Reedley, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| GERAWAN RANCHES, A General Partnership, GERAWAN CO., INC., A California Corporation,' GERAWAN ENTERPRISES, A General Partnership, RAY M. GERAWAN, Individually and as a Partner of GERAWAN RANCHES and GERAWAN ENTERPRISES, and STAR R. GERAWAN Individually and as a Partner of GERAWAN RANCHES and GERAWAN ENTERPRISES,<br><br>Respondents,<br><br>and<br><br>INDEPENDENT UNION OF AGRI-CULTURAL WORKERS, #2344, INTER-NATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, DOROTEO LOPEZ, DAMIAN G. OLIVAR, APOLINAR G. ZAMORA, MANUEL ESTRADA NEGRETE, and the UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Charging Parties. | ) | Case Nos. 90-CE-28-VI<br>91-CE-1-VI<br>91-CE-5-VI<br>91-CE-9-VI<br>91-CE-13-VI<br>91-CE-14-VI<br>91-CE-17-VI<br><br>18 ALRB No. 16<br><br>(December 30,1992 |

DECISION AND ORDER

On March 6, 1992, Administrative Law Judge (ALJ) James Wolpman issued the attached decision and recommended order in this matter. Thereafter, Gerawan Ranches, Gerawan Co., Inc., Gerawan Enterprises, Ray M. Gerawan and Star R. Gerawan, (Respondent) filed exceptions to the ALJ's decision with a brief in support of exceptions and General Counsel filed a response brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the ALJ's decision in light of the record and the briefs of the parties and has decided to affirm the ALJ's findings of fact and conclusions of law and to adopt his recommended remedial provisions.

Duty to Bargain During the Pendency of Election Objections

Respondent concedes that it unilaterally closed six labor camps used for employee housing during the pendency of objections to an election in which employees had designated the United Farm Workers of America, AFL-CIO (UFW) as their representative for purposes of collective bargaining but prior to certification of the UFW by the Board. The ALJ properly invoked the well settled doctrine which holds that an employer who makes changes in employees' terms and conditions of employment falling within the scope of mandatory subjects of bargaining without prior notice to the union while election challenges and objections are pending incurs a risk that the changes may be found to be violations of the duty to bargain. (Labor Code section 1153(e) and (a)[1]; Mike O'Connor Chevrolet v. National Labor Relations Board (1974) 209 NLRB 701, rev'd on other grounds (8th Cir. 1975) 512 F.2d 684; Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal.Sd 848 [176

[1] All section references herein are to the California Labor Code section 1140 et seq., herein called the ALRA or Act, unless otherwise specified.

Cal.Rptr. 753]). In the view of the ALJ who assessed Respondent's admitted failure to notify the UFW before implementing changes, Respondent took that chance and lost.[2]

Respondent asserts various justifications for its admitted failure to provide the UFW with an opportunity to bargain before closing down the housing. Among those defenses, Respondent suggests that, had it in fact offered to bargain about the change, it would have incurred a greater risk, that of having its offer to bargain interpreted as an indication that it was willing to recognize the UFW and withdraw its objections to the election. Respondent asserts the Board's decision in Grow-Art (1983) 9 ALRB No. 67 justifies its position and establishes the "reasonable doubt" defense set forth in Highland, supra, 29 Cal.Sd 848. The question there was, after recognizing the

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[2]Respondent seeks to excuse its pre-certification actions by implying that its duty to bargain before implementing unilateral changes should not attach until after the Board has in fact disposed of its objections to the election and certified the UFW. Here, the UFW majority was established at the time of the election or, at the latest, upon Board resolution of a sufficient number of outcome-determinative challenged ballots. "The [NLRB] has held that once any employer becomes aware of a properly designated bargaining representative, he may not unilaterally make changes in the employees' terms and conditions of employment, without first giving the representative an opportunity to bargain collectively." (Fleming Manufacturing Co. (1957) 119 NLRB 452, 464 [41 LRRM 1115].) Moreover, it should be remembered that whether there is ever a pre-certification duty to bargain in the first instance is entirely within the control of the employer. It is only when an employer, between the election where employees have designated a bargaining representative, and certification chooses to make changes in terms and conditions of employment that are mandatory subjects of collective bargaining that the employer brings upon itself a limited duty to bargain.

certified union and entering into negotiations, did the employer have standing to then challenge the certification. The Board answered that question in the negative, relying on the reasoning of the National Labor Relations Board (NLRB) in Screen Print Corp. (1965) 151 NLRB 1266 [58 LRRM 1641].[3]

The Board in Grow-Art sought to prevent an employer from leading the certified union through months negotiations and then nullifying its fruits by attacking the premise of the protracted labors. An employer who embarks upon full bargaining negotiations with a certified union is therefore treated as having implicitly abandoned such objections as he may have raised during the representation proceeding before the certification issued.

Respondent's reliance on Grow-Art, supra, is misplaced. The question here is whether Respondent could lawfully modify a mandatory subject of bargaining pre-certification. The question in Grow-Art involved an employer who, following certification, did not engage in a technical refusal to bargain in order to judicially test the election, but instead recognized the certified union, commenced negotiations, submitted information to the union as requested, participated in bargaining sessions and continued to bargain towards contract or impasse for three months before finally deciding that perhaps it

[3] To the extent that the parties in Screen Print agreed to be bound by the NLRB's "Consent Election" procedures, the case would have no parallel under the Act, although the cited principles are applicable under both laws.

would attempt to challenge the certification. Therefore, neither Grow-Art, nor any other authority of which we are aware, stands for the proposition that an employer waives the right to challenge a certification by engaging in the limited bargaining that is required before making a change in an existing term or condition of employment subject to mandatory bargaining.

In response to the related contention that bargaining would have served no purpose because Respondent's decision to cease providing employee housing was irreversible, we cite with approval the following analysis of an NLRB ALJ as affirmed by the NLRB in Vallev Counseling Services, Inc. (1991) 305 NLRB 146, slip opinion at page 7 [139 LRRM 1144]:

> The issue here is not the wisdom of [Respondent's] choice, or the high probability that the co-pay option would have survived negotiations. The statutory bargaining requirement is not relaxed simply because the employer perceives the issue as lacking in sensible alternative. Even where management is convinced, and jurists and governmental representatives later might agree, that the effected change was inevitable, the Act demands that the employee representative be afforded a reasonable opportunity, in advance, to persuade that this is not the case, or to concur.

By proposing, as a final defense, that the elimination of housing was a minor change not worthy of bargaining, Respondent demonstrates a failure to grasp a fundamental and underlying principle of both the ALRA and the National Labor Relations Act and the Board's role in preventing unfair labor practices. The Board is charged with enforcing public rather

than private rights. Accordingly, whenever the Board finds that the Act has been violated, it is statutorily required to devise an appropriate remedy in order "[T]o insure that the adverse effects of a wrongdoer's unlawful conduct are eliminated and that the public right is vindicated . . . ." (International Technical Products Corporation (1980) 249 NLRB 1301, 1304 [104 LRRM 1294].)[4]

Consistent with the foregoing, we find that the ALJ's findings of fact and conclusions of law are free from prejudicial error and they are hereby affirmed.

## ORDER

Pursuant to Labor Code section 1160.3, Respondents Gerawan Ranches, Gerawan Co., Inc., and Gerawan Enterprises, Ray M. Gerawan and Star R. Gerawan (Respondent), its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee with regard to hire or tenure

[4] Because Respondent has expressed a fear that its unlawful unilateral change makes it subject to the bargaining makewhole remedy described in section 1160.8, it is necessary that we draw a distinction between the concept of making employees whole for economic losses they may have suffered as a result of violation of the Act (such as discriminatory discharge) and the remedy for failure to bargain in good faith. Bargaining makewhole is an appropriate remedy for an employer's post-certification failure to bargain in good faith towards a comprehensive bargaining agreement concerning wages, hours and other terms and conditions of employment as defined in section 1155.2. This Board has never awarded bargaining makewhole within the meaning of section 1160.8 for a single unilateral change in violation of the duty to bargain.

of employment or any term or condition of employment because he or she has engaged in concerted activity protected by section 1152 of the Act.

( b ) Discouraging membership of any of its employees in any labor organization by unlawfully discharging, refusing to rehire, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized by section 1153( c ) of the Act.

( c ) Discharging, or otherwise discriminating against agricultural employees with regard to hire or tenure of employment or any term or condition of employment because he or she has filed charges, participated in hearings, or otherwise involved themselves in the processes of the Agricultural Labor Relations Board.

( d ) Threatening any agricultural employee with loss of employment or any other change in the terms and conditions of employment because he or she has engaged in union or concerted activity protected by section 1152 of the Act or because he or she has filed charges, participated in hearings, or otherwise involved themselves in the processes of the Agricultural Labor Relations Board.

( e ) Unilaterally changing the terms and conditions of employment of its agricultural employees by eliminating company provided housing or labor camps in the future without first notifying and affording the UFW a

reasonable opportunity to bargain with it over the matter.

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

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

(a) Upon request, meet and bargain in good faith with the UFW as the exclusive bargaining representative of its agricultural employees.

(b) Offer Ricardo Valladares, Feliciano Valladares, Jose Tapia, Pasqual Apolinar Zamora, and Damian Olivar immediate and full reinstatement to their former or to substantially equivalent positions, without prejudice to their seniority and other employment rights and privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of their discharges, the amounts to be computed in accordance with established Board precedents, plus interest computed in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Make whole Respondent's present and former employees who had to find alternative housing because of the closures for all losses of pay and other economic losses they suffered during the remainder of the season in which they were employed, or waiting to be employed, as a result of its failure and refusal to bargain in good faith with the UFW over the closure of the six labor camps described herein, such makewhole

amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5.

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

(e) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order to all agricultural employees in its employ form April 1, 1990 to March 31, 1992.

(g) Provide copies of the signed Notice to each employee hired by it during the twelve (12) months following the issuance of this Order.

(h) To facilitate compliance with paragraphs (i) and (j) 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 Respondent's peak season have begun at the time the Regional Director

requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

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

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

(k) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it

has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: December 30, 1992

BRUCE J. JANIGIAN, Chairman[5]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[5] The signatures of Board Members in all Board decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board members in order of their seniority.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board by the United Farm Workers of America, the Independent Union of Agricultural Workers, Doroteo Lopez, Damian Olivar, Apolinar Zamora and Manuel Estrada, the General Counsel of the ALRB issued a complaint which alleged that we, Gerawan Ranches, Gerawan Co., Inc., Gerawan Enterprises, Ray M. Gerawan, and Star R. Gerawan, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by threatening employees on various occasions in 1990 and 1991 and by discharging Ricardo Valladares, Feliciano Valladares, Jose Tapia, Apolinar Zamora, and Damian Olivar in 1990 and 1991. The Board also found that we have violated the law by closing our Eastside and Westside Labor Camps without notifying the United Farm Workers of America, AFL-CIO and giving it an opportunity to bargain with us over the closures.

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

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

1. To organize yourselves;
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 wagesandworking 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 threaten employees with discharge or other adverse personnel action if they engage in union or other protected concerted activities or testify at ALRB hearings.

WE WILL NOT discharge or otherwise discriminate against any agricultural employee because he or she supported unionization or has acted together with other employees to protest the terms

and conditions of their employment or because that employee has filed a charge with the ALRB, testified in an ALRB hearing, or otherwise participated in ALRB procedures.

WE WILL MOT change the wages and working conditions of any agricultural employees without notifying their collective bargaining representative, if there be one, and giving it the opportunity to meet and bargain with us over such changes.

WE WILL reinstate to Ricardo Valladares, Feliciano Valladares, Jose Tapia, Apolinar Xamora, and Damian Olivar to their fontor positions and we will reimburse them with interest for any loss in pay or other economic losses they suffered because we discharged and refused to rehire them.

WE WILL make our employees whole for any financial losses they suffered by reason of the closure of the Eastside and Westside Labor Camps.

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

DATED:

GERAWAN RANCHES, GERAWAN CO., INC., GERAWAN ENTERPRISES, RAY M. GERAWAN, and STAR R. GERAWAN

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

GERAWAN RANCHES, et al.
IUAW, No. 2344

18 ALRB No. 16
Case No. 90-CE-28-VI, et al.

ALJ DECISION

Following a full evidentiary hearing on unfair labor practice allegations filed by several individuals and two unions, the Administrative Law Judge (ALJ) found that Respondent Gerawan Ranches, et al. violated California Labor Code sections 1153 (a), (c) or (d) by the following acts: discharging five employees in retaliation for their having engaged in activities protected by the Agricultural Labor Relations Act (ALRA or Act), refusing to rehire one employee for the same reason, and threatening employees if they engaged in union activities.

The ALJ also found that, following the representation election conducted by the Agricultural Labor Relations Board (ALRB or Board) but prior to certification of the United Farm Workers of America (UFW), Respondent ceased providing employee housing without notification to the designated bargaining representative and an opportunity to bargain before implementing the changes in terms and conditions of employment. Accordingly, the ALJ invoked the long-settled "at your peril" doctrine which holds that an employer who makes unilateral changes during the pendency of objections to an election which the union appears to have won does so at the risk of having the changes characterized as violations of the duty to bargain should the union ultimately be certified. The ALJ found that Respondent took that risk and lost. The Board, having since certified the UFW as the exclusive representative of Respondent's agricultural employees, affirmed.

BOARD DECISION

The Board adopted the ALJ's findings and conclusions and his recommended order which included reinstatement and backpay for employees who were discharged or denied rehire for discriminatory reasons. The order also provides that Respondent will compensate those employees who lost housing during times relevant herein as a result of the failure to bargain before closing the housing facilities.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| *In* the Matter of: | |
| GERAWAN RANCHES, A General Partnership; GERAWAN CO., INC., A California Corporation; GERAWAN ENTERPRISES, A General Partnership; RAY M. GERAWAN, Individually and as a Partner of GERAWAN RANCHES and GERAWAN ENTERPRISES; and STAR R. GERAWAN Individually and as a Partner of GERAWAN RANCHES and GERAWAN ENTERPRISES<br><br>Respondents,<br><br>and<br><br>INDEPENDENT UNION OF AGRI-CULTURALWORKERS,#2344,INTER-NATIONALBROTHERHOODOFPAINTERS &ALLIEDTRADES,DOROTEOLOPEZ, DAMIANG.OLIVAR,APOLINARG. ZAMORA,MANUELESTRADANEGRETE, andtheUNITEDFARMWORKERSOF AMERICA, AFL-CIO,<br><br>Charging Parties. | Case Nos. 90-CE-28-VI<br>91-CE-1-VI<br>91-CE-5-VI<br>91-CE-9-VI<br>91-CE-13-VI<br>91-CE-14-VI<br>91-CE-17-VI |

Appearances :

Freddie A. Capuyan
Visalia Regional Office
Visalia, California
for the General Counsel

Sarah A. Wolfe
Thomas A. Giovacchini
The Law Firm of Thomas E. Campagne
Fresno, California
for the Respondent

March 6, 1992

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN: This case was heard by me in Visalia, California, on August 27, 28, 29 and 30,1991.

It is based on a complaint, issued June 24, 1991, which alleged that the Respondent violated the Act by closing certain labor camps without first notifying and bargaining with the United Farm Workers as the certified bargaining representative of its employees. The Respondent denied that it was obligated to bargain over the closures, and contended that, even if it was, the Union had waived any bargaining rights it may have had.

The Complaint also alleged several threats by supervisors and the discharge or failure to rehire specific employees because of their union activities or, in some cases, because they had testified in a previous ALRB hearing. The Respondent denied that the threats had occurred and asserted that the discharges were justified.

During the Prehearing Conference and at the hearing itself, the General Counsel dismissed or abandoned a number of allegations,[1] leaving intact: (1) Paragraphs 14, 15 and 16, concerning with the closure of the camps; (2) the portions of Paragraphs 17 and 18, dealing with the discharge of four employees (but excluding their eviction from the labor camp); (3) Paragraph 19 concerning a threat alleged to have occurred on

[1]Paragraphs 20, 22, 27, 28, 34, 35, 36, 37, and portions of Paragraphs 17, 18, 26, 33 and 38 were either dismissed or abandoned.

April 20, 1990; (4) Paragraphs 21 and 25 concerning a threat alleged to have occurred on or about November 16, 1990; (5) Paragraph 23 concerning a threat alleged to have occurred on or about February 22, 1991; (6) Paragraphs 29, 30 and 33, concerning the failure to rehire one worker on or about March 31, 1991, (7) Paragraph 24, concerning a threat alleged to have occurred on April 12, 1991; and (8) Paragraphs 31, 32 and 33, concerning the discharge of another worker in January 1991.[2]

The Charging Party neither appeared nor intervened in the proceedings. Both the General Counsel and the Respondent filed post hearing briefs.

Upon the entire record, 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. JTJRISDICTIONAL FINDINGS

For the purposes of this proceeding, Gerawan Ranches, Gerawan Co, Inc., and Gerawan Enterprises constitute a single agricultural employer within the meaning of $1140.4(c) of the Act, and will be referred to as "Gerawan" or as the "Respondent". (See the Stipulation found in Joint Ex. 3.) Gerawan's non-supervisory farming employees are agricultural employees within the meaning of $1140.4(b). The United Farm Workers of America (UFW) and Independent Union of Agricultural Workers, Local #2344,

[2]Portions of paragraphs 26 and 38, insofar as they relate to the above allegations, remain operative.

(IUAW) are labor organizations within the meaning of §1140.4(f).

## II. BACKGROUND

Gerawan is one of the largest stone fruit and table grape growers in the world; it farms approximately 4000 acres spread over a 30 to 35 mile radius in three San Joaquin Valley counties--Fresno, Tulare, and Kern. At peak it employs up to 2400 workers and runs 77 to 80 crews. Michael Gerawan is in charge of farming, his brother runs the processing and packing operation, and their father handles sales and marketing.

On May 2, 1990, the International Union of Agricultural Workers filed a Petition for an election at Gerawan; the United Farm Workers intervened, and the election was held on May 9th. Because none of the three choices received a majority,[3] a runoff election was scheduled for May 15th in which employees were asked to chose between the two choices which had received the most votes--the UFW or No Union. The election took place on that date, and the Revised Tally which eventually issued showed 654 votes for the UFW and 410 votes for No Union [with 103 unresolved challenges].

Gerawan filled a number of objections to the conduct of the election. After review, the Executive Secretary set three of them for hearing and dismissed the rest. All three concern the scope of the vote: The first is whether the peak requirement was

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[3]After an outcome determinative number of challenges were resolved, the No Union choice received 44.9% of the vote, the UFW received 37.1%, and the IUAW received 13.8%. [Unresolved challenges account for the remaining 4.2%.]

met; the second is whether the run-off election was scheduled at a time when too few employees were actually working; and the third is whether potential voters received adequate notice of the election. The hearing on those objections was held in November 1990 before another Administrative Law Judge.[4] Gerawan withdrew the peak objection in its post hearing brief, and the two remaining objections were dismissed by the Administrative Law Judge in a decision issued on December 23, 1991. Because that decision is presently before the Board on Review, there has as yet been no certification of the results of the election.

## III. INCIDENTS INVOLVING MEMBERS OF JESUS VALLEJO'S CREW

### A. Findings of Fact.

On April 20, 1990, twelve days before the first election, IUAW organizer Roy Mendoza paid two visits to the Gerawan Labor Camp located on Lincoln Avenue in Raisin City and known as the Westside Camp. During the first visit, which occurred early in the afternoon, he and another organizer did not enter the fenced area of the camp, but stayed just outside where the catering truck was parked. There, they spoke with a number of the employees who were members of Jesus Vallejo's crew, among them Ricardo Valladares and Apolinar Pasqual Zamora. The workers complained about their wages and working conditions, especially about sanitary conditions in the camp: overcrowding, a broken refrigerator, clogged toilets, a stove with only one burner.

[4]The hearing was a consolidated one involving not only Gerawan's Objections, but a number of alleged unfair labor practices as well.

Mendoza explained their rights under the ALRA and succeeded in convincing a majority of those present to sign cards authorizing the IUAW to seek an election.

Foreman Vallejo was present while this was going on. At some point he was asked to leave he did so, but not before he had heard what was being said and had seen at least some members of his crew signing authorization cards. Two other supervisors, Saul Acosta and Kevin Welton, were in a truck nearby.[5]

After hearing the workers' complaints about conditions in the camp, Mendoza drove to Raisin City where he telephoned California Rural Legal Assistance. After learning that CRLA was willing to help, he returned to speak further with employees and to obtain additional information. This time, he was invited inside and shown stopped-up toilets and showers that were no longer working. While he was inspecting the kitchen with Ricardo Valladares, Valladares[1] father, Feliciaho, Jose Tapia, Pasqual Apolinar Zamora, and other members of the crew, their foreman, Jesus Vallejo, appeared, told him to leave, and threatened to call the,sheriff. Mendoza identified himself and told Vallejo that he had every right to remain because he had been invited in by the workers. At that point, one or more of the workers spoke up saying that Mendoza was present at their invitation.[6]

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[5]Acosta denied seeing the IUAW organizers speaking with workers, but I find Ricardo Valladares and Roy Mendoza's testimony that he was present the more credible.

[6]There is some confusion over exactly who it was that spoke up. Apart from Ricardo Valladares, it is difficult to say. What is clear is that the circumstances were such that Vallejo must

According to Mendoza, Vallejo, "Just looked at me, turned around, and walked out." (I:108.) Ricardo observed that he appeared upset. (I:130.)

Later that evening, after Mendoza had left, Ricardo testified that Vallejo said to him: "Look, Ricardo Valladares, you could end up losing your job because you are with the Union causing trouble."[7] (I:132.) To which he replied, "Well, I think we can all have the right to sign [authorization cards]." (Id.)

Vallejo did not testify, and there is nothing in the record or in Ricardo's demeanor which would lead me to doubt his veracity; I, therefore, accept his account of the conversation.

Four days later, on April 24th, Vallejo discharged Ricardo and the three workers--Feliciano Valladares, Jose Tapia, and Pasqual Zamora--who were standing alongside him in the kitchen when he spoke up for Mendoza. Ricardo testified that when he was discharged, Vallejo said, "There's no more work for you guys, because you guys have [been] very much involved with the Union and you're causing trouble." (I:133.) He further testified that he had never been warned that his work was considered unsatisfactory.[8] (I:133.)

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have been aware that all present were dissatisfied with conditions at the camp and wanted Mendoza to see them for himself. It is also clear that the four who were later discharged were conspicuous members of the group. (I:156-157.)

[7]Ricardo testified that other workers were in the area when this conversation occurred, but it is not clear that they actually heard what was said.

[8]Nor is there any evidence that the other three workers had been told their jobs were in jeopardy.

Again, there is nothing in Ricardo's demeanor which would lead me to doubt his unrebutted testimony.

At hearing, Gerawan attempted to show that the four were discharged for poor work performance while thinning. Acosta testified that Vallejo told him they were "dropping too many leaves", "working too slow", "talking too much", and not "pulling enough fruit off the treets]". (III:20-21.) While that testimony is hearsay and entitled to little weight, Acosta did go on to say that their poor performance was reflected in the crew sheets (III:21), and those sheets--which are legitimate business records--were introduced into evidence as Respondent's Exhibit 14.

An examination of the Exhibit shows that Ricardo Valladares averaged 16.75 trees per shift on the days he worked, Feliciano averaged 15.50 while he worked, and Apolinar Pasqual Zamora averaged 13.00. While those levels are below the overall crew average, there were at least two other employees--and possibly more--who were not terminated even though they had worse averages.[9] Only in the case of Jose Tapia, whose overall

[9]Because average production from day to day depends on where the crew was working, the only fair way to compare two or more employees is to average the output of each over those days when they were at work together. When that method is utilized, both Philipe Ceja and Norberto Mendoza consistently under-performed three of the discriminatees: On days when Ceja, Mendoza and the Valladares were working, Ceja averaged 12.29 and Mendoza averaged 11.88, as compared to Ricardo's 16.75 and Feliciano's 15.50; on days when Ceja, Mendoza and Zamora were working, Ceja averaged 11.83 and Mendoza averaged 12.00, as compared to Zamora's 13. Yet, neither Ceja nor Mendoza was discharged. Similar results obtain if Victoriano Granades is compared with the three discriminatees, although, in his case, there are fewer days upon

average was 10.00, is the Company's claim of poor performance entitled to serious consideration.[10]

In January 1991, Zamora was rehired to work in another crew, but when his previous discharge was discovered, he was immediately terminated.

B. Further Findings and Conclusions of Law.

1. The Discharge of Ricardo Valladares, Feliciano Valladares, Jose Tapia, and Pasqual Apolinar Zamora (Complaint, Is 17 & 18). To establish a prima facie case that those workers were discharged because of their union or other protected concerted activities, the General Counsel must prove by a preponderance of the evidence: (1) that they engaged in such activities; (2) that the employer knew of it; and (3) that a causal connection exists between those activities and their discharges. (Lawrence Scarrone (1981) 7 ALRB No. 13.)

The evidence establishes that Ricardo Valladares and Apolinar Zamora were among those who complained to union organizer Roy Mendoza about conditions at the labor camp and from whom he sought and obtained authorization cards. Their foreman, Jesus Vallejo witnessed the complaints and the signing. All four of the alleged discriminatees were present during Mendoza's tour of the camp later that afternoon, and the other three were

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which to base a comparison; and the same may be true of other names suggested by the General Counsel. (See Post-Hearing Brief, p. 7.)

[10]On those days when Ceja, Mendoza, and Tapia were working, Ceja averaged 10.75 and Mendoza averaged 12.50, both of which exceeded Tapia's average of 10.00.

standing alongside Ricardo when he told Vallejo that Mendoza was there at his invitation.

As for the causal link or nexus between their activities and the adverse action taken against them, there is, first of all, the timing of the discharges, coning as they did only three days after Mendoza's visit; then there is Vallejo's uncontradicted statement to Ricardo on the evening of the visit that he could end up losing his job because of what happened; finally, there is Vallejo's uncontradicted statement at the time of the discharges, "[Y]ou guys have [been] very much involved with the Union and you're causing trouble".[11]

Respondent argues that the four were discharged for poor performance, but it offered no explanation as to why at least two other employees were kept on who had worse records than three of the four. I therefore find that the claim of poor performance was a pretext. As for Jose Tapia, whose performance was below that of the rest of the crew, I find Vallejo's statement of the reason for the discharge--being "involved with the union"--to be controlling.[12]

Finally, Respondent argues that there was no discrimination because it continued to employ other workers who had signed cards

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[11]This latter statement further belies Gerawan's claim that it was unaware of the union or concerted activities of the four.

[12]His poor performance, was, at best, only a secondary reason which would not, under the Wright Line standard, have led to his dismissal but for his union and concerted activity. (Wright Line (1980) 251 NLRB 1083; NLRB v. Transportation Management Corp. (1983) 462 U.S. 393.)

that the others were as conspicuous as these four in their involvement with Mendoza and in their support for the Union. But even if they were, the fact that some union supporters went unpunished does not prove that no discrimination took place; especially here, where there are clear admissions to the contrary. (See Kitayama Brothers (1983) 9 ALRB No. 23, ALJD p. 27); Desert Automated Farming (1978) 4 ALRB No. 99; Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14, aff'd 24 Cal.3d 325.)

2. The Threat to Ricardo Valladares on April 20th (Complaint, ¶19). Vallejo's uncontradicted statement to Ricardo that, "You could end up losing your job because you are with the Union causing trouble," is clearly an unlawful threat. That Ricardo was not intimidated by his foreman's statement is irrelevant; the test is the objective one of whether the statement reasonably tended to interfere with or restrain the employ in the exercise of his rights under the Act. (Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 18.)

3. The January 1991 Discharge of Apolinar Pasual Zamora (Complaint, 5s 31, 32 & 33). The evidence is uncontroverted that the sole reason for Zamora's later termination was his earlier discharge. Since that earlier discharge was illegal, so too is the later one.

In Paragraph 32 of the Complaint, the General Counsel charged that Zamora's second termination violated §1153(d) of the Act. However, it offered no evidence establishing a nexus between that discharge and his participation in Board processes.

between that discharge and his participation in Board processes. Because the credible facts establish that his later discharge was based solely on his earlier discharge, I recommend dismissal of this allegation.

## IV. INCIDENTS INVOLVING BENITO CONTRERAS' CREW

A. Findings of Fact.

1. The Incident at Contreras' home. On November 8, 1990, Doroteo Lopez, who had previously worked in a crew supervised by foreman Benito Contreras, testified adversely to the Company at the ALRB hearing. About ten days later, he returned to work pruning plum trees in Contreras' crew.

He testified that at the conclusion of his first day back at work, Contreras told him to come to his home later that evening. When he arrived between 8:00 and 8:30 with his young son, Contreras took him aside and, saying that he was acting on instructions from the field man, Phillipe,[13] asked him to recant the testimony he had given at the hearing, promising him that, "[T]hings would go well for me if I rejected my testimony." (II:12.) When he refused to do so because "it's the truth" (Id.), Contreras admitted that it was and confessed that he and two other foremen (Cecilio Arrendondo and Max Rios) had been directed to give false testimony to the contrary.[14] Lopez also testified that, toward the end of the conversation, Contreras

[13]I am satisfied that "Phillipe" is Phillip Braun, a Field Supervisor at Gerawan.

[14]All three testified at the hearing on November 15, 1990.

advised him "not to speak or to have any conversation with Damien Olivar", a crew member who had supported the Union. (II:12.)

Contreras denied making any of the statements attributed to him and had an entirely different version of what occurred. According to him, Lopez came to his home, uninvited, and "asked my forgiveness" for his testimony. (III:41.) Contreras told him, "There's no problem. Just be careful of what you say." (III:41.) Contreras went on to testify that a month or two later, he asked Lopez why he had lied, and Lopez told him that he had been pressured into testifying falsely and "wanted to get out [of it]." (III:47.) When he asked Contreras how he could do so, the foreman said, "You're the one who knows how you got into this and you're the one who knows how to get out of it." (Id.)

2. The Incident in February 1991. Lopez testified that in February 1991, he worked in Contreras' crew grafting plum trees. In the afternoon of either the 22nd or the 23rd of February, while he and other crew members were returning from the groves in a company van, he asked Contreras why Damian Olivar was not working in the crew. According to Lopez, the foreman said, "He didn't come, and he won't come, and he also won't be here for the thinning." When Lopez asked why, Contreras said, "Damian is involved in politics....Because of being involved in Union activities." At that point, according to Lopez, the foreman addressed all the workers in the van, saying, "You'd better look out for your jobs or else the same thing is going to happen to

you that happened to Damian." (II:13-14.)

Contreras denied making any such statements and testified that Lopez did not even begin working in his crew until late March. (III:47-48.) While the crew sheets for the 22nd and the 23rd do not list him as an employee, they do list a "Dario Espinoza. (G.C. Exs. 2 & 3.) The General Counsel introduced canceled checks made out to Espinoza (G.C. Ex. 1), and Lopez testified that those checks were given to him for work he performed during the period in question and that he was told to cash them under the false name.[15] He identified the endorsement as being in his hand. He also named seven workers who were present in the van when the alleged threat was made. The names of two of those names do not appear on the crew sheets.[16] (G.C. Exs. 2 & 3) Although the names of the other five do appear on the preprinted sheets,[17] only two of them are shown as having actually worked on either the 22nd or the 23rd.[18] None of the seven were called to corroborate Lopez' testimony.

3. The Failure to Rehire Damian Olivar. Lopez testified that Contreras came to his home about a month later, at the end of March 1991, to tell him that thinning was about to begin.

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[15]This testimony was likewise denied by Contreras. (III:48.)

[16]Manuel Larios and Dagoberto Sorosano.

[17]Bertlio Portillo, Santos Lopez, Pedro Gomez, Miguel Serano, and Santos Moreno.

[18]Santos Lopez and Pedro Gomez.

Lopez asked who else he had contacted and, learning that he was the first, offered to give him Olivar's telephone number. The foreman said that was unnecessary; he would speak with Olivar personally. (II:19-20.)

Once again Contreras has an entirely different version of what occurred. He denies going to Lopez' home or being offered Olivar's telephone number (III:36); rather, he says that Lopez and the other workers took the initiative and contacted him and that he hired them in the order in which they had contacted him. Olivar was not hired because he did not apply until April 4th or 5th and, by then, enough workers had already applied to complete the crew. Olivar subsequently returned and left a telephone number; but later, when Contreras called to see if he was available to fill a subsequent opening, the person who answered knew nothing of him. (III:35-37.) The Respondent sought to corroborate Contreras' testimony by presenting a page from his notebook indicating the order in which workers had applied and the dates on which they made application. Olivar's name is 37th on the list and is found among a group of applicants who did not contact him until after March 29th. (Resp. Ex. 15.) However, that page was the only one in the notebook--which Contreras testified spanned a two year period (III:120-121)--where applications were numbered or dated.[19] Moreover, the actual composition of the crew, as evidenced by the crew sheets (Resp.

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19It also would have been the obvious place for Contreras to write down the telephone number Olivar had given him, but it is not there.

Ex. 8), contains the names of at least two employees whose names do not even appear on the list, but who began work within two or three days of Olivar's application.[20]

4. The Incident at the Store in April 1991. Lopez testified that one Friday in mid April, as Contreras was handing out paychecks to the members of his crew at a local store, known to the workers as "La Quemada" ("The Burnt One"), he said to the group:

> "Now you guys have got money, and Damian [Olivar] doesn't have work. That's what happened to him because of being involved in disputes. So you'd better protect your job. So you'd better take care of your jobs or the same thing is going to happen to you that happened to Damian." (II:22.)

Contreras denied making the statement (III:52), and none of the seven workers Lopez named as present at the store were called to corroborate his testimony.

B. Further Findings and Conclusions of Law.

Whether or not the General Counsel has established violations with respect to any or all of the four incidents described above turns on the respective credibility of Doroteo Lopez, on the one hand, and Benito Contreras, on the other. Lopez struck me as an intelligent witness who, though basically honest and forthright, was so committed that he, at times, acted more certain in his testimony than circumstances warranted. Contreras was a worse witness; his testimony was terse and

[20]Jesus Blancarte and Miguel Serrano, both of whom began work on April 7th.

guarded. His obvious discomfort in testifying[21] is exactly what one would expect of a low level supervisor caught between workers with whom he had a close and candid relationship and management who expected him to support their anti-union position. With that in mind, let me turn to the specific incidents.

1. The Incident at Contreras' Home (Complaint, ¶s 21, 25 and 26). I find Lopez' account of his visit to Contreras' home believable both because of the care and detail with which he was able to recount the events and because Contreras' contrary story is completely inconsistent with Lopez' strong and unwavering commitment to the right of crew to organize, a commitment which is apparent both in his conduct during 1990 and 1991 and in his testimony before me and at the prior hearing.[22] I therefore conclude that the Respondent violated both §1153 (a) and (d) when Contreras urged Lopez to retract his testimony before the Board and warned him to avoid any contact with Damian Olivar.

2. The Incident in February 1991 (Complaint, Is 23 & 26). Whether Contreras threatened crew members returning from the groves in the Company van on February 22nd or 23rd by telling

[21]This was apparent from his demeanor throughout his testimony and became especially evident when he suddenly asked that direct examination be halted because, "I'm frustrated." (III:44.)

[22]The parties stipulated that *I* take administrative notice of the entire record of the previous hearing. (I:7) In doing so, however, I am in no position to make demeanor based resolutions of the credibility of the testimony there offered; only where that testimony is uncontradicted or credibility can be resolved based upon circumstances appearing in the record itself (e.g. inconsistences, contradictions, etc.), have I relied on such evidence.

them that, "You'd better look out for your jobs or else the same thing is going to happen to you that happened to Damian [Olivar]," depends, once again, on who is believed--Lopez or Contreras. Contreras denied that the incident occurred; and, while his credibility is open to question, there are also distinct problems with Lopez' testimony about the incident. Two of the seven workers whom he says were present do not appear on the crew sheets; only two of the remaining five are shown as having actually worked on either the 22nd or 23rd (G.C. Exs. 2 & 3); and none of the seven were called to corroborate his testimony.[23] In these circumstances, while one may suspect that something untoward might have been said, there is simply not enough evidence to go beyond suspicion; and suspicion is not enough to establish a violation. Rod McLellan Company (1977) 3 ALRB No. 71. I therefore recommend that the allegation that a threat occurred on February 22 or 23, 1991 be dismissed.

3. The Failure to Rehire Damian Olivar (Complaint, ¶s 29, 30 & 33). Olivar was active on behalf of the IUAW, and the Company was aware of his activities. He served as an observer for the Union during the election; he testified at the previous ALRB hearing in November 1990; and, a short time later, when Lopez went to Contreras' home, he was warned to stay away from Olivar. (See Section IV (1), above.)

[23]While I do not rule out the fact that, on occasion, some crew members worked under other names (See II: 14-16), there is no basis believing almost the entire crew did so on February 22nd and 23rd. (See G.C. Exs. 2 & 3.)

Coritreras' explanation that Olivar was too far down on his list of applicants to be hired leaves unexplained why it was that two workers whose names were not even on the list were hired within two or three days of Olivar's application.[24] (Compare Resp. Ex. 4 with Resp. Ex. 7.) Nor was Contreras able to explain why this particular list; unlike every other one he made during the two years he had served as a foreman, was carefully numbered and dated so as to justify his contention.

Finally, there are two pieces of testimony from the previous hearing which went uncontradicted: (1) Contreras' failure to deny Lopez' testimony that Contreras told him that the Company did not want people who supported the Union; and (2) his failure to deny his admission to Lopez that Phillip Braun said the Company only wanted "donkeys" who would work hard, not "political" people sympathetic to the Union. (Previous Hearing Transcript III:117 & IV:7; See ALJ Decision in 90-RC-2-VI et al., p. 59.) All of these factors, lead me to credit Lopez' account of the circumstances surrounding the failure to rehire Olivar.

I therefore conclude that Gerawan violated §1153(c) and (d), and derivatively §1153(a), when it failed to rehire Damian

[24]These vacancies came quickly enough so that Contreras would, in all likelihood, have been aware of them at the time he says Olivar contacted him. Moreover, his description of his failed attempt to reach Olivar is suspect since the number he says Olivar gave him does not appear on the very list he claims to have prepared at the time and used in deciding whom to call and because there is no indication that he sought to hire the workers whose names appeared below Olivar's before going beyond the list. Lopez' testimony that Contreras refused his offer to provide Olivar's telephone number is more believable.

Olivar in April 1991.

4. The Incident at the Store in April 1991 (Complaint, ¶s 24 & 26). Lopez testified that, within two weeks of his failure to rehire Olivar, Contreras referred to him at La Quemada when he told crew members that they had better not get involved in "disputes" or the same thing would happen to them. In view of my finding that the failure to rehire Olivar was illegally motivated and in view of the fact that the threat followed so closely on the heels of that violation and specifically alluded to it, I credit Lopez' description of what occurred and conclude that Contreras violated §1153(a) by threatening the members of his crew.

## V. THE CLOSING OF THE LABOR CAMPS.

### A. Findings of Fact.

Until the end of March 1991, when they were finally torn down, Gerawan maintained six labor camps for its employees: (1) the Westside Camp, located at Lincoln Avenue and Benderson Avenue in Raisin City; (2) Ranch No. 7, located at Highway 181 and Frankwood Avenue in Reedley; (3) Ranch 25, located at 1469 South Frankwood Avenue in Reedley; (4) Ranch 19, located at Central Avenue and Reed Avenue in Reedley; (5) Ranch No. 11, located at Frankwood Avenue and Lincoln Avenue in Reedley; and (6) Ranch 6, located at Clayton Avenue and Alta Avenue in Reedley. (Joint Ex. 4.)

The employees who lived in the camps paid $15 a week rent which was deducted from their paychecks. The proportion of the

total workforce housed in the camps varied, but never exceeded 12|% and averaged about 7½%. (Resp. Ex. 6 . ) On occasion, workers were allowed to stay on at the camps between seasons. Workers who left at the end of a season were not promised housing should they later be re-employed.

Sometime in the Fall of 1990, Gerawan decided to close the camps. The parties stipulated that Ranch No. 6 was empty from the end of October until it was destroyed, that Ranch No. 7 and Ranch 18 were not occupied after November 28, 1990 and had few occupants after November 2nd, that the Westside Camp was closed on March 16, 1991, and that all of the camps were finally destroyed on March 29-30, 1991. (Joint Ex. 4 . )

Gerawan gave no notice to the UFW of its intention to close the camps and tear them down; nor did it offer to bargain over the effects of their elimination. Thirty day Notices to Quit the Westside Camp were posted, mailed, and delivered to some occupants on January 15, 1991 and to others on February 14, 1991. (III:3-7; Resp. Exs. 2 & 3.) The other five camps--known collectively as the "Eastside Camps"--were already vacant, and so Notices were unnecessary. In addition, two notices required by the Department of Labor pursuant to the Migrant and Seasonal Agricultural Worker Protection Act were posted at the Company's Offices in Sanger; one from November 1990 to April 1991 and the other from October 1991 to June 1991. The notices indicated, among other things, that no Company housing was available. (Resp. Ex. 12 . ) When workers came to the office to register

their employment, they were told to read the Notice; or, if they could not read, that it would be read to them. (III:107.) On March 27, 1991, the UFW filed its charge that the closures had occurred without bargaining. (I:21.)

B. Conclusions of Law.

In First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666, the Supreme Court distinguished the three kinds of management decisions and explained their attendant bargaining obligations:

> Some management decisions, such as choice of advertising and promotions, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. (Id. at 676-677.)

Over those, a union has no right to insist on bargaining.

> Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. (Ibid.)

Over those, a union has the right to bargain fully. The third type of management decision:

> Involvtes] a change in the scope and direction of the enterprise [and] is akin to the decision whether to be in business at all....[while] at the same time this decision touches on a matter of central and pressing concern to the possibility of continued employment and the retention of the employee's very jobs. (Ibid.)

A union has the right to bargain over the effects of those decisions, but not the decisions themselves.

In Bruce Church. Inc., (1985) 11 ALRB No. 9, the Board affirmed its Administrative Law Judge's determination that the closure of a labor camp, unlike the closure of a business itself, is not a change in the scope and direction of the grower's

"enterprise". (ALJD, pp. 18-19.)[25] While it could be argued that the elimination of housing for a substantial portion of an employer's workforce would constitute a change in the scope and direction of the business, here the percentage housed never exceeded 121% and averaged only 7½%. The camp closures are therefore outside the ambit of what the Supreme Court and the NLRB mean when they speak of "effects" bargaining over basic changes in the enterprise. (See Otis Elevator Co. (1984) 269 NLRB 891 (Otis Elevator II).) Rather, they fall squarely within the second category of management decisions because they have a significant impact on the relationship between employer and employee. Absent legitimate excuse or justification, the closures were therefore fully bargainable.

Gerawan offers a number of arguments to justify or excuse its failure to contact and bargain with the Union over the closures.[26]

1. The Union Was Aware of the Closures But Did Nothing, Thereby Waiving Its Bargaining Rights. In Roberts Farms, Inc. (1987) 13 ALRB No. 14, the Board said:

> The waiver doctrine is well established. When a union has sufficiently clear and timely notice of an employer's proposed changes in terms and conditions of employment, and thereafter makes no protest or effort to bargain about the plan, the union waives its right

[25]The ALJ went on to find no violation because the Union had received adequate notice of the closure. (ALJD pp. 20-23.)

[26]The Respondent made several additional arguments in the motions to dismiss which it presented at the beginning of the hearing. My rulings on those arguments are to be found in Volume I of the Transcript at pages 59 through 66.

> to complain that the employer acted in violation of its obligation to bargain. (Medicenter, Mid-South Hospital (1975) 221 NLRB 670; Clarkwood Corp. (1977) 233 NLRB 1172.) However, a finding of waiver requires proof of clear and unequivocal notice such that the union's subsequent failure to demand bargaining constitutes a "conscious relinquishment" of the right to bargain. (NL Industries, Inc. (1975) 220 NLRB 41, 43, affd., NL Industries, Inc. v. NLRB (1976) 536 F.2d 786.) And such notice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining. (International Ladies Garment Workers Union v. NLRB (1972) 463 F.2d 907.) If the union receives no notice at all waiver cannot be inferred from the union's failure to request bargaining about the change. (Fountainhead Development Corporation, dba Blu-Fountain Manor (1984) 270 NLRB 199.) The burden of proving waiver is on the party alleging it. (Litton Microwave Cooking Products Division, Litton Systems, Inc. (1987) 283 NLRB 973.)

Here, Gerawan concedes that no notice was given to the union, but argues that the various notices given to employees constituted constructive notice to the Union. In Martori Brothers (1982) 8 ALRB No. 23, the Board affirmed its Administrative Law Judge's rejection of the same argument where the Company had canceled bus service for its workers without notifying the Union. He explained:

> These arguments are not persuasive. Patently the bus riders had actual notice that bus transportation had ceased. However, no authority is cited for the proposition that such notice is to be equated with notice to the UFW, Charging Party herein. A labor organization is sui generis and has an existence separate from that of its members [citing cases]. Knowledge of a bargaining unit member, qua bargaining unit member, is not chargeable to the union any more than service of process upon a rank-and-file bargaining unit member constitutes service on the union. (ALJD, p. 23.)

(See also George Arakelian Farms, Inc. v. ALRB (1986) 186 Cal.App.3d 94, 107.) Since notice to employees does not

constitute notice to the Union, there was no waiver.

By the time the UFW actually learned of the closures and filed its charge on March 27, 1991, it was too late for meaningful bargaining. (International Ladies Garment Workers Union v. NLRB, supra.)

2. There Were Good Economic Reasons for the Closure of the Camps. At my request, the Respondent submitted a written offer of proof, listing its reasons for closing the camps: (1) rising costs of operation; (2) the prospect of continuing increases in costs of operation due to dilapidation of the facilities; (3) the Eastside Camps had been built to take advantage of the Replacement Agricultural Worker Program, a program which never materialized; (4) the Eastside Camps never operated at full capacity; (5) the neighbors had complained about activities in the camps; (6) the fear of potential liability from activities in the camps; and (7) the existence of alternative housing in the area.[27]

In Thomas S. Castle Farms, Inc. (1983) 9 ALRB No. 14, the Board held that:

> Having an economic reason for making a change is not necessarily the equivalent of a business necessity that would justify making a change in employees' working conditions without giving the union notice or an opportunity to request bargaining about the change. Even if there is a legitimate business or economic reason that justifies a change, that alone does not justify the employer's effecting the change without prior notice thereof to the union. In such situations,

[27]That offer of proof, which is contained in a two page letter to me from Thomas M. Giovacchini dated September 13, 1991, is hereby admitted into evidence as Respondent's Exhibit #16.

> the employer must give the union prior notice and a reasonable opportunity to request bargaining about the matter, to the extent possible under the circumstances. (Joe Maggio, Inc., Vessey & Company, Inc., & Colace Brothers, Inc. (1982) 8 ALRB No. 72.) (Slip Opn. pp. 10-11.)

The reasons cited by the Respondent all lack the urgent need for immediate action which is required to establish "business necessity". Indeed, all involve problems and circumstances which might well have been resolved in a manner acceptable to both sides if Gerawan had given the union an opportunity to come forward with its ideas and suggestions. Gerawan has thus failed to establish the defense of "business necessity".

In a related argument, Gerawan contends that there should be no monetary award because, even if there had been bargaining, the camps would nonetheless have been closed. This argument represents an attempt to extend the so-called "Dal Porto" principal to unilateral changes in working conditions. (William Pal Porto & Sons, Inc. v. ALRB (1987) 191 Cal.App.3d 1195.)

In Abatti Farms, Inc. (1990) 16 ALRB No. 17, the Board held the Del Porto principal inapplicable to situations involving an "absolute refusal to bargain". (Slip Opn., pp. 7-8.) The reason being that, where there is an absolute refusal, there is no way to determine what the outcome would have been if bargaining had occurred. (George Arakelian Farms, Inc v. ALRB (1989) 49 Cal.3d 1279, 1292-93.) That difficulty is even more pronounced in a unilateral change case which--by its very nature--involves a single issue. When the union has not even been notified of such a change, it is impossible to know what the outcome of bargaining

over it would have been. That is one reason why the National Labor Relations Board, which does not accept the concept of "bargaining make whole", has no problem in awarding monetary damages for improper unilateral changes in wages or working conditions. (See Paramount Plastic Fabricators, Inc. (1971) 190 NLRB 170; 2 Morris, The Developing Labor Law (2nd ed.), p. 1665.)

3. The Effects of the Closures Were Too Insignificant to Require Bargaining. While closing down camps housing 7 1/2% of the workforce may not be a fundamental change in the nature of Gerawan's business, it is certainly not insignificant. For example, a change in tractor drivers' pay amounting to $15 a week would certainly require bargaining even though tractor drivers constituted only 5% the workforce. The closure of the camps cannot therefore be dismissed as de miminus.

4. The Union Was Not Certified at the Time the Camps Were Closed. In W.G. Pack, Jr. (1984) 10 ALRB No. 22, the Board addressed this argument and explained:

> In Highland Ranch v. ALRB (1981) 29 Cal. 3d 848, the California Supreme Court upheld this Board's application of the National Labor Relations Board (NLRB) rule which states that an employer refuses to bargain "at its peril" during the period between an apparent union election victory and the union certification as exclusive representative of the employer's employees. (See Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54, citing Mike O'Connor Chevrolet (1974) 209 NLRB 701.) Under NLRB precedent, where an employer unilaterally changes its employee's working conditions during that period without giving the union notice or an opportunity to bargain over the changes, and the union is subsequently certified, the employer's unilateral action violates Labor Code Section 1153(e) and (a) (W.R. Grace Co v. NLRB (5th Cir. 1978) 571 F.2d 279, enforcing (1977) 230 NLRB 617.)

In reaching its decision, the Court accepted the Board's view

that while §1153(f) of the Act, making it unlawful to recognize or bargain with an uncertified union, prohibits full scale negotiations prior to certification, it does not preclude bargaining over unilateral changes during that period. (See 29 Cal.3d at 858-860, where the Board's language at 5 ALRB No. 54, pp. 7-8, is considered.)

Gerawan argues that under the Board's subsequent decision in Grow-Art (1983) 9 ALRB No. 67, it would have forfeited its right to object to the election if it had offered to bargain with the union over the closures.

In Grow-Art, the employer undertook full scale bargaining following an election and then, five months later, sought to back away from it and attack the election. The Board held that, by entering into the comprehensive negotiations contemplated by §1155.2(a), the company had forfeited its right to pursue its election objections. There is nothing in that decision which could be construed as overruling its earlier holding in Highland Park that an employer acts at its peril when it fails to engage in the limited bargaining required in a situation involving a unilateral change. Gerawan's dilemma is, therefore, a false one.

5. The "Reasonable, Good Faith Doubt" Defense. In considering the effect of §1153(f) on the pre-certification bargaining obligation, the Highland Court went on to suggest that:

> When the employer can establish that it entertained a good faith, reasonable doubt as to the representative status of a union that has not yet been formally certified by the ALRB, the proscriptions of section 1153, subdivision If) may

> preclude a ruling that the employer acted "at its peril" in refusing to bargain with a presumptively victorious union during the period of an election challenge. (Cf. J.R. Norton Co. v ALRB (1979) 29 Cal.3d 1.) (Supra. 29 Cal.3d at 861.)

In W.G. Pack, Jr.. supra, the Board accepted the Court's suggestion and held that no violation would be found where the Respondent could prove that it entertained a reasonable good faith belief that the election was invalid.

That standard, as first enunciated by the California Supreme Court in the Norton case, requires that the Board:

> ...determine from the totality of the employer's conduct whether it went through the motions of contesting the elections results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the Union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. (26 Cal.3d at 39.)

On remand, the Board took this language to mean that, to avoid make whole, the employer's litigation posture at the time of the refusal to bargain must have been both reasonable and asserted in good faith, and went on to explain:

> ... that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances. (J.R. Norton (1980) 6 ALRB No. 26, p. 3.)

In applying the Norton standard, the Board has adopted the procedure of first inquiring into the reasonableness of the employer's litigation posture and only proceeding to consider its good faith where the matter cannot be disposed of on grounds of reasonableness. (Holtville Farms, Inc. (1981) 7 ALRB No. 15.)

The place to begin, therefore, is with the reasonableness of Gerawan's reliance on its post-election objections.

a. Whether the Regional Director improperly directed the election at a time when Gerawan was at less than 50% of its prospective peak employment. Gerawan withdrew this objection in its Post Hearing Brief to the Administrative Law Judge assigned to the Objection proceedings. (See ALJD, Gerawan Ranches, Case Nos. 90-RC-2-VI et al., p. 6.)[28] At hearing, the Regional Director had testified that he utilized employment figures for 1987 and 1989 and determined, based on the "body count" method, that the 50% peak requirment was met.[29] He rejected 1988 as unrepresentative when he learned that 500 or 600 additional employees had been hired that year to perform a one time experiment in thinning. On those facts, I can find no reasonable basis for believing that Gerawan would have prevailed on its peak objection, and it implicitly conceded as much when it withdrew the objection.

b. Whether the Regional Director improperly ordered a runoff election among an unrepresentative number of employees. In the previous proceeding, Gerawan contended that the Regional Director should have delayed the run-off election for two or

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[28]Its ostensible reason for doing so--that the expected 1991 peak was not achieved--is dubious since the validity of the objection turns, not on the actual employment figures, but on whether the Regional Director acted reasonably in determining the expected peak.

[29]He had requested figures figures for 1986 as well, but Gerawan did not provide those figures.

three weeks until the workforce became more representative.

In her decision, the ALJ pointed out that since the Board had already rejected Gerawan's request for a new eligibility period keyed to a later run-off (Gerawan Ranches (1990) 16 ALRB No. 8.), any additional delay in nolding the election would have likely resulted in an even smaller and less representative turnout.

With respect to Gerawan's argument that the run-off was defective because it was held at a time when the size of the workforce had declined to the point that it was no longer representative, the ALJ found that the Regional Director acted reasonably in scheduling the run-off and pointed out that the Board had upheld elections in Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99 and Sun World Packing Corporation (1977) 4 ALRB No. 23 where there had been much lower turnout.[30]

I concur in the ALJ's finding that the Regional Director acted reasonably in scheduling the run-off. In view of that, in view of the clear authority of Gagosian and Sun World, and in view of the Board's earlier determination that "[N]o precedent supports an eligibility period of the character desired by the Employer." (16 ALRB No. 8 at p. 7.), I conclude that the Respondent had no reasonable basis for believing that it would prevail on this objection.

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[30]In Gagosian only 39.6% the eligible employees voted and in Sun World employee turnover between the first election and the run-off led to a turn out of less than 30%; whereas here, the turnout was approximately 50%. (See ALJD, p. 15, fn. 19.)

e. Whether a substantial number of potential voters were disenfranchised because they failed to receive adequate notice concerning the run-off. In recommending the dismissal of this objection, the ALJ who presided at the hearing on the objections pointed out that both our Board and the NLRB uniformly hold that, even if the number of potential voters who do not receive notice is sufficient to affect the outcome, an election will not be overturned so long as the Regional Director has made a reasonable effort to notify those voters. (Leo Gagosian Farms, Inc., supra; Rohr Aircraft Corp. (1962) 136 NLRB 958.) The ALJ then went on to find that here the Regional Director made substantial efforts to notify eligible voters of the run-off election and of the times and locations for voting.[31] Once again, I concur in her findings. I also find that the that legal authority upon which she relied is clear and uncontroverted. I therefore conclude that the Respondent had no reasonable basis for believing that it would prevail on this objection.

Having concluded that there was no reasonable basis for Gerawan to believe that it would prevail on its objections, it is unnecessary to determine whether it was acting in good faith in

[31]She found that:

> [N]ot only were the usual election notification procedures utilized here, there were extensive public broadcasts, house to house visits and the addition of five evening voting sites located in the major areas where voters, both working and non-working, were concentrated. Further, both the UFW and the Company knew of the run-off on Friday and had the weekend and Monday to notify eligible voters. (ALJD, p. 21.)

pursuing them. It should, however, be pointed out that the ALJ who presided at the earlier hearing found that Gerawan violated §1153( c ) in making the layoffs upon which its objections were based. If that be so, Gerawan must be found to have acted in bad faith, for to hold otherwise would be to reward the wrongdoer for its misdeeds.

**VI. THE REMEDY**

The Discharges and Threats. Having found that Respondent violated §1153( c ) and ( a ) of the Act by the discharging Ricardo Valladares, Feliciano Valladares, Jose Tapia, and Pasgual Apolinar Zamora; that it violated §1153( c ), ( d ) and ( a ) of the Act by the discharging Damian Olivar; and, further, that it violated §1153( d ) and ( a ) by threatening Ricardo Valladares on April 21, 1990 and §1153( a ) by threatening members of the Contreras' crew in November 1990 and April 1991, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. In fashioning the affirmative relief delineated in the following order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Managemet, Inc. (1977) 3 ALRB No. 14.

The Closure and Destrnuction of the Labor Camps. In cases involving unilateral changes in wages, hours, or other terms or conditions of employment, the NLRB usually orders the respondent

to restore status quo ante and make its employees whole for the benefits they have lost. (2 Morris, The Developing Labor Law (2nd ed.), p. 1665..) Here, however, the General Counsel has not requested the rebuilding of the camps, probably because the cost of doing so would be disproportionate to the injury inflicted.[32] Because I believe that to be a reasonable consideration, I shall simply order the Respondent to make whole those employees who had to find alternative housing because of the closures for the economic losses they suffered as a result. The make whole period shall extend to the remainder of the season in which each such employee was employed, or waiting to begin employment, at the time of the closure of the camp where he was living.[33] This relief will, however, only come into play if the United Farm Workers is certified to be the collective bargaining representative for Gerawan's agricultural employees. (W.G. Pack, Jr., supra.)

Upon the basis of the entire record, the findings of fact and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

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[23]In Cardinal Distributing Company, Inc. (1983) 9 ALKB No. 36, mod. in other respects 159 Cal.App.3d (1984), the Board declined to order restoration of status quo ante because the change was neither motivated by anti-union animus nor inherently destructive of employee rights.

[33]I have not ordered make whole for subsequent seasons, because the evidence discloses that employees had no firm expectation of company housing for future seasons. Nor have I included a bargaining order because, with the camps destroyed, it is difficult to imagine that there could be meaningful bargaining over the issue.

ORDER

Pursuant to Labor Code section 1160.3, Respondents Gerawan Ranches, Gerawan Co., Inc., and Gerawan Enterprises, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee with regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by §1152 of the Act.

(b) Discouraging membership of any of its employees in any labor organization by unlawfully discharging, refusing to rehire, or in any other matter discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized by §1153(c) of the Act.

(c) Discharging, or otherwise discriminating against agricultural employees with regarded to hire or tenure of employment or any term or condition of employment because he or she has filed charges, participated in hearings, or otherwise involved themselves in the processes of the Agricultural Labor Relations Board.

(d) Threatening any agricultural employee with loss of employment or any other change in the terms and conditions of employment because he or she has engaged in union or concerted

activity protected by §1152 of the Act or because he or she has filed charges, participated in hearings, or otherwise involved themselves in the processes of the Agricultural Labor Relations Board.

(e) In any like or related manner, interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by §1152 of the Act.

2. Should the UFW be certified as the collective bargaining representative of Respondent's agricultural employees, cease and desist from:

(a) Unilaterally changing the terms and conditions of employment of its agricultural employees by eliminating company housing or labor camps in the future without first notifying and affording the UFW a reasonable opportunity to bargain with it over the matter.

(b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by §1152 of the Act.

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

(a) Offer Ricardo Valladares, Feliciano Valladares, Jose Tapia, Pasgual Apolinar Zamora, and Damian Olivar full reinstatement to their.former or to substantially equivalent positions, without prejudice to their seniority and other employment rights and privileges, and make them whole for all losses of pay and other economic losses they have suffered as a

result of their discharges, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms, (1988) 14 ALRB No. 5.

(b) Should the UFW be certified as the collective bargaining representative of Respondent's agricultural employees, make whole Respondent's present and former employees who had to find alternative housing because of the closures for all losses of pay and other economic losses they suffered during the remainder of the season in which they were employed, or waiting to be employed, as a result of its failure and refusal to bargain in good faith with the UFW over the closure of the six labor camps described herein, such make whole amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with the Decision and Order in E. W. Merritt Farms (1988) 14 ALRB No. 5.

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

(d) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the

purposes set forth in this Order.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from April 1, 1990 to March 31, 1992.

(f) Provide copies of the signed Notice to each employee hired by it during the twelve (12) months following the remedial order.

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

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

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

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

(1) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved

DATED: March 6, 1992

JAMES WOLPMAN
Chief Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board by the United Farm Workers of America, the Independent Union of Agricultural Workers, Doroteo Lopez, Damian Olivar, Apolinar Zamora and Manuel Estrada, the General Counsel of the ALRB issued a complaint which alleged that we, Gerawan Ranches, Gerawan Co., Inc., and Gerawan Enterprises, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by the threatening employees on various occasions in 1990 and 1991 and by discharging Ricardo Valadares, Feliciano Valladares, Jose Tapia, Apolinar Zamora, and Damian Olivar in 1990 and 1991. The Board also found that, should the UFW be certified as the collective bargaining representative of our agricultural employees, we have violated the law by closing our Eastside and Westside Labor Camps without notifying the Union and giving it an opportunity to bargain with us over the closures. The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

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

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

Because you have these rights, we promise that:

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

WE WILL NOT threaten employees with discharge or other adverse personnel action if they engage of union or other protected concerted activities or testify at ALRB hearings.

WE WILL NOT discharge or otherwise discriminate against any agricultural employee because he or she has supported unionization or has acted together with other employees to protest the terms and conditions of their employment or because that employee has filed a charge with the ALRB, testified in an ALRB hearing, or otherwise participated in ALRB procedures.

WE WILL NOT change the wages and working conditions of any agricultural employees without notifying their collective bargaining representative, if there be one, and giving it the opportunity to meet and bargain with us over such changes.

WE WILL restore to Ricardo Valadares, Feliciano Valladares, Jose Tapia, Apolinar Zamora, and Damian Olivar to their former positions and we will reimburse them with interest for any loss in pay or other economic losses jthey suffered because we discharged an refused to rehire 'them.

WE WILL make our employees whole for any financial losses they suffered by reason of the closure of the Eastside and Westside Labor Camps.

DATED:

GERAWAN RANCHES, GERAWAN CO., INC., and GERAWAN ENTERPRISES

By: _____
Representative Title

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