people overseeing the work of the Company employees, they and Company management held them out to the workers as supervisors who regarded them as such. They used independent judgment in granting requests for time off. Finally, as will be seen below, they were included in meetings with labor consultants who helped the Company wage an anti-union campaign, and they introduced the consultants to the workers. Both Company management, Estrada and Salazar themselves, and the workers, all considered them part of the management team.

IV. THE UNION ORGANIZING CAMPAIGN

UTAF co-ordinator Ventura Gutierrez testified that in early February, he held two or three meetings at the duplex on the ranch where several of the steady workers (Vidal Lopez, Miguel Rodriguez, Manuel Angel Ramirez, Pedro Lugo, Jorge Chavez, Jose Luis Estrada (not to be confused with foreman Enrique Estrada) and Rigoberto Martinez lived. He also held three or four meetings at the Union office in the nearby town of Coachella.

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workers and which day they were to testify.

Usually, about 12 or 13 of the steady workers attended the meetings, and 13 signed authorization cards for the UTAF between February 21 and 23. (I:53-54, 103-104, 128; II:4, 58, 85, 100.) Among the Union supporters were: Rigoberto Martinez, Hermenegildo Mondragon Becerril and his brother Miguel Mondragon Becerril, Miguel Rodriguez, Manuel Ramirez, Oscar Salazar, Ruben Sotelo, Pedro Lugo, Jose Luis Estrada, Jorge Chavez, and Rigoberto Martinez.

Various workers testified that their co-workers Miguel Yepis, Jose Saldivar, Hermino Becerril Ugalde and foreman Ramon Romo were not Union supporters. According to them, these four wore "No Union" hats and buttons for a month or so, whereas those who supported the Union wore them at most a day or so after the Company distributed them. (I:76-77, 83, 100-101, 103-105, 113-115, 123-126. 128, 133-136; II:4, 8-11, 49-51.)

Mr. Maroney testified he knew nothing of the Union organizing campaign until March 5 when he was served with a Notice to take Access.[6] (I:19.) He was unfamiliar with the Act, so he promptly hired an attorney and two labor consultants in order to both inform himself about the law and to wage an anti-union campaign. (I:20.)

The consultants conducted a two day seminar for Maroney and

[6] Mr. Gutierrez testified he spoke with Maroney before he filed the petition for certification on March 6, but there is no evidence when that conversation occurred, so it does not necessarily contradict Maroney's testimony. (I:56.) The petition was dismissed because the unit sought was inappropriate. Union organizing basically ceased after the dismissal.

foremen Estrada and Salazar on the ALRA. Maroney and the two foremen discussed their feelings about unions. Estrada, for example, told Maroney he had worked for the United Farm Workers before and did not like it.[7] (I:20.45-46.)

Mr. Maroney instructed the two consultants to ask the workers what kind of "problems" they had with work. Foremen Estrada and Salazar were present during this meeting and were told to escort them to the fields to speak to the workers. The consultants reported back to Maroney and identified which workers had problems and which did not. (I:22-23.)

V. ALLEGED INTERROGATION BY LABOR CONSULTANTS

1. Facts;

In paragraph 26 of the Complaint, General Counsel alleges that two workers were unlawfully interrogated by the Company's labor consultants. From charge number 90-CE-75-EC, it is clear this allegation refers to palmero workers Oscar Salazar and Ruben Sotelo.

Mr. Salazar, the brother of foreman Jesus Salazar, testified the consultants asked him why "they" wanted a union. The men did not show any identification, and he did not recall exactly what they said but it was "something like" they were from Sacramento or from the government. (II:58-60.) Mr. Sotelo did not testify.

Although not alleged in the Complaint, two other instances of interrogation by the labor consultants were testified to by

[7]Estrada denied discussing the union campaign with Maroney. (III:98.) I credit Maroney.

various workers. These were fully litigated, and are sufficiently related to the complaint so that it is appropriate to consider them. (George Lucas & Sons (1978) 4 ALRB No. 86.)

Vidal Lopez and Jorge Chavez described an incident at the beginning of March when they and several co-workers (including Manuel Ramirez, Hermenegildo Mondragon Becerril, Miguel Mondragon Becerril, Jose Luis Estrada, Herminio Ugalde and Pedro Lugo) were working in the palms. The consultants told the group they were from the state and understood the workers had many problems with the Company, and they wanted to help resolve matters. One or more of the workers responded that there were many problems, but they were with the Company and the foremen, so the workers did not believe the men could help. (I:83-85, 129-130.)

Worker Juan Resendiz testified to another incident in early March when foreman Estrada told him that two men wanted to ask him some questions. Estrada left, and the consultants told Resendiz their names and said they knew there were problems with the Company. Resendiz responded affirmatively that there were problems but did not testify whether anything else was said either by him or the consultants. Resendiz testified he did not realize the consultants were with the Company but did not indicate they said they were with the state. (I:105-107.)

Neither the consultants nor foreman Salazar testified, and foreman Estrada did not testify on this issue. Thus, the testimony of the workers is uncontroverted. They all testified in a credible manner, and I have no reason not to believe their

accounts except that I do not credit Salazar that the consultants told him they were from the state because he was equivocal.

2. Analysis;

Interrogating workers about their union sympathies is violative of the Act because of the propensity to restrain employees in exercising their rights to organize because of fear of discrimination and retaliation based on what the employer learns. (Morris, The Developing Labor Law, 2d. ed. (1983) (hereafter Morris).) "Questioning employees as to their union sympathies is not treated as an expression of views or opinions within the meaning of Section 8(c) [of the National Labor Relations Act ("NLRA" or "national act")] because the purpose of an inquiry is not to express views but to ascertain those of the person questioned.'" (Morris, at p. 120, quoting from Struksnes Constr. Co. (1975) 165 NLRB 1062 [65 LKRM 1385])

Whether interrogation is an unfair labor practice depends on the circumstances, including such factors as the time, place, position of the person making the inquiry and the known attitude of the employer. When the employer seeks to force the employee to disclose his union sentiments without stating a valid purpose and clearly assuring the employee there will be no reprisals, questioning is generally unlawful. (Morris, p. 124.)

I find the interrogation of Oscar Salazar was an effort to ascertain his union sympathies by Company agents and that there were no circumstances mitigating against finding a violation of section 1153 (a) of the Act. (Rod McLellan Company (1977) 3 ALRB

No. 71.)

I also find the other two incidents violative of section 1153(a) of the Act because the underlying purpose was to identify which workers had "problems" with the Company and thus might logically be part of the UTAF organizing effort. Such questioning has the same tendency to restrain employees.

Further, an employer is prohibited from soliciting grievances in response to or in opposition to a union organizing campaign where there is an implied promise to correct them. (Giuamarra Vineyards (1981) 7 ALRB No. 24, review den. by Ct.App., 5th Dist., June 3, 1983, hg. den. July 27, 1983.) Here, there was clearly such an implication since the consultants stated they wanted to help resolve the workers' problems.

VI. THE MARCH 7 MEETING AT THE SHOP (Paragraph 28)

1. Facts:

After hearing the consultants' reports, Mr. Maroney decided to meet with the approximately 18 steady workers so they could air their complaints about the Company. The consultants had spoken to worker Vidal Lopez[8] the day before, and they asked him what the workers wanted or what problems they had.[9] Lopez

[8]Prior to the meeting, the workers had asked Lopez to speak for them. (I:107-108,131.)

[9]Only Jorge Chavez testified they also asked why the workers wanted to bring in a union. (I:130-131.) I decline to credit Chavez. His testimony is denied by Maroney and was not corroborated by Lopez or Resendiz.

replied the palmeros[10] wanted their pay raised to what it had been before, and Maroney agreed.[11] (I:28,86.)

Lopez also said the general laborers wanted to be paid the same as palmeros when they did that work. According to Maroney, he also agreed to this request since it was already Company policy. (I:28-29.) Mr. Lopez, on the other hand, testified that Maroney replied he would talk to his boss. The meeting broke up because Lopez said if they could not resolve this conflict, there was no point in talking. (I:87, 109, 132.) I credit Lopez.

2. Analysis:

An employer may not promise or grant a wage increase during an organizing campaign unless it is a regularly scheduled increase consistent with past practice or is implemented for some other legitimate business reason. The National Labor Relations Board ("NLRB" or "national board") and this Board have been strict in finding circumstances where such increases have been allowed. Here, there in no evidence of any purpose other than to try to resolve employees' complaints because they were seeking to bring in the Union.

Conferring or promising benefits in such a case is unlawful

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[10]Palmeros are very skilled workers who have to climb the date palm trees (over 55 feet high) to perform a variety of tasks. The work takes special skills and a lot of nerve according to Maroney. There are also date workers who are not palmeros.

[11]At the Prehearing Conference, both parties agreed that Mr. Maroney then spoke to the consultants and rescinded the increase telling the workers the labor consultants told him he could not make any promises during a union organizing campaign.

even where the employer does not specifically condition the benefit on the workers rejecting the union. (NLRB v. Exchange Parts ("Exchange Parts") (1964) 375 U.S. 457; NLRB v. S.E.Nichols, Inc. (2d. Cir. 1988) 862 F.2d 952 [129 LRRM 3098], modifying on other grounds (1987) 284 NLRB No. 55.) I find the wage increase given the palmeros and the promise to consider raising wages for general laborers violated section 1153(a) of the Act.

VII. FOREMAN ESTRADA AND THE EVENTS OF MARCH 7 AND 8

1. Facts;

General Counsel alleges in paragraph 27 of the Complaint that Foreman Estrada ordered employees to stop unionizing and in paragraph 29 that Estrada interrogated workers about their union sympathies and those of their co-workers. Workers Miguel Rodriguez and Pedro Lugo testified that on March 7, after the meeting with Mr. Maroney, they were working at the Marita Ranch when foreman Estrada asked how they saw "...this about the Union." (II:46.)

Both men replied they did not know anything. Estrada then said that they should talk to the workers who were organizing for the Union and tell them to stop. They either did not respond to his statement or repeated they knew nothing. (I:35, 46-47.)

Both men were working at the same ranch the next day, and Estrada again raised the subject of the Union. Lugo testified in more detail and described Estrada as saying the Union promised many things and, if they could deliver, Estrada himself would

join. Estrada also told them the Union would exact a price for any benefits, but if they talked to Maroney, they could get the same thing without giving up anything to the Union. (I:47-48.)

Rodriguez did not mention these remarks, but he and Lugo both agree that Estrada told them the Company knew that Rodriguez was the Union leader. Rodriguez, but not Lugo, testified that Estrada asked when the election would be. They either did not reply or said they knew nothing in response to both statements. (II:36, 48.)

Both men seemed straightforward, but Mr. Lugo gave a more detailed account than Rodriguez. Where their accounts differ, I credit Lugo. Foreman Estrada testified only as a General Counsel witness and was not asked about either of these conversations. I find he made the statements attributed to him.

2. Analysis:

Estrada's direction to stop unionizing does not come within the Company's protected right to free speech to express its views or opinions. Rather, it is an unlawful direction or instruction to employees to cease exercising their statutory rights which violates section 1153(a) of the Act. (Morris, at p. 114.)

I also find Estrada's statement that he knew Rodriguez was the Union-leader was an interrogation as to his Union sympathies since the context indicates he was seeking information rather than making a statement of fact. This violates section 1153(a) of the Act.

I find no violation in his question of how they "saw" the Union since it is vague and subject to interpretations which could be lawful. I find no evidence to support the allegation that Estrada interrogated them about the Union sympathies of their co-workers. Consequently, both of these allegations should be dismissed.

VIII. THE MARCH 10 MEETING AT THE SHOP (Paragraph 30)

1. Facts;

Three workers, Jorge Chavez, Miguel Mondragon Becerril and Manuel Ramirez testified about a meeting with foreman Estrada on this date. Their testimony was virtually the same.

Most of the steady workers were present. Foreman Estrada showed them a piece of paper which he referred to as a petition, and stated that if the Union won, he, as foreman, would present his petition. He did not say to whom he would present it.

Estrada told them the petition[12] proposed to reduce the number of hours and days of work[13] and to eliminate transportation. Also, if they damaged equipment, they would have to pay for it. Further, they would not be allowed to talk to co-workers and would be laid off if they did so.[14] (I:137, 148-

[12]Thc witnesses did not have a copy of the "petition" since Esrxaaa had passed around his copy and then taken it back.

[13]General Counsel withdrew its allegation in paragraph 37 of the Complaint that Respondent discriminatorily reduced the work hours and/or days of the employees listed in paragraph 24 of the Complaint.

[14]Jorge Chavez testified they would be laid off or "stopped." It is not clear if he meant the terms to be synonymous. Since Ramirez corroborated only that they would be

149; II:12.) Foreman Estrada did not deny making these remarks, and I credit the workers' version.[15]

2. Analysis:

Threats are proscribed by section 1153(a) because they naturally tend to interfere with employee's freely exercising their rights to organize. Clearly, Estrada's remarks constitute an unlawful threat.

IX. THE MARCH 12 LAYOFF (Paragraph 34)

1. Facts;

Mr. Maroney acknowledged that Mr. Estrada laid off six workers on this date. They were: Miguel Mondragon Becerril ("Becerril"), Hermengildo Mondragon Becerril, Manual Ramirez, Miguel Rodriguez, Rene Martinez and Jose Luis Estrada.[16] (I:150.)

Mr. Becerril testified that when foreman Estrada announced the layoff and read the names, he said that whoever repented right then of joining the Union would have his job back. (I:150-151.) Chavez testified to the same effect although he has

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laid off, I credit that statement and do so in spite of the fact that Mr. Becerril failed to mention it.

[15]In order to conserve hearing time and avoid undue repetition, General Counsel made an offer of proof that workers Miguel Rodriguez, Pedro Lugo and Jose Luis Estrada would testify to the same essential facts as the foregoing witnesses. (II:36-37, 48, 100.)

[16]I credit Mr. Becerril's testimony that it was Miguel Rodriguez rather than Ruben Sotelo as Jorge Chavez testified because Mr. Sotelo was a palmero who worked with Oscar Salazar. The foreman of the palmeros was Jesus Salazar not Enrigue Estrada.

Estrada speaking of repenting of signing an authorization card. (I:138-139.)

Manual Ramirez, however, testified that when asked why they were laid off, foreman Estrada first replied it was because work was slow; but when asked if it were not because they were organizing a union, Estrada said, "No," but if they dropped the petition, those on layoff would get their jobs back. (II:13-14.)

Estrada was coy when the Workers asked how long they would be laid off, saying he did not know; it could be a week, a month or more, or even a year or more. (I:138-139, 151.) Jorge Chavez testified the Company had not laid off its regular workers in 1989, and they had worked year round except for vacations. (I:138-139.) Miguel Rodriguez testified that he personally was not laid off in either 1988 or 1989. (II:37.)

Manuel Ramirez testified that after these remarks by Estrada, he accused Estrada of planning to get rid of them later even if they dropped the Union petition. Estrada replied that it was true, but by then they would have had a chance to earn some money. (II:13-14.) Mr. Becerril attempted to testify to this same effect but sounded confused as to what was said. (I:151.) I discount his statement, but credit Ramirez. Estrada did not deny having made any of the statements.

The very next day Mr. Ramirez filed an unfair labor practice charge with the Board. The six men were reinstated with full pay the following day, March 14, after Mr. Maroney consulted with his attorney. (III:19.)

2. Analysis;

Estrada's statements clearly show that the layoffs were in retaliation for the Union activities of the workers. The fact that the layoffs were a departure from past practice is circumstantial evidence supporting this finding.[17] Respondent's only defense is that the men were quickly reinstated and paid for the two days' work they lost. This goes to remedy rather than whether the layoff was unlawful. The layoffs violated sections 1153(c) and (a) of the Act.

X. THE INTERROGATION OF RIGOBERTO MARTINE2 (Paragraph 31)

1. Facts:

Employee Rigoberto Martinez testified that on March 12, Mr. Estrada told Martinez he was asking, "man to man" if he had signed the petition for the Union. Martinez said he had. Estrada then said he had an order to lay off 6 men, but that he would give Martinez "an opportunity" to stay working. (II:88-89.) Martinez was not laid off at that time, but he was laid off in August, and General Counsel alleges the Company unlawful failed to rehire him. That allegation is discussed below.

There is no evidence contradicting Mr. Martinez' testimony, and I credit him.

2. Analysis:

Estrada's questioning is clearly an unlawful interrogation

[17]This is especially true since the Company was responsible for more land in 1990 than in 1989 which makes it less likely that layoffs would be required in 1990 when there were none in 1989.

about Martinez' Union sympathies. The fact that Martinez answered honestly does not detract from the fact that such inquiries have a natural tendency to interfere with and restrain employees in the free exercise of their rights. Estrada's question violated section 1153(a) of the Act.

XI. THE APRIL 6 LAYOFF OF JOSE LUIS ESTRADA (Paragraph 35)

Foreman Enrique Estrada laid off Jose Estrada on this date. Jose testified Enrique told him the layoff would last for 2 or 3 weeks. Jose asked if he were the only one being laid off, and Enrique answered he was laying off his (Enrique*s) nephew Miguel Yepis and also Ramon Romo. (II:106-107.)

Jose testified he saw Yepis and Romo working after he had been laid off. (Id.) Yepis was irrigating, but previously had been a general laborer like Jose who contended he could have been assigned the irrigation work just as easily as Yepis. (II:116-117.) He did not specify what work Romo was doing. (II:117.)

Respondent provided no evidence as to what work Yepis or Romo was assigned while Jose was on layoff but did not rebut Jose's testimony that they were working. It will be recalled that neither Yepis nor Romo supported the Union.

Enrique Estrada did not testify on this issue. Dennis Maroney was asked why Jose was laid off and promptly answered it was because of lack of work. He was then asked a leading question as to whether Jose's work was satisfactory. He replied it was not and described several instances where he found Jose's work performance inadequate. (III:21, 61-64.)

From Maroney's demeanor, I am convinced that the discussion of problems the Company had with Jose's work was simply something he added because of counsel's question to him. It did not ring true and appeared to be soley a make weight justification.

Jose Estrada testified about one of the incidents where his foreman and Maroney criticized his work. It occurred about a week or two before the layoff. He testified that Mr. Maroney and foreman Estrada told him he was working too slowly. Jose replied there was nothing wrong with his pace, whereupon Enrique, translating for Maroney, said he was working like a turtle.

Foreman Estrada then told Jose that he could give Jose unemployment so he could visit his family in Mexico. Jose replied he did not need to go to Mexico, but that Enrique was the foreman and could lay him off if that was what he wanted to do. (II:102-104.)

Enrique commented that perhaps Jose was working slowly because there were problems with the Union. Jose replied there were no problems except what the workers were already saying (he did not testify what he meant by this remark). Enrique then told him that some of the workers said Jose was the leader of the Union. Jose replied he was not a child and understood what Enrique was doing by complaining that he worked like a turtle and then saying he was the Union leader.

At this point, Enrique told him to go back to work. Enrique and Maroney, who had been present throughout (although it is not clear whether all of the statements made by Enrique in this

paragraph were translations of what Maroney said), left the area. (II:104-106.) Neither Maroney nor foreman Estrada rebutted Jose Estrada's testimony.

Estrada returned to the office on April 30 and asked Maroney for work. Maroney told him there was no more work and that he could not continue to live at the ranch house. (II:107-108.) Maroney did not rebut this testimony.

The parties agree that in early May, Mr. Maroney mailed a letter of recall to Jose to the address in Calexico he had provided the Company on an immigration form in March. (RX3) He apparently never received it and did not return to work at Oasis.[18]

Mr. Maroney testified that the normal practice for recalling a worker is to personally notify him if he lives on the ranch as Jose did. If this effort were unsuccessful, the recall notice would be posted on the bulletin board by the shop, and a notice would also be sent to the worker by certified mail.[19] (III:45.)

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[18]Company policy is that workers are considered to have quit if they do not report within 3 days after the reporting date set forth in a recall notice. (III:52.) Jose Estrada is marked as "Quit 5-17-90" on JX1, the seniority sheet dated April 4, 1990. Presumably, he should have reported on May 14. JX1 also shows he and Yepis were the least senior workers and that he was a general laburere whereas Yepis was an irrigator.

[19]The mailing address for workers living on the ranch is the same as the Company address. Mail is delivered to a mail box. Whoever picks it up, usually Maroney, separates out his mail and puts the rest in another box in the center of the ranch near the Company office. There is no separate mail box at the ranch house. (III:45-47.) General Counsel attacks this system, but there is evidence workers did receive recall notices in this fashion, and there is no evidence the Company changed the system once the organizing campaign began. Consequently, I do not find

After the March 12 layoffs, the workers, including Jose Estrada, were personally notified by Maroney that they were being recalled. (1:167; 11:102.) There is no evidence Maroney or anyone else from the Company attempted to personally notify Jose Estrada in this instance.[20] Nor is there any evidence his recall notice was posted on the bulletin board.

2. Analysis:

Respondent argues that the layoff was not discriminatory because it was justified regardless of any Union activity because of Jose's poor work. (Resp. brief, p.15.) In the first place, I have not credited Maroney that dissatisfaction about Jose's work habits was the reason for his layoff.

Second, even if it were, the issue is not whether reasons existed which could have justified the layoff; the question is what was the real reason the Company laid him off. The fact that a justifiable reason might exist is not enough.

General Counsel contends the conversation between Jose and foreman Estrada and Maroney shows the layoff was because they believed Jose was active in the Union. It contends the recall

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anvthinq unlawful about the system.

[20]Jose testified he was not living at the ranch for about a week around the time RX4 (a certified postal receipt card sent by Jose to Maroney dated May 15 which apparently accompanied the charge he filed on May 14 with the Board). (11:112-113.) I cannot tell from the record whether his absence covered the period when the Company sent the recall notice. Since he was living on the ranch except for this one week, I make no finding that he was not living there at the time the Company sent the recall notice.

notice was not sent in good faith and thus does not support Respondent's argument that it was not attempting to rid itself of a Union activist when it laid off Jose.

In order to show a discriminatory layoff, General Counsel must show that the alleged discriminatee engaged in protected concerted activity, that Respondent knew or believed the discriminatee had done so, and that the worker was laid off because of that activity. (Lawrence Scarrone (Scarrone) (1981) 7 ALRB No. 13.) Once General counsel has made its prima facie case, the burden shifts to Respondent to prove that it would have taken the adverse action even absent the protected activity. (NLRB v. Transportation Management Corp. (Transportation) (1983) 462 U.S. 393 [113 LRRM 2857]; Wright Line (1980) 251 NLRB 1083 [105 LRRM 119], enf'd. NLRB v. Wright Line (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].)

Estrada's and Maroney's reference to Jose's connection to the Union coupled with criticizing his work and suggesting he could be laid off is direct evidence which establishes the elements of a prima facie case. Further, the timing of his layoff also indicates an unlawful motive since it -is less than a month after foreman Estrada's threat.

Additionally, Respondent's failure to show it followed its usual recall procedure by attempting to personally notify Jose or post the recall notice indicates an unlawful motive. Respondent's shifting reasons that it laid him off because of lack of work or dissatisfaction with his work also support

General Counsel's case.

It is now up to Respondent to show that it would have laid off Jose Estrada without regard to his role as a supposed Union leader. Estrada had only begun working at the Company in December 1989. He was the least senior general worker so the fact that Yepis and Romo remained working does not indicate any impropriety in selecting Estrada for lay off.

Although no workers were laid off in 1989 and the Company was working more land in 1990, Jose had been working only since December, so this fact is of little probative value here. There is no evidence there was work to which Estrada should have been assigned until May 30 when a new worker was hired.[21] Thus, I find no violation in Jose Estrada's layoff.

I do, however, find a violation as to his recall. Respondent did not follow its usual procedure of trying to notify him personally or posting the recall notice. And although the address it used to mail his recall letter to was in the Company files, it makes no sense to me that if the Company intended the notice to reach Jose that it would not mail it to the address of the ranch house (84-510 Johnson Street) that it used to reach the other workers who lived there with Jose.

Thus, I find Respondent has not rebutted the evidence General Counsel produced that the Company intended to rid itself of Union supporters starting with Estrada whom it considered to

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[21]JX2, the 1991 seniority sheet, shows Manuel Quesada was hired as a general laborer on May 30. It also shows that Valeria Gallosh was hired on June 4, but he was hired in the dates.

be one of the Union's leaders. The failure to recall Jose Estrada violated both sections 1153(c) and (a) of the Act.

XII. TRANSPORTATION (Paragraph 32)

1. Facts:

Four workers[22] testified that before the Union organizing campaign started, foreman Estrada regularly drove the general laborers from the shop where they gathered to receive work assignments to their work site. This practice was discontinued at the beginning of May. (1:87-88, 110-111, 140; 11:13.)

Mr. Maroney denied that the Company provided transportation except that perhaps once or twice a week foreman Estrada would give a worker a ride if he were going to the worker's work site.[23] (1:38-39.) Foreman Estrada also denied he regularly transported workers. He testified that two or three times a week if a worker were going the same place he was, then he would give him a ride. He would not go to the shop to pick up others.

In a declaration signed by foreman Estrada in October 1990 (GCX11), he stated he was responding to an allegation that he had denied transportation to Vidal Lopez. He further declared that

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[22]Vidal Lopez, Juan Resendiz, Jorge Chavez, and Manuel Rar.irsz. The parties stipulated that worker Miguel Rodriguez would testify to the same effect. (11:38.)

[23]He further stated that there was no Company policy for foreman Estrada to transport all general laborers to their work site. (1:40-41.) This testimony is not necessarily inconsistent with that of the workers since Juan Resendiz, for example, testified usually there would be about 5 workers at the shop, and JX1 shows there were 8 general laborers in the spring of 1990. (1:117.) Resendiz did not say how the other workers would get to work.

he would "...transport the general labor employees but never the irrigators." I note that Lopez was irrigating at that time. I credit this statement of Estrada's rather than his testimony.

The Company admits that it ceased whatever practice it had, but Mr. Maroney testified it was because he attended an insurance seminar in late April and became concerned about allowing employees to ride in the. back of Company pickup trucks. (111:94.) Workers Juan Resendiz and Manuel Ramirez testified that some workers would ride in the back since only one or two could sit in the truck cab. (1:118; 11:28.) Maroney's testimony tends to discredit that of foreman Estrada since if he usually transported only a single worker, it is unlikely that workers would be riding in the back of the truck.

I credit the workers. Their testimony was credible, and they all testified to the same basic facts but their testimony sounded believable and not rehearsed. Further, Estrada's declaration corroborates their testimony. I also do not believe Maroney's proffered reason that it was the insurance seminar which led him to change the Company practice. If that were the case, I can see no reason why that was not mentioned in Respondent's answers or at the prehearing conference. I believe Mr. Maroney thought of this reason later.

2. Analysis :

Respondent's shifting rationales and the fact that I do not believe the only reason it gave for terminating transportation cause me to conclude that it did so in retaliation for the

workers' organizing activity. I have considered Respondent's argument that Estrada's threat that the Company would cease providing transportation occurred some two months previously and that it was tied to the Union being successful.

On balance, however, I do not find the timing that remote, and based on the foregoing considerations, I conclude the cessation of transportation violated sections 1153(c) and (a) of the Act.

XIII. THE JUNE 14 LAYOFF OF OSCAR SALAZAR AND RUBEN SOTELO

(Paragraph 36)

1. Facts:

Both men were laid off after they refused to spray sulfur on date palm trees on June 13 because they believed they were not provided the necessary equipment to do the job.[24] Oscar Salazar testified that he and Mr. Sotelo based their protest on what a state inspector had told them sometime previously.[25] (11:67-68.)

Foreman Salazar told them he could not provide any other equipment, so they went to see Mr. Maroney. Maroney said there

[24]In paragraph 33 of the Complaint, General Counsel alleges that on June 13 Mr. Maroney threatened certain workers at Drippy Springs Ranch with a reduction of work because of their Union sympathies. Since Mr. Salazar and Mr. Sotelo were working there on that date, I infer this allegation applies to them. There was no evidence of such a threat, and I recommend this allegation be dismisses.

[25]Respondent interposed a hearsay objection, and the inspector's statement was admitted not to establish that the equipment was necessary, but to explain Sotelo's and Salazar's actions.

was no other equipment, and there was no other work available. They reiterated they would not spray without proper equipment and asked if Maroney would give them unemployment since there was no other work.[26] (11:69-70.)

Overnight they changed their minds, and the next morning got the equipment and began spraying. After they had been working a while, their foreman came and told them to stop and to go see Mr. Maroney. They did so.

Maroney had already assigned two other men to .'do the work. Oscar Salazar testified that Maroney gave them a document in English, which they could not read, and Maroney told them that was their problem. (11:71.) From Maroney's testimony, I infer it was a layoff notice. (111:36.) Maroney recalled Salazar and Sotelo after the sulfuring was completed. (11:72.)

2. Analysis:

Workers who jointly protest working conditions which they believe are unsafe are undeniably engaged in protected concerted activity. Here, however, I find that Salazar and Sotelo were not laid off because of their protest but because there was no other work for them to perform except the sulfuring.

Maroney's testimony that there was no such work has not been rebutted. In fact, Oscar Salazar acknowledged that both Estrada

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[26]Mr. Maroney testified Oscar Salazar said he preferred unemployment to performing the sulfuring. (111:27.) I credit Salazar that he and Sotelo asked for unemployment only because Maroney said there was no other work available, and they believed, whether correctly or not, that they should not do the work without having additional protective gear.

and Maroney told him and Sotelo that sulfuring was the only work available for them at that time. Similarly, Maroney's testimony that Salzar was recalled after the sulfuring was completed was not rebutted.

If there had been work for them to perform, clearly their layoff would have violated the Act. But in the absence of available work, I find that Respondent had a legitimate business reason for laying them off and that this was the primary reason it did so. I recommend that this allegation be dismissed.

XIII. ISOLATING SALAZAR FROM OTHER WORKERS (Paragraph 38)

1. Facts:

Oscar Salazar testified that on his first day of work after being recalled, foreman Salazar, his brother, sent him to work alone at a ranch. As a palmero, he did not usually work alone because he had to climb into the 56 foot—or higher—palm trees, and he needed someone in the area in case his ladder should fall. He protested, but his brother said he could do nothing because Maroney had ordered him to do this. He worked alone for two or three weeks. (11:73-74.)

Foreman Salazar did not testify. Mr. Maroney agreed that someone needed to be available in case a palmero's ladder fell, but testified he checked the Company records and that Salazar was not alone because Juan Resendiz was irrigating in the area. (111:27-28.) Respondent did not produce any records to corroborate Mr. Maroney's testimony.

I credit Mr. Salazar. He was a good witness. He was

generally sure of his answers but did not exaggerate. His demeanor showed he was genuinely upset about his isolation, and his manner lent credibility to his testimony.

Further, Respondent's failure to produce Company records to show Mr. Resendiz was working in the same area warrants an adverse inference. (Cal. Evid. Code, section 412; Limestone Apparel Corp. (1981) 255 NLRB 722 (Company failed to produce production records to support oral testimony that a Worker was not a good worker).

2. Analysis:

The timing of Mr. Salazar's isolation from other workers convinces me it was in retaliation for his and Sotelo's protest which I have found was protected concerted activity. Respondent's departure from its typical procedures with absolutely no valid reason shown for doing so supports this view.

Further, such conduct is consistent with certain other behavior of Mr. Maroney where he sought to impress on workers that he was the one with the power to give orders which must be followed. (See Maroney's comments to workers Miguel Mondragon Becerril and Manuel Ramirez.) I find segregating Mr. Salazar from other workers violated section 1153(a) of the Act.

XV. THE JUNE 29 AND JULY 11 LAYOFFS (Paragraphs 39 and 40)

1. Facts:

Miguel Mondragon Becerril ("Becerril"), Hermenegildo Mondragon Becerril ("Mondragon") and Manuel Ramirez were laid off on this date. Becerril testified foreman Estrada said it was

because there was no work. (1:152.) Mr. Ramirez said Estrada gave no reason. (11:14-15.) Mondragon did not testify.

Both men testified they saw Miguel Yepis, who was less senior than they, irrigating after they were laid off. (1:152: 11:15.) Both acknowledged they had not previously irrigated for the Company, but stated that Yepis[1] classification, like theirs, was general laborer. (1:158; 11:28-29.) JX1, dated April 4, shows Yepis listed as an irrigator.

Mr. Ramirez testified he also saw Jose Saldivar and Ramon Romo working while he was on layoff. Saldivar is less senior than the three men laid off, but is listed on JX1 as an irrigator, and RX 5 shows he had been irrigating at least since October 1989. Ramirez did not say what work Romo was performing. He said Saldivar was in charge of Borrego Springs but did not explain what he meant. (11:29.)

Becerril and Ramirez were recalled and notified to report on July 10.[27] They worked a full day that date but were laid off after working only about a half hour or, at most, one hour on July 11. Becerril testified foreman" Estrada said only that there were problems but did not say what they were, and he did not ask. (1:152-153.) Ramirez testified that Estrada, presumably referring to another layoff notice, said, "The mailman is here again."

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[27]The parties stipulated that H. Mondragon was sent a recall notice on July 5 to report on July 9, and there is a signed postal receipt dated July 9. There is no evidence why Mr.Mondragon did not return.

Ramirez testified that the preceding day Estrada had referred to the fact that on July 5 the Union had filed a charge about the June 29 layoff.[28] (11:17, 19-20.) He asked Estrada if he was being laid off because of that conversation. Estrada said, "No" but then said he knew that Miguel and Ramirez were the leaders of the Union and that he had read their demands. I infer he was referring to the charge. Ramirez replied to Estrada that if that was what Estrada thought, that was fine. (11:21.)

Foreman Estrada did not testify on this issue. Mr. Maroney testified the men were laid off on June 29 because of a lack of work because the Company tries to keep hard physical work to a minimum in the hot, humid weather and that the summer of 1990 was one of the hottest spells in many years. (111:31-32.) He also stated, however, that the summer "continued very hot." (111:31.) The men were not laid off in 1989, and there is no showing it was hotter at the time they were laid off than when they were recalled.

With regard to the July 11 layoff, Maroney testified the men were stopped from working because they had worked into an area which had been sprayed with pesticides and was not yet safe to enter. He acknowledged the men were not given any reason for their layoff. (111:33-34.) Estrada did not testify on this issue.

After Estrada told them they were laid off on July 11, they

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[28]This charge is dated July 5 and indicates it was served on Respondent on this same date.

went to the office to see Maroney because Mr. Ramirez disagreed with the amount of rent deducted from his check. When he disputed the deduction, Maroney replied that he was the only one who gave orders at the Company. (1:154; 11:22.)

Ramirez asked how long they would be laid off, and Maroney replied he did not know, it could be a long time. (Id.) Maroney then said if they wanted work, they should go see their friend Ventura at the Union and see if he would give them a job. (Id.)

Maroney testified the conversation was only about rent and not about work or why they were laid off. (111:34.) He did not specifically deny making the remark about the Union, however, I so infer since he said the conversation only concerned rent. He did not deny telling the men that he was the only one who gave the orders at the Company.
I credit the workers as to their conversation with foreman Estrada. I also credit them as to their conversation with Maroney. I found both Becerril and Ramirez credible, and their testimony as to Maroney's remarks are consistent with other of Maroney's comments and actions.

2. Analysis:

Becerril, Mondragon and Ramirez were among the workers laid off by Respondent on March 12 in retaliation for their Union activity. General Counsel's overall theory is that from March until September the Company engaged in a series of unfair labor practices to rid itself of those who supported the Union.

JX1 and JX2 show that in 1990 eight workers quit or were

fired, and all were connected to the Union in the eyes of the Company.[29] The only three men identified as non-Union (Yepis, Romo and Saldivar) remained working.

By the time of this layoff, some three months had passed since the Union's petition was dismissed and organizing essentially had ceased. In the intervening time, however, the Company unlawfully refused to rehire Jose Estrada because of his Union activity and unlawfully segregated Oscar Salazar. Although the latter act was due to his protest about working conditions, the charge contesting this action was filed by the Union. Thus, I find, contrary to Respondent's argument in its brief, that Union activity was not a thing of the past but rather an ongoing issue at the Company. General Counsel has established a prima facie case.

Respondent's defense is that although it had not found it necessary to lay off any workers in 1989, it did in this case because of the hot weather, and it laid off those with the lowest seniority in its general laborer classification. It satisfactorily explained why Yepis, Saldivar and Romo would not have been laid off instead of Becerril, Mondragon and Ramirez, and the two other people who had less seniority (per JX1) were

[29]Although there is no testimony that Rene Martinez supported the Union, he was among the six men laid off on March 12. I note that there are no unfair labor practice allegations regarding three of the eight men: Ruben Sotelo, Rene Martinez and Miguel Rodriguez.

not general laborers but were working in the dates.[30]

Thus, the issue is whether I believe Respondent's underlying reason for the layoff. I do not. Not only did Maroney not sound convincing when he testified, I find it improbable that despite the continuing excessively hot weather, it was not necessary to lay off any other worker throughout the summer until Rigoberto Martinez was laid off on August 3. (See discussion below.)

Since I do not believe the only reason proffered by Respondent, it has not successfully rebutted General Counsel's prima facie case. The fact that they were recalled 11 days later does not alter my conclusion. Laying off workers and depriving them of income can powerfully demonstrate that it is the employer who controls their economic destiny. (Exchange Parts.) I find the layoff violated sections 1153(c) and (a) of the Act.

With regard to their layoff on July 11, Estrada's reference to the recently filed unfair labor practice charge regarding the June 29 layoff and Maroney's comment that they should ask the Union for work establish a prima facie case that the layoff was unlawful. Maroney, however, had a plausible explanation for their sudden layoff, and I did not find his demeanor unconvincing as in certain other instances.

I find Respondent has successfully rebutted the prima facie

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[30]GCX9 shows that one general laborer, Manuel Quezado, who had just been hired in May was working the week of July 1 as an irrigator. Absent further evidence, I am unable to conclude that it was improper for him to be working in that position.

case, and I recommend this allegation be dismissed.[31]

XVI. THE FAILURE TO RECALL RIGOBERTO MARTINEZ (Paragraph 41)

Facts:

On August 3, foreman Estrada laid off Mr. Martinez. There is no allegation the layoff was improper. Estrada told Martinez he did not know how long the layoff would last and did not say anything to Martinez about checking back. (11:89.) Vidal Lopez was present at the conversation.

The parties stipulated a recall letter was mailed to the ranch house address on August 22 with a reporting date of August 27. The postal receipt was signed by Jorge Chavez on August 23.

Mr. Martinez testified he was in Mexicali, and a co-worker, Pedro Lugo, told him he was recalled but that he should talk to foreman Estrada first. On August 25, the same day he had talked to Lugo, Martinez testified he telephoned Estrada who told him he had to have his own transportation in order to work.

When Martinez replied he had no transportation, Estrada replied there was no use in his showing up. Earlier, Estrada had said that since the Union came on the scene, he could no longer transport the workers. (11:90-92.)

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[31]•Genera] Counsel argues that, as with Jose Estrada, Respondent was not sincere when it recalled Becerril and Ramirez because it did not personally notify them. Despite the fact that as with Jose Estrada, there is no evidence Maroney attempted to notify Becerril and Ramirez nor that he posted their recall notices, here he did send the letters to the ranch house where they were living rather than to, for example, Thermal where Ramirez sometimes received mail. I note that this is not an issue as to Hermenegildo Mondragon since he did not report on July 10 as required by the recall notice sent following the June 29 layoff. I do not find the recall procedure was a sham.

Martinez acknowledged that from May, when the Company allegedly ceased providing transportation, until he was laid off on August 3, he had worked regularly. (11:92-93.) There is no evidence why he no longer had transportation, nor any explanation of why Estrada would raise the subject when Martinez had been working for some three months after transportation was stopped.

Foreman Estrada did not testify about this issue. Mr. Maroney testified Martinez was recalled and did not appear within 3 days after the reporting date and therefore was terminated pursuant to Company policy. (111:35-36.)

Despite the fact that Estrada did not deny this conversation occurred and although there was nothing inherently unbelievable about Mr. Martinez' demeanor, I do not credit his testimony. It simply makes no sense that Estrada would have had Martinez telephone him so he could tell Martinez what he already knew, that is, that the Company was no longer providing transportation to the workers. I recommend this allegation be dismissed.

XVII. THE REFUSAL TO REHIRE VIDAL LOPE2 (Paragraph 42)

1. Facts;

Mr. Lopez was hired by Sea View in 1985 as a general laborer, but in February 1990 he was irrigating. Enrique Estrada was his foreman.

In early May, his car broke down so he could no longer transport himself to work.[32] Mr. Maroney told him to have

[32]There is no evidence, and General Counsel does not contend, that the Company ever provided transportation for its irrigators.

Ramon Romo fix the car and told him he could return as an irrigator when his car was ready. (1:90-91.)

He remained working for the Company as a general laborer, and informed Maroney on July 3 that his car was repaired, and he was ready to return to irrigating work. Co-workers Rigoberto Martinez, Jorge Chavez and Miguel Rodriguez were present.

According to Lopez,. Maroney told him he had quit. When Lopez protested he had not, Maroney told him to ask Lopez' friend Ventura (from the Union) if he had irrigation work for him. (1:91-92.) Then Maroney said, "Oh, shit. There's no more irrigation work for you." (1:92.) Jorge Chavez corroborated Lopez' testimony. (1:140-141.) Maroney did not deny it.

I credit Lopez and Chavez not only because Maroney did not deny the statements, but because they are consistent with his remarks to Becerril and Ramirez which he also did not deny making. Further, the fact that Chavez and Lopez were still working at the Company at the time they testified means their testimony is entitled to special weight. (Georgia Rug Mill (1961) 131 NLRB No. 160.)

Lopez testified that in September he saw a new worker, Lorenzo Gallegos, irrigating at the Crockett Ranch.[33] (1:93.) Mr. Lopaz has continued working for the Company and was still employed as a general laborer at the time of the hearing. He

[33]GCX 9 is a time sheet for the week ending July 1 showing Manuel Quesado irrigating. There is no evidence whether he continued to do so as of July 3 when Lopez indicated he was available to return to work.

receives the same pay as an irrigator but works fewer hours. (1:95-96.)

Mr. Maroney testified that in July when Mr. Lopez asked to go back to irrigating, there were no jobs in that classification. But then he testified the problem was that Lopez wanted to irrigate a particular ranch, Indio 80, where he had previously irrigated. Miguel Yepis had been irrigating there since May, and the ranch owner had written to specifically request that Maroney keep Yepis. (RX6.)[34] Maroney testified he offered to have Lopez irrigate other ranches, but Lopez refused. (111:37.)

Maroney also testified that Lopez wanted the Company to provide transportation from the ranch house where he lived to Indio 80, a distance of some 35 miles, while Yepis lived only 2 miles from Indio 80. (111:37.) I find this unbelievable since Lopez had provided his own transportation in the past and knew when his car broke down that he could not continue to irrigate. It makes no sense for him to have made such a demand.

Mr. Maroney testified Gallegos was hired to do several jobs and specifically mentioned general labor and irrigating. In September, he supposed Gallegos would have been irrigating and harvesting dates. (1:43-44.)

Foreman Estrada was not Gallegos' foreman, but testified he thought Gallegos irrigated once and otherwise worked as a

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[34]RX5 is a similar letter the Company received in 1989 regarding another worker. Maroney testified that he always tried to accommodate the wishes of the ranch owners for whom Oasis provided labor. (111:38-40.)

palmero. (111:101.) Maroney also testified he expected Gallegos would have irrigated a day or two at most. GCX7 shows Gallegos irrigated at Indio 80 for 5 days in the week of October 28.

The Company offered no explanation as to why a new employee, rather than Lopez, was given this job especially since Maroney did not deny that he had told Lopez he would be put back to irrigating when his vehicle was repaired. The Company has not contended that Mr. Lopez did not perform his irrigation duties properly.

2. Analysis:

Maroney's reference to the Union when Lopez indicated he was ready to return to work indicates Respondent's continuing concern with its workers' organizational activities. I find no evidence, however, that there was irrigating work available to which Lopez should have been assigned and, consequently, find no violation.

I do find, however, a violation in Respondent's failure to assign Mr. Lopez irrigation work when it became available in September. Contrary to Respondent's argument that any concern of the Company with Union organizing had ceased when the petition for certification had been dismissed, the evidence shows it was a continuing issue. Respondent's failure to give any reason for this action when Lopez was available causes me to find that Respondent violated sections 1153(c) and (a) of the Act.

CONCLUSION

Based on the entire record, the findings of fact and conclusions of law set forth 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 Jensen Family Trust, dba Sea View Ranch, and Oasis Ranch Management, 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 activities and sympathies;

c. Segregating workers because they engaged in protected concerted activity;

d. Denying benefits to employees because of their Union activities;

e. Granting or promising wage increases during a Union organizational campaign;

f. 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;

g. Unlawfully laying off, refusing or failing to recall, refusing or failing to reassign workers to their prior work duties, eliminating transportation, 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 Jose Luis Estrada 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 Vidal Lopez immediate and full reinstatement to his former position of employment as an irrigator, 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 Jose Luis Estrada for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful failure to recall him. 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 interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

d. Make whole Vidal Lopez for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful refusal to assign him irrigation work. 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 interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

e. Make whole Manuel Ramirez, Miguel Mondragon Becerril and Hermenegildo Mondragon Becerril for all wage losses or other economic losses they suffered as a result their unlawful layoff from June 29, 1990 through July 9, 1990, inclusive. 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 layoff. The award also shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

f. Reinstate its practice of transporting its general labor employees from the Company shop to the work site.

g. 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.

h. 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.

i. 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.

j. 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.

k. 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 March 1, 1990, to the date of mailing.

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

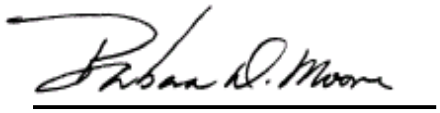
m. Arrange for a Board agent or a representative of Respondent to distribute and read the Notice in all appropriate languages to Respondent's employees assembled on Respondent's time and property, at times and places to be

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. 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.

n. 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.

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

DATED: February 26, 1992



BARBARA D. MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we Sea View Ranch and Oasis Ranch Management, Inc., violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by: (1) laying off employees Hermenegildo Mondragon Becerril, Miguel Mondragon Becerril, Manuel Angel Ramirez, Miguel Rodriguez, Jose Luis Estrada and Rene Martinez on March 12, 1990; (2) refusing to rehire Jose Luis Estrada; by refusing to reassign Vidal Lopez to his former duties as an irrigator; (3) laying off Miguel Mondragon Becerril, Hermenegildo Mondragon Becerril and Manuel Ramirez on June 29, 2990: (4) interrogating workers as to their activities and sympathies regarding the Union de Trabajadores Agricolas Fronterizos (Union); (5) threatening workers with adverse consequences because they engaged in Union activities; (6) isolating workers who engaged in protected concerted activity; and (7) discontinuing transportation for workers because they engaged in Union activities.

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

The Agricultural Labor Relations Act is law that gives you and all other farm workers in California these rights:

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

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

WE WILL NOT 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, layoff, discriminatorily assign work duties, isolate or segregate employees, or otherwise discriminate against any employee, because she or he has engaged in Union activity or supported the Union or otherwise engaged in protected concerted activity.

WE WILL NOT interrogate workers about their Union sympathies or activities or threaten them with adverse consequences or deny benefits to them because they engage in Union or other protected concerted activities.

WE WILL make all employees whole for any losses they suffered as a result of our unlawful acts.

DATED: Sea View Ranch/Oasis Ranch Management, Inc.

By: _____
Representative Title

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