El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

IMPERIAL ASPARAGUS FARMS, dba IMPERIAL ASPARAGUS FARMS, INC., Respondent, and RUBEN HERRERA, an Individual, Charging Party.	Case Nos. 93-CE-7-EC 93-CE-7-1-EC 20 ALRB No. 2 (April 20, 1994)

DECISION AND ORDER

On December 3, 1992, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in which he found that Imperial Asparagus Farms , dba Imperial Asparagus Farms , Inc . (Imperial) violated section 1153 (a) of the Agricultural Labor Relations Act (ALRA or Act) by refusing to rehire employees Ruben Herrera Salgado (Herrera) , Nicanor Ruiz Moreno (Ruiz) and Virgilio Garcia Rodriguez (Garcia) because they engaged in protected concerted activities while employed by Imperial during 1992. The ALJ ordered that Herrera and Ruiz be reinstated with backpay dating from January 21, 1993. Because he found that Garcia had injured his hand on February 2, 1993, and was physically unable to work for the rest of the season, he terminated Garcia 's backpay as of that date, provided Garcia was offered work for the 1994 season.

Imperial timely filed exceptions to the ALJ's decision, and the General Counsel timely filed a reply brief. The

Agricultural Labor Relations Board (Board) has considered the record and the attached decision of the ALJ in light of the exceptions and briefs submitted by the parties and affirms the ALJ's findings of fact and conclusions of law, and adopts his recommended remedy, as modified herein.[1]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Imperial Asparagus Farms, dba Imperial Asparagus Farms, Inc., its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to rehire, 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 section 1152 of the Agricultural Labor Relations Act (Act).

(b) 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.

[1] General Counsel's motion to strike Respondent's exceptions is denied, as the Board finds that the exceptions do adequately identify those portions of the ALJ Decision to which exceptions are taken and identify specific portions of the transcript to support Respondent's arguments. (Cal. Code Regs., tit. 8, §20282(a) (1) .)

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

(a) Offer Ruben Herrera Salgado, Nicanor Ruiz Moreno and Virgilio Garcia Rodriguez full reinstatement to their former, or substantially equivalent, positions, as soon as the first such positions become available, without prejudice to their seniority and other rights and privileges of employment.

(b) Reimburse Ruben Herrera Salgado and Nicanor Ruiz Moreno for all losses of pay and other economic losses they suffered from January 21, 1993, as a result of being refused employment, the amounts to be computed in accordance with established Board precedent, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Reimburse Virgilio Garcia Rodriguez for all losses of pay and other economic losses he suffered from January 21, 1993 to February 1, 1993, and thereafter from the beginning of the 1994 packing shed season, as a result of being refused employment, the amounts to be computed in accordance with established Board precedent, plus interest computed in accordance with the Board's decision 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 and 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 exact backpay periods and the amounts of backpay and interest due under the terms of this Order.

(e) 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 already 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.

(f) 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 purpose set forth in this Order.

(g) 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 January 21, 1993 to January 20, 1994.

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

(i) Arrange for a representative 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 places (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 time lost at the reading and quest ion- and -answer period.

{j) 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: April 20, 1994

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. PRICK, Member

CASE SUMMARY

IMPERIAL ASPARAGUS FARMS
(Ruben Herrera)

20 ALRB No. 2
Case Nos. 93-CE-7-EC
93-CE-7-1-EC

ALJ Decision

The ALJ found that General Counsel established a prima facie case that Imperial Asparagus Farms (Imperial) had unlawfully refused to rehire three employees in its packing shed facility because of the employees' protected concerted activities in complaining when they did not receive their paychecks, complaining to their supervisor and later to the Labor Commissioner about not receiving overtime pay, and declining their supervisor's request that they work on a salary basis rather than for an hourly wage. After considering Imperial's asserted defenses for the refusals to rehire, the ALJ found that the defenses were either pretextual or insufficient, in themselves, to have caused Imperial's failure to rehire the employees. The ALJ therefore concluded that the evidence failed to show that Imperial would not have rehired the three employees in the absence of their protected concerted activity. He concluded that Imperial had violated §1153(a) of the ALRA by refusing to rehire the employees, and he ordered Imperial to offer the employees reinstatement with backpay.

Board Decision

The Board affirmed the decision of the ALJ, with some modification of the ALJ's proposed order. In conformity with the ALJ's findings and conclusions, the Board ordered reinstatement of the three employees and awarded backpay from January 21, 1993 for two of the employees. Because the third employee was physically unable to work from February 2, 1993 to the end of the season because of a hand injury, the Board ordered the Employer to reimburse him for backpay from January 21-February 1, 1993, and thereafter from the beginning of the 1994 season.

* * *

* * *

After investigating charges that were filed in the El Centro Regional Office of the Agricultural Labor Relations Board (ALRB) by Ruben Herrera Salgado, the General Counsel of the ALRB issued a complaint which alleged that we, Imperial Asparagus Farms, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by refusing to rehire Ruben Herrera Salgado, Nicanor Ruiz Moreno and Virgilio Garcia Rodriguez.

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

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

1. To organize yourselves;
2. To form, join, or help 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 union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

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

WE WILL NOT refuse to hire or otherwise discriminate against any agricultural employee because he or she has acted together with other employees to protest the terms and conditions of employment.

WE WILL reinstate Ruben Herrera Salgado, Nicanor Ruiz Moreno and Virgilio Garcia Rodriguez to their former positions, and we will reimburse them with interest for any loss in pay or other economic losses they suffered because we refused to rehire them.

DATED: IMPERIAL ASPARAGUS FARMS, INC.

By: _____
Representative Title

If you have a question about your rights as farm workers or about this notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 South Waterman Avenue, El Centro, California 92243-2284. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA
AGRICULCTURAL LABOUR RELATION BOARD

In the Matter of: IMPERIAL ASPARAGUS FARMS, dba IMPERIAL ASPARAGUS FARMS, INC., Respondent , and RUBEN HERRERA, an Individual, Charging Party.	)	Case No. 93-CE-7-EC 93- CE -7-1- EC

Appearances:

Eugene Cardenas
El Centro ALRB Regional Office
319 South Waterman Avenue
El Centro, CA 92243-2284

William F. Macklin
1407 Main Street
El Centro, CA 92243

Before: Douglas Gallop
Administrative Law Judge

DATED: December 3, 1993

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: This case was heard before me at El Centro, California on September 21, 22, and 23, 1993.

It is based on a charge filed by Ruben Herrera Salgado (Herrera) on January 28, 1993, and which was amended on February 23, 1993. On July 14, 1993, a complaint issued, alleging that Imperial Asparagus Farms, Inc. (Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter Act), by refusing to rehire Herrera, Nicanor Ruiz Moreno (Ruiz) and Virgilio Garcia Rodriguez (Garcia), because they engaged in protected-concerted activities during their employment with Respondent in 1992. Respondent filed an answer, denying the commission of unfair labor practices. Herrera did not intervene. Subsequent to the hearing, General Counsel and Respondent filed written briefs.

Upon the entire record, including my observations of the witnesses, and after careful consideration of the briefs and other arguments presented, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Jurisdiction

Respondent, a California corporation, is an agricultural employer, within the meaning of §1140.4(c) of the Act. Herrera, Ruiz and Garcia are agricultural employees, within the meaning of §1140.4(b).

Respondent contends that the Agricultural Labor Relations Board (Board) has no jurisdiction in this matter,

because the dispute revolves around a wage claim, which is solely actionable before the Labor Commissioner. Respondent cites no authority for this proposition, and the Act contains no such limitation on jurisdiction. As will be discussed more fully below, the Board, the courts and the National Labor Relations Board have all found concerted wage complaints to be protected activity, and-remedial under labor-management legislation.

Furthermore, the evidence shows that in addition to protesting their rate of pay, the alleged discriminatees protested their hours, and threatened to refuse working all of the hours Respondent desired, also protected activities under the circumstances presented. Therefore, Respondent's argument is rejected.

II. Background

Respondent is primarily engaged in the growing and harvesting of asparagus. In conjunction with these activities, Respondent operates a packing shed, to prepare the harvested asparagus for market. The packing shed operation normally begins in January and ends in March. Although Respondent's supervisors largely hire and direct its field and packing workers, they are paid by, and considered employees of its labor contractor, Ramon Serna (Serna). As Respondent's labor contractor, Serna is an agent of Respondent, and since the record shows that he also, at times, independently hires employees for work in Respondent's operations, he is also a

supervisor under section 1140.4(j).

Respondent's owner is James W. Brock (Brock). Salvador Garcia has been Respondent's field supervisor for many years, and as Respondent's highest authority, below Brock and Serna, also becomes involved in non-routine personnel matters concerning packing shed employees. Amparo Oceguera Calderon (Oceguera) has worked for Respondent, through Serna, for eight or nine seasons, and as the packing shed supervisor since 1990 or 1991. For the 1991 season she used an employee, Ramon Rodriguez, as her assistant. Brock, Salvador Garcia and Oceguera are supervisors, within the meaning of §1140.4 (j).

Herrera and Ruiz began working for Respondent during the 1989 season. Both were originally field workers, but during the 1991 season, were reassigned to the packing shed by Salvador Garcia. In February 1992, Herrera and Ruiz were experiencing transportation problems. An acquaintance, Virgilio Garcia had transportation and desired employment. Herrera and Ruiz requested Garcia be hired, so they could ride to work with him, and Oceguera agreed.

Herrera's initial regular assignment during the 1992 season was to operate a machine which makes cardboard cartons. As the season progresses, Respondent generally requires fewer cartons, so Herrera was later asked to perform a variety of job duties. Ruiz was the primary employee working in the cold storage room during the 1992 season, although others would sometimes assist him. Garcia worked on the asparagus conveyor

belt lines. In addition to their regular duties, these three employees, along with a few others, began their shifts early and worked late, performing cleanup duties. As the result, they were working up to 12 hours per day, sometimes seven days per week.

III. The Protected Concerted Activities

Most of Respondent's packing shed employees were paid on an hourly basis for the 1992 season. Oceguera was responsible for keeping track of the hours worked, and since she arrived and left at different times than employees who performed cleanup tasks, such as Herrera and Ruiz, those employees were paid a salary. When Garcia first began his employment, he was paid on an hourly basis, but was soon changed to a salary. Herrera and Ruiz, even before Garcia was hired, had been complaining to various supervisors, because they had not consented to being paid a salary, and were working so many hours, they felt the salary paid was unfair. When Garcia was placed on a salary, he also became upset.

Respondent's payday is Saturday. On February 29, 1992, a payday, while other employees received their paychecks, Herrera and Ruiz did not. In their testimony, Herrera and Ruiz stated they asked Oceguera why they had not been paid, and she replied the checks had not yet issued. According to Ruiz, he told Oceguera:

> You're not going to make a fool out of me. You cannot tell me or convince me that the checks did not come out.

Herrera and Ruiz testified that after this, they went to Brock, and inquired about the checks. Brock stated he was unaware of what had taken place, but would investigate. Shortly thereafter, Herrera and Ruiz spoke with Salvador Garcia, who told them their checks had issued, but Oceguera had returned them to Brock, because she felt they had been overpaid.

Although Brock, Salvador Garcia and Oceguera all testified at the hearing, none of them testified concerning these conversations.[1] On cross-examination, Oceguera denied there was ever an occasion when the employees did not receive their checks. Assuming this also means their checks were never late, said testimony is not credited. Oceguera was generally not a credible witness, because her testimony was frequently at odds, not only with General Counsel's witnesses, but Respondent's as well. In addition, she demonstrated a willingness to actively conceal facts she apparently felt might be harmful to Respondent's positions, and to give exaggerated, summary testimony. Respondent also failed to provide any documentary evidence, such as paychecks, which would directly or circumstantially refute the version of this incident given by Herrera and Ruiz. Based on the foregoing, and because Herrera,

[1]Respondent objected to the testimony, since the incident was not specifically alleged in the complaint. The objection was overruled, since this activity is similar to the other conduct engaged in, took place at approximately the same time, and Respondent was invited to request a continuance to prepare, if necessary.

at least, was generally a credible witness,[2] his and Ruiz' testimony will be credited. At some point during the following week, Herrera and Ruiz were given an "advance" by Serna, until the amount of their pay could be resolved.

Upset by the above incident, and because Respondent continued to deny overtime pay, Herrera, Ruiz and Garcia resumed their complaints. According to Herrera, he spoke with Oceguera on March 2, 1993. Ruiz and Garcia were also present.[1] Herrera asked Oceguera why they were not being paid overtime, and Oceguera told them to speak with Serna. The employees did so, but Serna informed them Brock was responsible for approving overtime.

Frustrated, Herrera, Ruiz and Garcia returned to Oceguera. They told her they would not be at work the following day, but instead were going to the Labor Commissioner. Oceguera replied, "Go".

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[2]Herrera, from the standpoint of his recall and corroboration by documentary evidence, was the most reliable of the three alleged discritninatees. Virgilio Garcia appeared to be the least biased of the three, probably because Respondent has now offered to rehire him. His testimony, however, lacked the detail and consistency of Herrera's. Ruiz, on the other hand, was not a credible witness, although he generally corroborated the themes set forth by General Counsel's other witnesses. Ruiz was frequently non-responsive, often contradicted himself and showed a willingness to adopt what others had told him as his own perceptions. In this instance, however, his response to Oceguera rings true, as the type of thing an upset employee would say to a supervisor he did not believe.

[3]Herrera recalls Ruiz being present, but cannot recall anyone else. Garcia testified he was present, and unlike Ruiz, Garcia did not display a willingness to testify first-hand to events related to him by others.

Oceguera, in her testimony, denied she was ever told the employees were going to the Labor Commissioner's office. According to her, they all "knew" they were being paid a salary, and only objected to being paid a "different" salary than the other shed employees. She further asserted they never requested overtime pay, but only wanted to be paid the same rate as other employees.

General Counsel's witnesses are credited over Oceguera concerning this incident. Clearly, Herrera and Garcia were generally more believable, and it is hard to understand how Garcia, at least, would "know" he was a salaried employee, when his first paycheck was based on an hourly rate, plus overtime. It is also difficult to understand how Oceguera could claim most of the shed employees were salaried when she kept their hours, and they were clearly paid overtime, when it was worked. Finally, as discussed below, Serna was soon informed that the three had registered a claim with the Labor Commissioner, and the logical inference to be drawn is he was so informed by Oceguera.

On March 3, 1992, Herrera, Ruiz and Garcia went to the Labor Commissioner's office, intending to file claims against Respondent. Upon stating they were actually paid by Serna, the employees were instructed to name him as the offending employer, which they did. The claims were for both regular and overtime wages.

When he returned to work on March 4, according to

Herrera, Serna told him to bring Ruiz and Garcia for a meeting. Once the employees were assembled, Serna began yelling at them, because they had filed claims with the Labor Commissioner. Serna shouted, "You should have told me, and I would have paid you out of my pocket, but I'd rather pay an attorney then pay you an [expletive] penny!" Herrera explained their complaint was really against Brock, but they had been instructed to file against Serna. Ruiz told Serna the complaint had already been filed, and. if Serna was not going to pay them, to speak with the Labor Commissioner. Serna did not testify. Herrera's testimony, essentially corroborated by Garcia and Ruiz, is credited.

According to the three alleged discriminatees, later that day, Brock requested they meet with him, Salvador Garcia and Oceguera. Brock, on the other hand, testified that he joined the meeting in which Serna was discussing the pay issue, only because he coincidentally was at the packing shed. Herrera, corroborated in less detail by Ruiz and Virgilio Garcia, testified that Brock told them he wanted to reach an agreement regarding their pay. Ruiz and Garcia had their paystubs, and were able to calculate what they felt was due, but Herrera did not, so his claim was not settled until a later date. Herrera claims Brock told him he was stupid, because he was claiming additional wages when he did not even have his pay stubs. Herrera told Brock not to speak to him in that manner. Ruiz and Garcia did not corroborate this exchange in their

testimony.

Once the claims of Ruiz and Garcia were settled, Brock asked the three employees if they would now be willing to work on a salaried basis. They refused, citing the long hours they were working. Herrera told Brock if Respondent was not going to pay them to work overtime, they would prefer to only work the same number of hours as the other packing shed employees, and not work before and after the regular work shift. Herrera, Ruiz and Garcia all contend that Brock appeared angered by this, and instructed Salvador Garcia to only permit Herrera and Ruiz to work 40 hours per week.

Although most packing shed employees had been working fewer hours than the alleged discriminatees, they were still frequently working more than 40 hours per week. Thereafter, Herrera and Ruiz were limited to 40 hour workweeks, but Garcia was not. Generally, Herrera and Ruiz no longer worked on weekends, although weekend days were substituted for days missed during the week.[4]

Brock, in his testimony, concurred that an agreement was reached with Garcia and Ruiz, but not with Herrera, but contended it took place at the initial meeting with Serna. Brock does not recall pay stubs being produced, and generally believes Herrera's claim was not settled at the time, simply because Herrera was being recalcitrant. Brock, corroborated by

[4]Herrera, Ruiz and Garcia withdrew their-wage claims after Respondent paid them the wages they said were due.

Salvador Garcia, but not Oceguera, denied he referred to Herrera as being stupid. Brock testified a second meeting did take place that day, but claimed it was initiated by Herrera and Ruiz, who later approached him and declared they were not going to work more than 40 hours per week in the future. Brock then called Salvador Garcia over, telling him Herrera and Ruiz did not want to work more than 40 hours, and this was acceptable to him. If the two did not show up for work on weekends, Garcia was not to "penalize" them. Salvador Garcia, who appeared to be a very hesitant, somewhat non-responsive and uncooperative witness, denied virtually any recall of these conversations. At the same time, he denied that Brock limited Herrera and Ruiz to working 40 hours per week, and testified it was their request not to work overtime.

Brock denies he became angered or upset by the conduct of Herrera, Ruiz or Virgilio Garcia. A comment made during his testimony, regarding their alleged refusal to work overtime, however, is revealing:

> I had a lot of other stuff on my mind. We were starting a very busy period of our year, and I didn't want to get into this thing of going out and having to train new people. (Emphasis added)

In addition, Brock denied any knowledge that Herrera, Ruiz or Garcia had gone to the Labor Commissioner's office until January or February 1993, while he was investigating the unfair labor practice charge.

For the most part, the version of the meetings given

by Herrera, as corroborated by Ruiz and Garcia, is credited. Brock, who was present during the testimony of all other witnesses before he testified, appeared to consciously tailor his testimony to Ocegura's and Salvador Garcia's, even when they were clearly wrong or not being truthful. It is unlikely he became involved in these discussions by coincidence, and his testimony, that he was not informed of the three employees' visit to the Labor Commissioner's office is simply not credible, given Oceguera's demonstrated propensity to report unusual personnel events to Brock and Serna, and Serna's outburst on March 4. Brock's version of the events was also contradicted by Virgilio Garcia, who was the least biased of the witnesses who testified concerning the meetings, and the failure to include Garcia in the 40-hour limit is explicable by his less vocal role generally, and non-involvement in the missing check incident.

In addition to the general credibility factors detailed above, it is also more logical that the reduction in hours for Herrera and Ruiz would have taken place in the manner set forth by Herrera, rather than by Brock. The evidence shows that Herrera and Ruiz had for at least two seasons been willing, if they did not actually welcome, the additional hours, so long as they were paid for them in an acceptable manner. Surely, if they simply wanted to work fewer hours, they would have raised the issue on an earlier date. On the other hand, Brock's version appears unlikely, because if Herrera and Ruiz had just

been granted their request to be paid on an hourly basis, with overtime rates where appropriate, there would have been no reason for them to now limit their work to 40 hours per week. In the absence of corroboration, however, it is concluded that Brock did not actually tell Herrera he was "stupid". Rather, this is probably a conclusion Herrera reached concerning Brock's opinion of him, based on the settlement discussions as a whole.

IV. The Refusal to Rehire Herrera, Ruiz and Garcia for the 1993 Season

There are many discrepancies between the witnesses concerning the dates Herrera, Ruiz and/or Garcia sought employment for the 1993 season, which of them was or were present and what took place during these work-seeking efforts. Indeed, while General Counsel's witnesses generally corroborate what took place during the visits, there are significant conflicts even between them concerning the dates of the visits, and which of them were present. The most striking difference between General Counsel's witnesses and Respondent's concerns the number of visits, the former contending there were many, while the latter accounted for three, at the most.

During the investigation of this charge, Herrera gave a sworn declaration, dated January 26, 1993, in which he detailed the work-seeking efforts made by the alleged discriminatees. In his testimony, Herrera was only asked to describe what took place during four visits, but referred to having made several others. Herrera's recall of the visits, during his testimony, was clearly superior to the other

witnesses', and the declaration, taken shortly after most of the visits, is even more reliable. Accordingly, the credited facts concerning the visits are based on Herrera's testimony and his declaration of January 26, 1993. Where the testimony and declaration conflict, the declaration is credited as a more contemporaneous recall of the events.

Herrera, Ruiz and Garcia first reported on or about December 15, 1992, and met with Salvador Garcia. He advised them to check again after December 20.[5] On about December 22, they returned and spoke with Brock, asking when work would begin. He said not until the beginning of January, because the asparagus crop was late. Brock said he had no work from them and to check with "Ramon."[6]

On about December 28, 1992, Herrera, Garcia and Ruiz again met with Brock, who estimated the season would begin sometime between January 10-15, 1993. On about January 6, Herrera and Garcia returned, but work in the packing shed had not begun. Brock told them to check again, and all three

[5]Salvador Garcia did not testify concerning any of these visits.

[6]Ruiz and Herrera credibly testified Brock used only the name "Ramon", which Ruiz interpreted to mean Seraa, and suggested they would only be hired for field work. Herrera was unsure whether Brock was referring to Serna, or Ramon Rodriguez, the assistant foreman in the packing shed during the 1991 season. Brock, in his testimony, insisted he specifically used Serna's last name. Brock, in fact, demonstrated a substantially weaker recall of these conversations and, as will be further discussed below, this testimony constituted no more than an attempt to support Oceguera's testimony, that Brock never told her to refuse employment to the alleged discriminatees.

returned on about January 9. On that occasion, they spoke with Salvador Garcia, who told them the harvest had been delayed by rain, but to return on January 12.

On about January 12, 1993, Herrera, Ruiz and Garcia again sought employment from Respondent. Respondent had previously contacted about 15 former employees, and they began working in the packing shed that day. Perhaps another 25 employees also appeared, seeking work. For the first time during these visits, Herrera, Ruiz and Garcia spoke with Oceguera, who apparently had just recently returned to work at . the shed. Oceguera told them there was no work for them that day. She gave Garcia her telephone number, and instructed him to call her on a daily basis. Garcia called that evening, seeking work on behalf of himself, Herrera and Ruiz, but was told there was no work yet, and not to call again for about two weeks.

The alleged discriminatees did not trust Oceguera, so they instead returned the following day, but there were only a few employees working in the shed. On or about January 16, Herrera and Garcia returned and spoke with Oceguera and Salvador Garcia, who told them work was slow, but to keep checking. Nevertheless, Herrera observed an employee performing his job duties (presumably running the carton machine). They returned on about January 19, but were again told, by Salvador Garcia, that work was slow.

Respondent hired about 15-20 additional employees

on January 21, 1993, including a number of new employees. On January 24, Herrera and Garcia again sought employment at the packing shed. When Herrera saw that new employees had been hired, he attempted to speak with Oceguera. She said, "Don't say nothing to me. Speak to Salvador." Herrera and Garcia went to Salvador Garcia and asked if work was available. He told them Oceguera was responsible for hiring packing shed employees.

At that point, Herrera, Ruiz and Garcia concluded Respondent was definitely not going to hire them, and on January 28, 1993, filed the original charge in this case. On that day, they went to the packing shed, briefly seeing Oceguera, but not speaking with her. Then, Herrera handed a copy of the charge to Brock. Respondent continued hiring packing shed employees after January 28, 1993.

Sergio Alvarez Villegas (Alvarez) was employed by Respondent for portions of the 1992 and 1993 seasons, and plans to seek employment for the 1994 season. Alvarez, along with two female companions, was hired for the 1993 season on January 28. In his testimony, and in a previously-executed sworn declaration, Alvarez testified that after Herrera, Ruiz and Garcia left on January 28, Oceguera approached him and asked what they were doing there. He replied they were probably seeking work. Oceguera stated, "They have no shame. I had already told them there is no work for them." .Alvarez asked why this was the case, to which she replied, "Because of what they

did."[7] Oceguera, in her testimony, denied ever having discussed these employees with Alvarez.

Alvarez' testimony and declaration are credited over Oceguera's denial. He appeared to be a sincere witness who had nothing to gain from testifying, and as a probable future applicant for employment, would be unlikely to fabricate testimony harmful to Respondent. Oceguera, as noted above, was generally not *a* credible witness.

After being served with the original unfair labor practice charge, Brock, by letter dated February 18, 1993, sent Garcia a letter offering him employment. In his testimony, Brock implied, but did not expressly claim, the offer was made at that time because Garcia had not begun work in the 1992 season until mid-February. Garcia received the letter, but was unable to work due to an injury suffered on February 2, 1993.

Garcia did meet with Brock in March 1993. Brock asked him if he was then ready to report to work, and Garcia stated his injury still prevented him from working. Brock invited Garcia to return to work for the 1994 season.

Garcia testified that during this discussion, Brock told him Respondent had work for him, but he was not asked to return, because he was always with Herrera and Ruiz. Brock, in testifying about this conversation, made no reference to the above comment, but did not specifically deny having made it.

[7]This account is based on Alvarez' sworn declaration, which is very similar in overall content, but more coherently stated than was his testimony.

Garcia, as a generally credible and unbiased witness, is credited in this testimony.

V. Respondent's Stated Reasons for Not Retiring Herrera, Garcia and Ruiz

On September 14, 1993, the parties participated in a prehearing telephone conference. During that conference, Respondent represented that one employee (Ruiz) was offered employment and was hired; another (Garcia) was offered employment but was unable to work due to an injury; and Herrera was offered employment, but refused, because he was unwilling to load and unload wooden cartons from the conveyor belt.

Oceguera's testimony somewhat corresponds to this position. -According to her, she was never told not to hire any of the alleged discriminatees. Rather, she would have hired Ruiz and Garcia, but neither applied for employment at a time when they were needed. She contended Ruiz and Garcia only sought employment from her once, on January 14, 1993. With respect to Herrera, Oceguera testified that when he sought employment in mid-January, she recalled various problems with him during the 1992 season, and asked Brock to speak with him before hiring him for the 1993 season. Brock allegedly instructed her to follow that course of action.

Toward the outset of the hearing, Respondent's position radically changed from that taken at the prehearing conference. It contended only Garcia was eligible for rehire, and Herrera and Ruiz were not, based on Brock's determination that they had engaged in job-related misconduct in 1992.

Despite this contention, Brock, in a transparent attempt to corroborate Oceguera's testimony, initially denied telling her not to rehire Herrera or Ruiz. When asked to explain this, Brock claimed Herrera and Ruiz should have known they were not going to be rehired, based on his statements in December 1992, that he had not work for them, and they should speak with Serna. When asked what he would have done if Oceguera, not instructed to the contrary, had hired Herrera and Ruiz, Brock changed his testimony, stating he did instruct Oceguera not to hire them, and that he believes he told her the reasons for this instruction.

It is found that Brock not only instructed Oceguera not to hire Herrera and Ruiz, but also Garcia. Certainly, given the many flaws in Brock's testimony (more of which will be discussed below), he cannot be taken at face value in his assertion. Clearly, had Respondent wished to hire Garcia it could have done so. Even if Oceguera were hesitant to hire only Garcia, with Herrera and/or Ruiz also present, a reason not raised by Oceguera in her testimony, a job offer could have been made by telephone or mail.

Furthermore, Oceguera admitted to Alvarez, on January 28, 1993, she could not hire "them," and contrary to her assertion, Ruiz and Garcia were both present, along with Herrera. Oceguera never contended she was only referring to Herrera and Ruiz; instead, she denied making the statement at all.

Similarly, the credited evidence shows that Brock admitted to Garcia he had not been offered a job, because he was always with Ruiz and Herrera. Brock, in his testimony, did not contend this referred to any hesitancy to hire Garcia in the presence of Herrera or Ruiz; rather, he simply omitted any reference to the statement.

Furthermore, Respondent's attempt to somehow link its belated offer of employment to Garcia's February 1992 hire date is specious. Although seniority is one factor in Respondent's hiring decisions, nowhere has it been established that because an employee began work mid-season in a prior year, Respondent waits until that date to rehire the employee in subsequent years. At any rate, the evidence shows that by January 28, 1993, employees had been hired with no prior employment with Respondent. Finally, as found above, Brock admitted to Garcia he was not rehired due to his association with Herrera and Ruiz, and said nothing about his 1992 hire date being a reason for the delayed offer.

Respondent contends Herrera was not rehired for refusing to accept work assignments, loafing, missing work without notifying Oceguera and acting in a threatening manner toward her when he returned. With respect to Herrera's general work performance, Oceguera testified that she had to "speak" with Herrera "every single minute" about problems with his work, and had to be "all over him." "Every time she passed by him," Herrera would be loafing while standing on boxes, and

interrupting other employees' work by talking to them. In addition, Herrera would "never" do what she told him to, and refused "all" work assignments except running the cardboard box machine. Herrera would "always" talk back to her, "all the time," but particularly when she asked him to do something. Oceguera claims she reprimanded Herrera 10-15 times each for loafing and refusing work assignments. Oceguera "sometimes" reported these problems to Brock.

Brock initially testified that, based on complaints by Oceguera, he spoke with Garcia on one or two occasions about the need to cooperate, particularly in loading and unloading wooden boxes from the conveyor belt. Later in his testimony, Brock expanded the number of such conferences to five or six.

Brock further testified that he "sometimes" observed Herrera loafing, when he was asked to perform a job function he disliked, and Herrera was "to some extent" belligerent to Brock, in that he complained about having his work assignments changed, and sneered when directed to perform the new assignments.

Salvador Garcia, however, testified that Herrera was an average employee, and did not corroborate these allegations of misconduct. Although Salvador Garcia was the field supervisor, the record establishes that he was frequently in the packing shed, and was familiar with the work performance of the employees who worked there.

Herrera denied that he ever refused to load or unload wooden boxes. He cited only one unrelated refusal to

perform an assignment. On the other hand, Herrera testified that, unlike during the 1991 season, he was required to perform a number of different job duties in 1992. While he did not expressly so testify, it appeared these many changes did annoy him.

Based on the foregoing, it is found that while Herrera probably did express dissatisfaction at having his work assignments changed, and may have been less than enthusiastic in performing such duties, he did not refuse to work as directed, other than the one assignment, and did not loaf to an inordinate degree. Oceguera's account is a gross exaggeration, and Brock's version is also exaggerated. In addition to the credibility factors discussed above, any employee as belligerent and unproductive as Herrera was portrayed to be by Oceguera would have been discharged, or severely disciplined.

With respect to Herrera's attendance violation, it is undisputed that shed employees are required to contact Oceguera if they are going to be absent, and may lose their jobs if they fail to do so. Herrera missed four days of work during the last week of the 1992 season, and Oceguera testified she was never notified of the reason. Herrera testified he told Garcia to inform Oceguera he was unable to work, but Garcia did not corroborate this.[8] The practice of having employees report

[8]This lack of corroboration is at least partially mitigated, because Garcia was the first witness to testify, and was excused from returning. It is unlikely Counsel for the General Counsel, given Respondent's changes in position, could have been aware, at the time Garcia testified, such testimony

absences for others is at least not unprecedented. Alvarez had another employee report for him when he was absent in 1992 .

With respect to Herrera's threatening conduct, Oceguera testified that when Herrera returned, she told him he had lost his job, because he missed four days of work. Herrera demanded he be permitted to return anyway. Oceguera repeated Herrera had lost his position, because of the days missed, and added that since it was late in the season, the work level had decreased, and he was not needed to operate the cardboard box machine. Herrera allegedly began yelling that Oceguera was stupid, and claimed other employees had been permitted to return to work after leaving. Herrera then said, "If you don't give me my job back, I'm going to take some measures. It's going to be bad for you."

Oceguera testified she took this as a physical threat and called Brock from another location. She told him what had happened, and stated she thought Herrera was going to hit her. Brock told Oceguera the dispute was not worth anyone being injured, and instructed her to let Herrera work. Brock, in his testimony, corroborated Oceguera's version of the telephone call. He further testified that Oceguera was very upset, to the extent she requested leaving to see a physician (a request not alleged by Oceguera). Brock believes he spoke with Herrera, but does not recall the contents of conversation.

Herrera did not testify at length concerning this

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would be needed.

incident. He denied engaging in abusive conduct, or that Oceguera became very upset or cried. It was undisputed that Herrera, at the time, was not formally disciplined, and was permitted to work the last two days of the 1992 season.

In evaluating this incident, Oceguera's conduct, as alleged by her, is somewhat baffling. She was fully aware that Herrera, at the time, rode to work with Garcia every day. In the past, Oceguera had transmitted information to employees through others, as when she told Herrera to have Ruiz report to work at the start of the 1992 season. Thus, if Oceguera had wished to know why Herrera was absent, she simply could have asked Garcia to find out. Also, by her own testimony, Oceguera did not tell Herrera he lost his job for failing to contact her, but because he had missed four days, in itself not a rules violation. Why Oceguera took it upon herself to, in effect, discharge Herrera, rather than leaving this to Brock or Serna, is a total mystery, since Oceguera also emphatically testified that she never fires anyone.

Nevertheless, and even taking into account Oceguera's tendency to at least exaggerate Herrera's conduct, it does appear that Herrera's statements upset her. It is also found, however, that Oceguera largely provoked the conformation, and it is highly questionable whether her refusal to permit Herrera's return resulted from his failure to contact her, rather than her apparent dislike for him.

Brock testified he did not permit Ruiz to be

rehired, primarily because he consumed beer on his last day of work during the 1992 season, and also because he then failed to report to work without contacting Respondent. According to Brock, Respondent maintains an inflexible rule, known to employees, that the consumption of alcoholic beverages during working hours will result in immediate discharge. In support of this, Brock cited the discharge of Oceguera's brother, and another unnamed employee. Inexplicably, Oceguera did not corroborate Brock concerning her brother's discharge. Ruiz testified he heard employees could be discharged for such conduct, but Respondent never formally notified him of this.

Brock testified he smelled beer on Ruiz' breath in the cold storage room, on Ruiz' last day of work during the 1992 season, which was March 21, 1992. He asked Ruiz to step out of the room, so he could confirm his suspicions. He continued to smell the beer, and observed Ruiz' face was flushed and his eyes were red. Brock asked Ruiz if he had been drinking, and Ruiz denied it, his voice somewhat slurred and raised. Brock told Ruiz there was no drinking permitted during working hours, and left.

Oceguera testified that during his last shift in 1992, Ruiz approached her, told her he was leaving, without giving a reason, and left. Respondent's timesheet shows that Ruiz was credited with having worked two hours on March 21.

Salvador Garcia testified he observed Ruiz leave work "drunk" . Garcia went to the cold storage room and observed

empty beer cans therein. He notified Brock, who testified the also saw the beer cans. Ruiz was the only employee working in the cold storage room that day. Ruiz missed the last several days of work in the 1992 season, without calling in, according to Respondent's witnesses. Salvador Garcia testified he did not know why any of the alleged discriminatees, including Ruiz, were not rehired.

Ruiz denied ever having consumed alcoholic beverages during working hours while employed by Respondent. Ruiz testified that the conversation with Brock took place earlier in the season, at the time the pay dispute was settled, and Brock accused him of having previously consumed beer, rather than on the day of the conversation. Ruiz denied he left work early on his last day, and contended he informed Oceguera he would be out ill with a fever, by telling Herrera to so inform her. Herrera did not corroborate this testimony. A review of Respondent's timesheets for the week ending March 25, 1992 shows that Herrera was absent from work on March 20, 21, 22 and 23.

It is concluded that Respondent had valid reasons to suspect Ruiz consumed beer at work on March 21, 1992. As noted above, Ruiz was generally a very unreliable witness, and his placement of Brock's accusation on an earlier date was uncorroborated by Herrera or Garcia. Ruiz' claim that he worked a full shift on March 21 is contradicted by Respondent's payroll records, in addition to Respondent's witnesses. His additional contention, that he told Herrera to inform Oceguera he would be

out ill, in addition to not being corroborated by Herrera, is improbable at best, because Ruiz reasonably would have known Herrera was also going to be absent. Therefore, the version of the March 21 events set forth by Brock, Oceguera and Salvador Garcia will be credited.

ANALYSIS AND CONCLUCIONS OF LAW

I. The Legal Standard

§1152 of the Act grants agricultural employees the right, inter alia "to engage in ...concerted activities for the purpose of mutual aid or protection." Under §1153(a), it is an unfair labor practice for an agricultural employer to "interfere with, restrain or coerce" agricultural employees in the exercise of that right. In order to be protected, employee action must be concerted, in the absence of union activity. This means the employee must act in concert with, or on behalf of others. Meyers Industries (1984) 268 NLRB 493, rev'd, (1985) 755 Fed.2d 941, decision on remand, (1986) 281 NLRB 882, aff'd, (1987) 835 Fed.2d 1481, cert, denied, (1988) 487 U.S. 1205.

Protected concerted activity includes conduct arising from any issue involving employment, wages, hours and working conditions. Protests, negotiations and refusals to work arising from wage disputes are concerted activities, as are concerted complaints to governmental agencies arising from wages, hours and conditions of employment. J. & L. Farms (1982) 8 ALRB No. 46/ Lawrence Scarrone (1981) 7 ALRB No. 13; Miranda Mushroom Farm. Inc., et. al. (1980) 6 ALRB No. 22; Giumarra

Vineyards, Inc. (1981) 7 ALRB No. 7; Alleluia Cushion Company (1975) 221 NLRB No. 162.

Retaliation by an agricultural employer against employees, because they engage in protected concerted activities, is considered interference, restraint and coercion under §1153(a). In order to establish a prima facie **case** of retaliatory interference for engaging in protected concerted activity, the General Counsel must prove: (1) that the employee engaged in such activity, (2) that the employer had knowledge of the activity, and (3) that a motive for the adverse action taken by the employer was the protected activity. Lawrence Scarrone. supra; United Credit Bureau of America (1979) 242 NLRB 921, enf'd (1981) C.A.4, 106 LRRM 2751; Mid-America Machinery Company (1979) 238 NLRB 537. Direct or circumstantial evidence may establish the alleged unlawful motive. Circumstantial evidence includes inconsistent reasons for the adverse action, the expression of anger by a supervisor toward the protected activity and the failure to follow established procedures. Miranda Mushroom Farm. Inc., et al. supra.

Where the adverse action is a failure or refusal to rehire, the General Counsel must also show the employee made a proper application for work at a time it was available. Nishi Greenhouse (1981) 7 ALRB No. 18; Verde Produce Company (1982) 8 ALRB No. 27. If the employer had a practice or policy of contacting former employees to offer them reemployment, its failure to do so when employment is available may also satisfy

this requirement. gyutoku Nursery. Inc. (1982) 8 ALRB No. 98; Mission Packing Company (1982) 8 ALRB No. 47.

Once the General Counsel has established protected concerted activity as a motivating factor for the retaliation, the burden shifts to the employer to rebut the prima facie case. Respondent must preponderantly show that the adverse action would have been taken, even in the absence of the protected concerted activity. J. & L. Farms, supra; Wright Line, a Division of Wriaht Line. Inc. (1980) 251 NLRB 1083.

II. The Prima, Facie Case

Under the above-cited precedents, Herrera, Ruiz and Garcia engaged in protected concerted activities when they jointly protested the failure by Respondent to pay them at an overtime rate and, as a group, filed claims with the Labor Commissioner. Clearly, the rate of pay received by employees pertains to their wages, hours or working conditions. In addition, their refusal to accept Brock's request to be paid on a salaried basis was protected and concerted, in that such activity also pertains to wages, and did not amount to unprotected insubordination, since the refusal to accept a salary came in response to a wage offer, rather than a directive. Similarly, the demand that their hours be reduced to that worked by other employees, if overtime pay was not to be paid, constituted the protected concerted negotiating of hours and wage rates. The protest by Herrera and Ruiz concerning the missing paycheck also constituted a concerted action pertaining

to wages.

The record establishes that Respondent was aware of all these protected concerted activities. The credited evidence shows that Serna, Oceguera and Brock, prior to the refusal to rehire, knew Herrera, Ruiz and Garcia had protested the failure to pay overtime rates, filed claims with the Labor Commissioner and protested working more hours than other employees at a lower rate. It has also been established that Brock and Oceguera knew Herrera and Ruiz had protested the failure to pay their wages on February 29, 1992.

The nexus between the employees' protected concerted activities and the refusal to rehire is established in several ways. Clearly, Serna was highly upset because they had filed claims with the Labor Commissioner. Brock was visibly upset with the employees, particularly Herrera and Ruiz when, at a very busy time during the season, they refused his salary offer and said they would prefer working the same hours as the other packing shed employees. Brock also displayed his anger by going a step further, and limited Herrera and Ruiz to 40 hours per week, while other packing shed employees frequently worked overtime, at overtime wage rates.

Respondent's evasive conduct toward the three employees at the time they sought employment for the 1993 season also leads to an inference that prohibited considerations motivated the refusal to rehire. Instead of simply telling the employees their services were not desired, Brock and Oceguera

put them off, with the apparent hope they would become discouraged and not reapply. Oceguera's instruction that Garcia telephone her, and when he did, further instructing him not to call again for two weeks is particularly troublesome, because she reasonably knew many employees would be hired within that two week period. By abruptly referring Herrera and Garcia to Salvador Garcia on January 12 or 14, 1993, when she must have known he was not responsible for hiring packing shed employees, Oceguera again engaged in dilatory conduct. In the absence of credible evidence explaining a lawful motive for these actions, it is concluded that they were in response to the protected activity. Surely, had employee misconduct been the only motive, Respondent could have notified Herrera and Ruiz of this. At minimum, Respondent was under an obligation to present credible evidence explaining its conduct, in the face of the implications arising therefrom.

The shifting positions taken by Respondent in explaining its actions, the critical conflicts in testimony and the discredited denials of facts considered damaging to Respondent's position also point to unlawful motive. Thus, not only did Respondent radically alter the explanation of its conduct, but presented witnesses who tended to corroborate both positions. Oceguera's flagrant attempt to conceal even the fact that the employees were denied employment strongly suggests unlawful motivation. Brock's repeated attempts to minimize the employees' work search for the 1993 season similarly suggest he

was attempting to conceal prohibited conduct. Similarly Brock's initial corroboration of Oceguera's denial regarding his instructions to her suggests concealment of an unlawful motive. In this regard, while Brock contends only Herrera and Ruiz were ineligible for rehire, he also contended they should have known this based on his conversation with them in December 1992. The problem with this is that Garcia was also present at the time, and Brock cited no misconduct on his part warranting a denial of employment.

Finally, there are the statements by Oceguera to Alvarez, and Brock to Garcia. Oceguera's statement, that "they" could not be hired because of what they had done, certainly could be interpreted as a reference to the employees' protected concerted activities, rather than any misconduct engaged in. The former inference is bolstered by Oceguera's denial of having made the statement at all, when she easily could have explained what and who she was referring to. As it stands, however, Oceguera referred to the three employees as a group when she spoke with Alvarez, and since Respondent cites no misconduct by Garcia, it is concluded that Oceguera was admitting all three were not rehired due to their protected activities.

Similarly, Brock's statement to Garcia, that he was not rehired because he was always with Herrera and Ruiz could refer to Garcia's association with their protected activities, or to Respondent's hesitance to hire Garcia in the presence of Herrera or Ruiz. Again, Brock did not give such an exculpatory

explanation, but instead omitted any reference to having made the statement at all. Accordingly, and considering Brock's statement in the context of Respondent's other conduct, it is concluded that Brock also implicitly admitted Respondent refused to rehire Garcia because he associated with the protected activities of Herrera and Ruiz.

Based on the -foregoing, General Counsel has established a prima facie case, that Respondent unlawfully retaliated against Herrera, Ruiz and Garcia for their protected concerted activities.[9]

III. Respondent's Defenses

As was noted earlier in this Decision, Respondent cited Herrera's alleged refusals to accept work assignments, loafing, missing work without notifying Oceguera and threatening conduct toward her as the reasons for its adverse action. As discussed above, Respondent's allegations concerning Herrera's general work performance were grossly exaggerated. The credible evidence shows that Herrera probably resisted, but did not refuse the pertinent work assignments, and did not "loaf" to an inordinate degree. Furthermore, it is abundantly clear that

[9]It has been concluded Respondent failed to rehire Garcia directly because of his participation in protected activities. That Respondent may have viewed Garcia's role as less significant does not alter the result herein, because the Act protects all participants in protected concerted activity from retaliatory discrimination, not only the leaders. Furthermore, even if there were no direct nexus between Garcia's protected activities and his loss of employment, his coincidental or designed inclusion in Respondent's retaliation against Herrera and Ruiz would still be unlawful. J. & L. Farms, supra; Matsui Nursery. Inc. (1979) 5 ALRB No. 60.

Herrera's general work performance was not a proximate cause for Respondent's refusal to rehire him. Herrera was not even formally disciplined for his general work performance and, even if Respondent's version of the facts were accepted, the incident with Oceguera after Herrera returned to work would have constituted an intervening and far more compelling basis for refusing to offer him employment for the 1993 season.

Having found two of Respondent's four reasons for not rehiring Garcia to be grossly exaggerated, and not even proximate causes for its action, it becomes very difficult to sustain its conduct on the remaining grounds. With respect to Herrera's failure to notify Oceguera of his absence, the evidence fails to establish that Respondent invariably discharges or refuses to rehire employees for this rules violation, even assuming Herrera made no attempt to inform Respondent of his absence. Oceguera's conduct, in taking it upon herself to discharge Herrera, appears to depart from normal procedures. Her apparent failure to even ask Herrera why he had not notified her, or why he was out, contributes to the conclusion that she attempted to prevent his return based on her animus toward his protected activities, rather than the rules violation. Finally, Brock admitted that similar conduct by Ruiz was only a minor factor in the decision not to rehire him.

Although Herrera was probably somewhat harsh toward Oceguera when he returned to work, her handling of the affair clearly contributed to his actions. There is no allegation that

Herrera used foul language or expressly threatened Oceguera with physical harm, which is probably why he was not even disciplined for his conduct. Indeed, the bottom line, with respect to this incident, is that Herrera was permitted to continue working, and if Respondent had really seen him as a threat or as being highly unacceptable, it would have terminated his employment in 1992. Brock's cursory investigation of the incident, and failure to even discuss it with Herrera in any detail, demonstrates that Respondent is now using it as a pretext to conceal its true motive.

Respondent's defense to Ruiz' discharge raises a closer issue, because it has been found that Respondent had valid reasons to suspect he drank beer during working hours on his last work day for Respondent in 1992. Whether Ruiz would not have been rehired in 1993, absent his protected activities, based on Respondent's suspicions concerning the incident, is not so clear. Although Brock testified he observed several indications Ruiz had been drinking beer, it is apparent he was not sufficiently confident of this to discharge Ruiz, in the face of Ruiz' denial.

The discovery of the beer cans certainly bolstered Brock's suspicions, but beyond Brock's testimony, there is no evidence that Respondent, in fact, refused to rehire Ruiz for that reason. Respondent did not cite this as a reason for its action until the hearing, and Salvador Garcia denied any knowledge of the reason for Respondent's refusal to hire Ruiz.

Based on his involvement in the incident and position in Respondent's operations, one would expect Garcia to have been informed, if this were the reason. Furthermore, although Salvador Garcia was a recalcitrant witness, he exhibited no difficulty testifying concerning Ruiz' conduct, and if he had been informed this was the reason for his not being rehired, presumably would have testified to that effect.

Thus, Brock apparently never gave the incident as a reason to Salvador Garcia or to Oceguera, who also failed to cite Ruiz' conduct. Based on Respondent's position at the prehearing conference, Brock also apparently failed to raise the issue with Respondent's representatives. Brock additionally failed to raise the issue with Ruiz when he sought work for the 1993 season. Brock had shown no reluctance to confront Ruiz in 1992, so there is no apparent reason why he would have failed to do so again, especially when he had additional information supporting his suspicions.

Based on these considerations, it is concluded that Respondent did not refuse to rehire Ruiz because it suspected he drank beer at work on March 21, 1992. Although Brock entertained such suspicions, the evidence shows that he was not confident enough in them to take action. Instead, Respondent is now using the incident as an ex post facto justification for its prohibited conduct. With respect to Ruiz' failure to return to work, this was admittedly of far less importance to Respondent and, as noted above, the evidence fails to establish an

inflexible rule whereby employees are discharged, or not rehired even if they give a valid explanation for the failure to contact Respondent. The failure of Respondent to cite this rules violation as a ground for the refusal to rehire Ruiz, prior to the hearing, and Oceguera's and Salvador Garcia's failure to make such an assertion in their testimony also demonstrates it was not a proximate cause for the adverse action.

Turning to Virgilio Garcia, Oceguera's contention, that he was not rehired because he did not seek employment at an appropriate time is clearly a sham since, contrary to Oceguera's testimony, Garcia sought employment on several occasions after January 12, 1993 and, at her direction, also telephoned seeking work. Brock's admission to Garcia, that he was not hired because of his association with Herrera and Ruiz, further belies Oceguera's testimony.

Said admission further discredits Respondent's assertion, that Garcia was not offered employment until February 1993, because he was not hired until February 1992. As noted above, Respondent produced no evidence showing this to be normal policy, and employees with no prior history of employment with Respondent were hired prior to its offer to Garcia.

Also contradicting Respondent's allegations regarding Garcia are Brock's statements to him in March 1993. As noted above, if Garcia's 1992 hire date had been the reason for the delay in offering him employment for the 1993 season,

Brock would have told him this, rather than citing Garcia's association with Herrera and Ruiz. In the absence of a credible exculpatory explanation concerning Brock's March 1993 statements, and in light of all the other indicia of unlawful motive, it is concluded those statements constituted an admission that Garcia was not rehired due to his association with the protected activities of Herrera and Ruiz, and not merely because he was physically present with one or both of them when he sought work for the 1993 season.

Based on the foregoing, the credible evidence fails to show Respondent would not have rehired Herrera, Ruiz and Garcia, in the absence of their protected concerted activities, by January 21, 1993.[10] Accordingly, Respondent violated §1153(a) of the Act by refusing to rehire Herrera, Ruiz and Garcia for the 1993 season.

REMEDY

Having found that Respondent violated §1153 (a) of the Act by refusing to rehire Ruben Herrera Salgado, Nicanor

[10] Although Herrera and Ruiz had several years of seniority, and might have been rehired with the first group of employees, absent their protected concerted activities, Respondent will be given the benefit of a doubt concerning its hires prior to January 21. It is noted Herrera's declaration indicates the work level was low until that date. Although Herrera, Ruiz and Garcia were not physically present at the packing shed on January 21, this was primarily the result of Respondent's evasive and unlawful conduct and, in any event, Respondent had no intention of hiring them whether they were present or not. Since Garcia was injured on February 2, 1993, and was physically unable to work for the rest of the season, his backpay will terminate as of that date, provided he is offered work for 1994 season.

Ruiz Moreno and Virgilio Garcia Rodriguez because they engaged in protected concerted activities, 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 Management. Inc. (1977) 3 ALRB No. 14.

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

ORDER

Pursuant to Labor Code §1160.3, Respondent Imperial Asparagus Farms, Inc., its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

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

(b) 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) Offer Ruben Herrera Salgado, Nicanor Ruiz Moreno and Virgilio Garcia Rodriguez full reinstatement to their former, or to substantially equivalent positions, as soon as the first such positions become available, without prejudice to their seniority and other rights and privileges of employment; and reimburse them for all losses in pay and other economic losses they suffered as the result of not being rehired, the amounts to be computed in accordance with the Board's decision in E.W. Merritt Farms (1988) 14 ALRB No. 5.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying and otherwise copying, all payroll and 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 amounts of back pay and interest due under the terms of this Order.

(c) 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.

(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 purpose set forth in this Order.

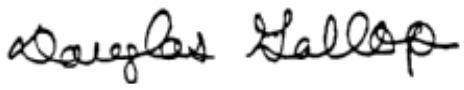
(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from September 1, 1992 to August 31, 1993.

(f) Post copies of the attached Notice in all appropriate languages, for 60 days, in conspicuous places on its property, the exact period(s) and places(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.

(g) 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 places (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 time lost at the reading and question-and-answer period.

(h) 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 3, 1993



Douglas Gallop
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office of Agricultural Labor Relations Board by Ruben Herrera Salgado, the General Counsel of the ALRB issued a complaint which alleged that we, Imperial Asparagus Farms, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by refusing to rehire Ruben Herrera Salgado, Nicanor Ruiz Moreno and Virgilio Garcia Rodriguez. The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

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

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

Because you have these rights, we promise that:

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

WE WILL NOT refuse to hire or otherwise discriminate against any agricultural employee because he or she has acted together with other employees to protest the terms and conditions of employment.

WE WILL reinstate Ruben Herrera Salgado, Nicanor Ruiz Moreno and Virgilio Garcia Rodriguez to their former positions, and we will reimburse them with interest for any loss in pay or other economic losses they suffered because we refused to rehire them.

DATED: IMPERIAL ASPARAGUS FARMS, INC.

By: _____
Representative Title