Thermal, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUN GOLD, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos . 94-CE-12-EC 94-CE-114-EC 21 ALRB No. 14 (December 28, 1995)

DECISION AND ORDER

On July 19, 1995, following an evidentiary hearing, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision and Recommended Order in this matter. In her Decision, the ALJ found that Sun Gold, Inc. (Sun Gold or Respondent) had violated section 1153 (a) and (c) of the Agricultural Labor Relations Act (ALRA or Act) by discharging three employees and by failing to recall a group of employees for the 1994 harvest season.

Thereafter, Sun Gold timely filed exceptions and a supporting brief, and General Counsel filed a reply brief. The Agricultural Labor Relations Board (ALRB or Board) has considered the record and. the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings and conclusions of the ALJ except to the extent they are inconsistent herewith, and to adopt her Recommended Order, as modified.

Background

Sun Gold is a date farming operation owned by Hernan Castro and his brother Efren Castro. Respondent's date farming operations are seasonal. During the time period relevant to this case, it employed "palmeros" and general laborers for a variety of tasks. Palmeros generally worked on the tallest trees, with ladders of 48 and 56 feet. General laborers worked with shorter ladders on the shorter trees. Certain palmeros, as well as some general laborers, worked using machines--either cranes with buckets or forklifts with platforms. Palmeros were paid a piece rate equivalent to about $10.00 to $12.00 per hour. General laborers were paid $5.00 to $7.00 per hour.

In November or December 1993, Sun Gold decided to mechanize its operation as much as possible by using cranes rather than ladders for all work in the tall trees. The decision to mechanize and use general laborers instead of palmeros was based on management's belief that using cranes with general laborers would be cheaper, safer, faster, and more efficient than using palmeros with ladders.

Sun Gold's management was also concerned about problems caused by palmeros during the 1993 harvest. Prior to the 1993 harvest season, Respondent informed the palmeros of its decision to incorporate their annual ten percent bonus and $60.00 per month rent allowance into their weekly paychecks through an increase in piece rates. During the 1993 harvest, a problem arose with palmeros dumping fronds and other trash into the bins

they filled with dates. This practice inflated the bins' weight, the basis upon which Respondent and the palmeros were paid. The practice caused complaints from the packing house and ranch owners who ended up paying for the trash mixed in with the dates.

As a result of this conduct, Respondent laid off its ladder palmeros after only three weeks and completed the harvest using machines with general laborers.[1] In December 1993, Respondent traded some equipment for one crane and took steps to purchase another. There were some problems with the cranes breaking down, but Respondent used cranes progressively more in its operations. Respondent completed the 1994 harvest using cranes and general laborers, as well as four palmeros who had previously worked with the cranes. No ladder palmeros worked for the remainder of the season. In 1995, Respondent did not use any cranes or palmeros because it had given up all of its ranches with tall trees .

Discharge of Vicente Espejel, Santiago Espejel and Mariano Espejel

Because they were dissatisfied with their working conditions and the changes Respondent had made' in their pay, most of the ladder palmeros went to the offices of the United Farm Workers of America, AFL-CIO (UFW or Union) on March 21, 1994.[2]

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[1] Respondent's management reasoned that general laborers, besides being less expensive to use, would not have the same incentive to dump fronds into the bins since they were paid an hourly rate rather than a piece rate based on the contents of the bins.

[2] All dates herein refer to 1994 unless otherwise specified.

The following day, most of the palmeros gathered together at the Tuffli Ranch to discuss various complaints they wanted to present to owner Hernan Castro. All but two or three were wearing union buttons or other insignia. After Castro arrived and asked why they were not working, Vicente Espejel spoke up, voicing the workers' complaints about wages, the poor condition of the ladders, and the unevenness of the ground around the trees, which made it difficult to move the heavy ladders. He also asked why the palmeros were getting less harvest work each year. Several other palmeros also spoke, but Espejel was the most vocal. After listening to Castro's responses, the palmeros returned to work.

Later that same day, Castro decided to discharge Vicente Espejel and his two brothers Santiago and Mariano. Castro testified that he decided to terminate Vicente in part because he was upset with him for making his requests after Castro had done him a number of "favors." Castro testified that he had permitted Vicente to borrow money from Respondent once or twice, $200.00 at a time. He had hired Vicente's brothers because Vicente had asked him to give them jobs, although they were not very experienced in date farming. Castro became more angry and upset as time went by, and he decided to discharge Vicente and his brothers that night. He went to~ their house, picked up their ladders, and left the three brothers' paychecks with Mariano. He told Mariano he wouldn't need them anymore, because he was going to do the rest of the work on the ranch with the machines.

The ALJ found that Castro admittedly discharged Vicente Espejel because he complained about working conditions and asked for a raise. Because Espejel voiced his complaints and requested the raise on behalf of himself and the other palmeros, the ALJ concluded that Castro had discharged Espejel for protected concerted activity in violation of section 1153(a) of the Act. The ALJ further concluded that Castro had discharged Espejel because instead of coming to Castro individually, he did so as part of a group who had gone to the UFW. Consequently, she concluded that the discharge also violated section 1153(c) of the Act.

The ALJ also concluded that Respondent violated sections 1153(a) and (c) of the Act by discharging Santiago and Mariano Espejel because she considered their discharge to be the direct result of Vicente's unlawful discharge. She did not credit Castro's explanation that he fired Vicente's brothers because he believed they were inexperienced and would not be able to do the work properly without Vicente's supervision.

We affirm the ALJ's finding that Respondent committed an independent violation of section 1153(a) of the Act by discharging Vicente Espejel. By Castro's own admission, Vicente's discharge was directly related to his "protected concerted activity in voicing the palmeros' complaints at the March 22 meeting. As the ALJ found, the concerted activity at issue herein clearly is protected by section 1152 of the Act. The fact that Castro may have had some personal reasons for being

particularly angry at Espejel for speaking out as he did cannot serve to excuse his adverse action against Espejel for exercising his statutory rights. Rather, it simply demonstrates one reason (besides Espejel's prominent role as spokesperson at the meeting) why Castro was motivated to take adverse action against Espejel but not the other palmeros. A violation of the statute was proven since it is clear that in the absence of his protected concerted activity Espejel would not have been discharged. *(Wright Line, A Division of Wright Line, Inc.* (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 455 U.S. 989 [109 LRRM 2779].)

We also uphold the ALJ's conclusion that Respondent's discharge of Vicente's brothers Santiago and Mariano Espejel violated section 1153(a) of the Act. The ALJ's refusal to credit Castro's claim that the two brothers were too inexperienced to be able to work properly without Vicente's guidance is reasonably based on the evidence. Mariano had been with Sun Gold since November 1993 and had prior experience as a palmero elsewhere. Santiago started with Sun Gold in March 1993 and therefore had approximately one year's experience when he was discharged. Thus, the evidence supports the finding that Castro's motivation for discharging the brothers was Vicente's protected concerted activity rather than the claimed inexperience of the brothers.

Since Castro admitted that he discharged the two brothers because he fired Vicente, the cases cited in Respondent's exceptions brief regarding discharge of relatives of

an employee who engages in protected activity are inapposite. In *George Lucas and Sons* (1978) 4 ALRB No. 86, the Board upheld an ALJ's holding that an employee, her mother and her sister were not unlawfully laid off after the employee spoke at a meeting. Since the case held that *none* of the three employees' layoffs was unlawfully motivated, the case has no relevance here.

In *Lightening Farms* (1986) 12 ALRB No. 7, the Board held that the mere fact that a claimant was related to a discriminatee was not enough by itself to support a finding that the relative's layoff constituted a violation. However, the Board noted that a familial relationship would support a finding of discrimination where the relationship between the discriminatees and with their employer is such that to lay off one discriminatee is to lay off the family member. It is clear that there was such a connection between the three brothers in this case, since Santiago and Mariano were hired to work at the same ranch as Vicente at his request. Applying a *Wright Line* analysis here, we find that in the absence of Vicente's protected concerted activity, his brothers would not have been discharged. Accordingly, we uphold the ALJ's conclusion that Respondent violated section 1153(a) of the Act by discharging Vicente, Santiago and Mariano Espejel.[3]

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[3] Having found that Respondent engaged in an independent violation of section 1153(a) of the Act by terminating employees because they engaged in concerted activities within the meaning of section 1152, we will order Respondent to offer them reinstatement and compensate them for wages and any other economic losses resulting from the unlawful discharge. Since the

(continued...)

Respondent excepts to a provision in the ALJ's recommended remedial order because it believes that backpay for the Espejels should be limited to five days. We disagree with Respondent. The ALJ discredited Castro's testimony that he had already planned to replace all three of them in just a few days with machines. Castro testified that other palmeros continued to work after March 22 in the pollinization, tie-down and wrap seasons. Some palmeros with crane experience worked during the 1994 harvest season. Since the Espejels were unlawfully discharged, they are entitled to be offered reinstatement to their former positions, or if their positions no longer exist, to substantially equivalent positions. What jobs exist and what jobs the discriminatees are qualified for are matters to be determined during compliance proceedings.

Failure to Recall Palmeros for the 1994 Harvest

Respondent discontinued using palmeros for the 1993 harvest and finished the harvest with general laborers, who worked not from cranes but from forklifts with baskets. It is undisputed that in November or December 1993 Respondent decided to mechanize the business as much as possible, and that mechanizing the operation makes it less expensive, safer and more efficient than using the palmeros with ladders. The initial

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[3](...continued)
remedy for discrimination in violation of section 1153(a) is the same as for discrimination in violation of section 1153(c), and thus would be cumulative, we need not reach the question as to whether, as found by the ALJ, the employees' union activity was an additional motivating factor for their discharge.

decision to mechanize was made prior to any union or protected concerted activity among the palmeros.

All of the palmeros (other than the Espejels) continued to work during the remainder of the pollinization season after the March 22 meeting, as well as during the tie-down and wrap seasons that followed. Between the end of the wrap season in September 1993 and the beginning of the harvest in October 1994, some of the palmeros (including seven of the alleged discriminatees) came to ask Castro whether he would recall them for the 1994 harvest season. He told them that the harvest would all be done with the cranes and general laborers. He said that he had recalled four palmeros for the 1994 harvest, all of whom had worked for him previously on the cranes and had just completed the wrap season working on the cranes.

All four of the palmeros recalled for the 1994 harvest had attended the March 22 meeting with Castro.[4] No new palmeros were hired for the season.

The ALJ concluded that the failure to recall virtually all of the palmeros for the 1994 harvest violated sections 1153(a) and (c) of the Act. She found that Respondent had falsely used the justification of mechanization in the harvest to conceal its true unlawful motivation, and that Respondent gave false and inconsistent reasons to the palmeros regarding their

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[4] Castro's father-in-law, Ignacio Vargas, was one of the four. He was laid off a few weeks later because he was not needed, and Castro thought the other three palmeros were better, more efficient workers.

rehire. As for Respondent's assertion that it was more cost effective to use general laborers, the ALJ believed that in the 1993 harvest general laborers and palmeros were paid the same,[5] and found no evidence that it was necessary to change this practice in 1994. She found that Respondent's acquisition of the Sun Valley crane in December, and its execution of a lease/option at the same time, supported its claim that it intended to mechanize for nondiscriminatory reasons. However, not taking possession until March, right after the protest, indicated to her 'that Respondent had accelerated its mechanization program for discriminatory reasons.

The ALJ did not find a violation for the continued refusal to rehire the palmeros in 1995. She reasoned that Sun Gold no longer had any ranches with very tall trees, and General Counsel had not established that the remaining ranches had trees that were assigned to the palmeros in the past.

We find that the record does not support the ALJ's finding of an 1153(a) and (c) violation for the failure to recall the palmeros for the 1994 harvest. The ALJ's analysis was heavily influenced by her mistaken belief that all employees were

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[5] This belief is based on the ALJ's incorrect finding that in the 1993 harvest, "all workers were paid two cents per pound of dates picked." (ALJ Decision, p. 6.) The portion of Lee Osborne's testimony to which the ALJ is referring actually states than when Respondent was custom farming for certain landowners, it would bill the landowner two cents per pound on the net weight of dates as stated by the packing house. (Tr: 564-566.) The testimony is not referring to employee wage rates. Testimony elsewhere indicated that palmeros were always paid a piece rate which equated to $10 to $12 per hour, while general laborers were always paid an hourly rate of $5 to $7.

paid the same in the 1993 harvest. Another factor which persuades us that no violation occurred is the issue of timing. All of the palmeros who wore union buttons and spoke up at the March 22 meeting with Castro were recalled for several successive seasons after that meeting. If Respondent wanted to rid itself of union activists, there was no reason to wait until the November 1994 harvest season to do so. Further, two of the palmeros retained for the 1994 harvest were at least somewhat active union supporters. Thus, because of mechanization Respondent had only four palmero positions open, and half those positions were filled by union supporters. This suggests that Respondent was differentiating between the palmeros on the basis of their skills and experience with the cranes rather than their union activity.

Further, the evidence does not support the ALJ's finding that Respondent "accelerated" its mechanization program in response to the March protest. Castro's accountant Lee Osborne began telling him in November 1993 (four months before the palmeros' protest meeting) that overall the use of cranes with general laborers would be less expensive than using palmeros with ladders. The testimony of both men supports a finding that they genuinely believed that mechanizing the Company's operations would make them safer, faster, more efficient and less costly.

We find that rather than accelerating the mechanization program, Respondent proceeded at a normal, step-by-step pace. In December 1993 the Company traded a large tractor and a disk to

Sun Valley in return for a crane. (Sun Gold had previously leased cranes but had not owned any.) Sun Gold also paid a deposit to Budget Crane in December 1993 toward the purchase of a second crane. The crane purchased from Sun Valley operated during the January 1994 dethorning season, but then broke down and was in the shop for repairs for two and a half to three months. While the Sun Valley crane was being repaired, the Company leased a different crane from Sun Valley. The crane from Budget was delivered in March 1994, but Respondent was never able to get it running. The Sun Valley crane was finally repaired and back in service during the last week of March 1994. It was then used at the Mecca Ranch for the pollinization of the tall trees. Nothing in this described process of purchase, repair, and use of cranes reasonably suggests that Respondent accelerated mechanization of its operations in response to the March 22 meeting.

We also find that Castro did not give false and inconsistent reasons to the palmeros for not rehiring them. Castro knew that some of the palmeros had sabotaged the 1993 harvest by dumping trash in the bins after learning their compensation was to be changed. He was understandably concerned that if he told the palmeros in advance that he would be hiring only a few of them for the 1994 harvest, they might not perform the date wrap work properly. Thus, he had good reason to be cautious in how he answered their inquiries about the harvest work.

Consideration of all the factors concerning this allegation indicates the lack of a violation. Thus, there was no overt expression of anti-union animus by Castro or any other management person. Union activity increased after the March 22 meeting but the palmeros continued working through several seasons, with no one being discharged or otherwise discriminated against. Cranes and forklifts staffed by general laborers were used almost exclusively in the 1994 harvest, and the decision to dp so was well justified by cost savings. Of the four palmeros recalled for the 1994 harvest, two had engaged in union activity, none were new employees, all had experience working with cranes, and all had just completed the date wrap season.

We find that Respondent modified the manner in which it. had heretofore managed date production and that it did so for valid economic reasons. Accordingly, we find that the elimination of palmeros was not discriminatorily motivated, but was the result of justifiable business decisions. On that basis, we are compelled to disavow the ALJ's contrary finding.[6]

The Remedy

Respondent argues that even if violations of law are found in this case, a reinstatement order is not appropriate. All palmero positions were eliminated at the end" of the 1994 harvest, and no palmeros were used by the Company in 1995. Since

[6]It is not necessary to overrule any demeanor-based credibility resolutions in order to find that no violation was established. Most of the ALJ's credibility determinations are based on factors other than demeanor.

only general laborer positions exist today, Respondent claims, there are no former or substantially equivalent positions to offer the discriminatees.

Respondent further argues that the ALJ's proposed remedial order is punitive. Respondent complains that it is punitive to require a mailing, reading and education remedy for the Company's current employees, all of whom are general laborers and none of whom are palmeros, when there is no evidence that the general laborers engaged in any protected or Union activity. Respondent asks that the mailing, reading and educational components of the recommended order be stricken, and that the posting period be limited to 60 days.

We will include the standard cease-and-desist, offer of reinstatement, payment of backpay, and reading, posting and mailing provisions in the order to remedy the Espejels' unlawful discharge. The Espejels are entitled to offers of reinstatement to their former jobs, or if their positions no longer exist, to substantially equivalent positions. The question of what positions Respondent may currently have for which the Espejels would qualify is a matter for compliance. The palmeros performed a number of different functions for Sun Gold, including harvesting, pollinization, wrap, and tie-down. Even if these jobs are now performed by general laborers for less pay than the palmeros received, they may nevertheless constitute substantially equivalent employment for purposes of reinstatement offers.

Although there may be only general laborers and no palmeros remaining at Sun Gold, the existing employees should be informed of Respondent's unlawful discrimination against employees for their protected concerted activities. Thus, we will include the standard reading, mailing and education provisions in our order. The ALJ's mailing provision, however, will be shortened to the standard one-year period.

Respondent's Claim of ALJ Bias[7]

Respondent argues in its exceptions brief that the ALJ should have disqualified herself from this case for bias and that because she did not do so, her decision should be disregarded by the Board. Respondent asserts that the ALJ demonstrated bias by making critical factual findings based on non-existent evidence. As one example, Respondent cites the ALJ's erroneous finding that in the 1993 harvest, all workers were paid two cents per pound for dates picked.

A party seeking to disqualify an ALJ for bias must show actual bias and demonstrate that the ALJ acted on that bias in some prejudicial manner. (Andrews v. *ALRB* (19B1) 28 Cal.3d 781.) Respondent's cited examples do not demonstrate bias, but, at the most, factual errors made by the ALJ.

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[7] On April 10, 1995, the ALJ denied Respondent's motion, filed pursuant to Title 8, California Code of Regulations, section 20263, requesting that the ALJ disqualify herself from conducting the hearing. On April 11, 1995, the Executive Secretary denied Respondent's application for special permission to appeal the ALJ's denial. The regulation provides that Respondent retains its right to file exceptions to the hearing on the ground of ALJ bias along with its exceptions to the decision.

Respondent also argues that the ALJ showed bias by uniformly crediting worker witnesses over Company witnesses without justification from surrounding facts and circumstances. The fact that an ALJ uniformly credited evidence of one party and discredited evidence of another is not relevant to a determination of whether the ALJ is biased. *(Andrews* v. *ALRB, supra,* 28 Cal.3d 781.) Moreover, the ALJ in this case did not uniformly credit General Counsel's witnesses. For example, in at least two instances she discredited workers who testified that Castro had made anti-union statements.

Respondent asserts that all inferences made by the ALJ were adverse to the Company, and that her logic in making such inferences was faulty. Respondent also asserts that the ALJ acted as an advocate for General Counsel by making findings on an issue not addressed by General Counsel in her closing argument.

Again, Respondent has not demonstrated bias on the part of the ALJ. Even if one accepts Respondent's assertion that the ALJ made faulty inferences and made findings on an issue not addressed in General Counsel's closing argument (although it was addressed in the complaint), this does not demonstrate bias under the relevant case law.

Consequently, Respondent's claims of ALJ bias are denied.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor

Relations Board (ALRB) hereby orders that Respondent, Sun Gold, Inc. (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 of employment, or any term or condition of employment because the employee has engaged in concerted activity protected under section 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 Vicente Espejel, Santiago Espejel, and Mariano Espejel, immediate and full reinstatement to their former positions of employment, or if their positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

(b) Make whole the employees who were discharged for all wages or other economic losses they suffered as a result of their unlawful discharges or failure to be rehired. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharges. The award shall also include interest to be determined in the manner set forth in *E. N. Merritt Farms* (1988) 14 ALRB No. 5;

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay and/or makewhole amounts due those employees under the terms of the remedial order as determined by the Regional Director;

(d) Upon request of the Regional Director, sign the attached Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent shall produce sufficient copies of the Notice in each language for all purposes set forth in the remedial order;

(e) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from March 22, 1994, until March 21, 1995.

(f) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which may be altered, defaced, covered or removed;

(g) Arrange for a Board agent to distribute and read the Notice in all appropriate languages to 'all of Respondent's agricultural 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 a reasonable rate of compensation to be paid by Respondent, to all non-hourly wage employees in order to compensate them for lost time at this reading and during the question-and-answer period;

(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this matter;

(i) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the dates of its 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;

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

DATED: December 28, 1995

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office of the Agricultural Labor Relations Board (ALRB) the General Counsel of the ALRB issued a complaint that alleged we, Sun Gold, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging Vicente Espejel, Santiago Espejel, and Mariano Espejel for protesting their wages and working conditions.

The ALRB has told 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 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 which forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge employees because they protest about their wages, hours or other terms and conditions of employment.

WE WILL offer the employees who were discharged immediate reinstatement to their former positions of employment, and make them whole for any losses they suffered as a result of our unlawful acts.

DATED: SUN GOLD, INC.

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, CA 92243. 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 OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: SUN GOLD, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging party,	)	Case No (s) . 94-CE-12-EC 94-CE-114-EC

Appearances:

William C. Wright
Samantha M. Paynter Littler,
Mendelson, Fastiff,
Tichy & Mathiason
for Respondent

Kristine Rodriguez
El Centro ALRB Regional Office
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORS, Administrative Law Judge: This case was heard by me on April 11, 12, 19, 20 and 21, 1995, in Indio, California. It arises from two charges filed by the United Farm Workers of America, AFL-CIO ("Union" or "UFW") with the El Centro Regional Office of the Agricultural Labor Relations Board ("ALRB" or "Board") against Respondent Sun Gold, Inc. ("Respondent," "Sun Gold," or "Company").

Based on these charges, which were timely filed and duly served on Respondent, the Regional Director of the El Centro Office, on February 16, 1995, consolidated the two matters and issued a First Amended Complaint alleging that Respondent violated sections 1153(a) and (c) of the Agricultural Labor Relations Act ("ALRA" or "Act")[1]. Briefly, General Counsel contends that on March 22, 1994,[2] various palmeros[3] complained to Respondent about wages and working conditions, and the next day Respondent fired the chief spokesman, Vicente Espejel, and his two brothers, Santiago Espejel and Mariano Espejel because of Vicente's role in the protest. Then, after subsequent increased Union activity, Respondent, on or about November 10, refused to rehire almost all

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[1]All section references hereafter are to the California Labor Code unless otherwise specified.

[2]A11 dates hereafter are 1994 unless otherwise indicated.

[3]A palmero climbs tall date trees up to 50 to 60 feet, or even higher, to perform various tasks. At Sun Gold, there were some palmeros who generally did not use ladders but instead rode in a bucket on a crane. Other palmeros generally worked with ladders but sometimes worked in the cranes. When I use the term palmero, I mean those workers who generally used ladders.

of the palmeros[4] because of the March protest and additional Union activity. Thereafter, at the start of the 1995 season, Respondent, for the same reason, did not rehire any of the palmeros.

Respondent denies it violated the Act and contends it fired the Espejels not because of Union activity but because its owner, Mr. Hernan Castro, was angered by Vicente Espejel's request for a raise after Castro had done favors for the Espejels. As to the other palmeros, Respondent contends they were not rehired because, prior to any protected concerted activity, Mr. Castro decided to mechanize "as much as possible, " and was able to operate with only four palmeros in the 1994 harvest and no palmeros of any kind in 1995.

Following the hearing, the Respondent filed *a* written brief Upon the entire record,[5] including my observations of the witnesses, and after careful consideration of Respondent's brief and oral argument by the General Counsel, I make the following findings of fact and conclusions of law.

JURISDICTION

The Respondent is a California corporation engaged in the

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[4]The complaint alleges a refusal to rehire the following workers: Salvador Chairez, Alejandro Diaz, Jesus Vega, Salvador Sevilla, Oscar Zatarian (also known as "El Tiburon"), Octaviano Cuevas (also known as "Soline" or "Selene"), Agapito Garcia and Armando Verduzco.

[5]The official hearing transcript volumes are numbered consecutively, so transcript references will be by page number only. General Counsel's Motion to Correct Transcript Errors is granted. General Counsel's and Respondent's exhibits will be identified as GCX number and RX number, respectively.

growing and harvesting of dates with its principal place of business in Thermal, California, and is an agricultural employer within the meaning of section 1140.4 (c) of the Act. The UFW is a labor organization, and the alleged discriminatees are agricultural employees within the meaning of sections 1140.4(f) and 1140.4 (b) of the Act, respectively.

FINDINGS OF PACT

Company Operations

Sun Gold was started in January 1992, and is owned by Hernar Castro and his brother Efran Castro. Efran is in charge of the business side of the company, and Hernan is responsible for the day to day operations.

Sun Gold's financial controller is Mr. Lee Osborne who also performs services for Sun Valley which is owned by Hernan's and Efran's father and their sister. Osborne is in charge of Sun Gold's financial affairs. In this capacity, he performs financial and budgetary forecasting and is responsible for payroll, accounts receivable and accounts payable.

Until the beginning of 1995, Sun Gold both custom farmed dates for various landowners and leased land on which it grew and harvested dates for itself. Beginning in 1995 up to the date of the instant hearing, Sun Gold, in Osborne's words, "let go" all of the land it was leasing to farm for itself and "let go" most of the ranches it custom farmed. (527)

Also in 1995, it stopped farming any ranches with the tallest trees, i.e. those over 56 feet where cranes were usually employed.

Most of those ranches previously done by Sun Gold were being farmed by Sun Valley. Of the five such ranches, Palm Desert Gardens, Carillo, International, Mecca (also known as Pavas), and Sea Acres, Sun Valley was working the first three.[5]

To properly evaluate this case, it helps to have an understanding of the work at the company. Date farming consists of several seasons separated by periods of layoff.

First is the dethorning which begins in January and lasts for about 4 or 5 weeks. Then, the pollenization starts about the beginning of March. It lasts 7 or 8 weeks, sometimes as long as to the end of April. Next is the tie down which lasts 4 to 6 weeks.[7] The wrap starts in late June or early July and lasts through August. Then, the harvest begins in early October with the machines, and the palmeros with ladders go to work about m: October. The harvest lasts until November or December.

Until the harvest of 1994, Sun Gold had two types of palmeros. The most difficult work was performed by the palmeros who carried heavy, 48 and 56 foot ladders (which collapsed to about 20 feet) which they used to climb tall palm trees. The other palmeros also worked in tall trees but rode up in a bucket

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[6]The five ranches totaled 150 acres. The three that Sun Valley was farming accounted for 110 of these. The Tuffli Ranch at 110 acres was the largest ranch farmed by Sun Gold in 1994. Neither Sun Gold nor Sun Valley was working this ranch in 1995 because it was being turned into a golf course. In total, excluding Tuffli, Sun Valley picked up 140 of the 227 acres Sun Gold was not doing in 1995 that it had done in 1994. Sun Gold had about 60 to 70 percent less business in 1995 than 1994.

[7]The testimony is contradictory as to whether this starts in late April/ early May or late May/early June.

on a crane, and, except in the harvest, got out of the bucket into the trees to work.[8] Certain trees were assigned to the machines, and others were earmarked for the palmeros who used ladders. (354) Typically, the cranes were used on the tallest trees, i.e., those over *56* feet because in those trees palmeros had to get off their ladder and climb on a ladder that was permanently attached to the tree which was quite dangerous.

The company also employed general laborers who performed a variety of tasks such as driving tractors, irrigating, general clean up, and working in the short palms--i.e. those less than 20 feet high. The general laborers performed the same kinds of tasks on the trees, i.e. dethorning, etc. as the palmeros did, but worked from the ground or on the shorter ladders. (530-534, 542)

Usually, general laborers were paid hourly at a rate of $5.00 to $7.00, and palmeros were paid a piece rate equivalent to approximately $10 to $12 per hour. (pages 822, 829.) In the 1993 harvest, all workers were paid two cents per pound of dates picked.[9] (565.) In the 1994 harvest, the company decided not to use any of the palmeros who worked with ladders but to use only general laborers and four palmeros who worked in cranes.[10]

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[8]In the harvest, the worker stayed in the bucket, cut the bunches of dates and dropped them through an opening in the bottom of the bucket into a shaker.

[9]In the 1994 harvest, the general laborers were paid by the hour, and the four palmeros were paid piece rate. No explanation was offered *as* to why the method of payment was changed.

[10]Castro and the workers used "cranes" and "machines" interchangeably, and I have done so in my decision. There were also forklifts with platforms which were used to lift general

Sun Gold's controller, Lee Osborne, was not involved in this decision. He mistakenly thought all the workers were paid hourly in this harvest. (Compare 541-542-598.) The palmeros were not. (See RX19.)

The company used two cranes leased from Sun Valley in all phases of its operations in both 1992 and 1993 . It used them to start both the 1992 and 1993 harvests, but then it brought in the palmeros about two weeks later.

The palmeros worked fewer weeks in the 1993 harvest than in 1992 because Castro believed they were responsible for "trash," i.e. branches, fronds and other material besides dates, being thrown in the bins. The packing house people complained because they were paying for this useless material since they paid based on the weight of the bins. The company finished the harvest us' the cranes and forklifts with platforms that lifted the general laborers so they could work in the trees.

The Protected Activity and Employer Knowledge

On March 21, 1994, most of the palmeros went to the UFW because they were displeased with their pay and working conditions.[11] In the past, they had received a 10% year end

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laborers into trees . These are not encompassed in the term "machine(s)."

[11]A day or two before this, Castro and foreman Lupe Angulo went to Diaz' home at night. Castro told Diaz he had spoken to various palmeros, that none of them had a problem with the wages, and he asked Diaz if he were satisfied. Diaz replied he was not, but that if he were the only one dissatisfied then there was no problem for Castro. Castro admitted the conversation but first placed it a couple of weeks after the March 22 protest. This was still during the pollenization season. He later changed his

bonus and a $60 per month rental allowance. At the beginning of the 1993 harvest, Castro informed the palmeros he was going to change the method of payment and include both amounts in their regular weekly check.[12] The piece rate was raised 10% or more, it varied by season., but there is no evidence the increase made up for the $60 per month rent allowance.

On the next day, March 22, 1994, at a time when normally they would have been working, virtually all of Respondent's palmeros were gathered at the Tuffli ranch to talk about various complaints they wanted to present to Kernan Castro.[13] They had not finished

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testimony after General Counsel questioned why he would make such an inquiry after Diaz and the others had voiced their discontent at the March 22 meeting and were still being paid the same wage they had complained about. On redirect, Castro said the conversation with Diaz did not occur until late April or early May in the tie down season and he spoke to Diaz then because those rates were higher in 1994 than in 1993. (Compare: 695 and 759 with 819-820.) His rationale does not hold up because the wage rate in the pollenization had also been raised in early March by the same percentage, and Diaz and the other workers were not satisfied with that amount. (The rate in the pollenization had been raised from $5.20 to $6.00 per tree and from $2.80 to $3.22 in the tie down. Both equate to a 15% increase.) Castro's shift in testimony was not convincing. I find Diaz' account more credible even though he did not describe this incident in an affidavit.

[12]Castro denied promising to continue the rent allowance, but Osborne's testimony corroborates the palmeros' testimony that only the method of paying the rent allowance was to change.

[13]I credit Vicente Espejel that a day or two previously Castro had come to his house to ask why palmeros were getting together about complaints rather than coming to him one on one and inquired who was getting them together. As with Diaz, Espejel did not mention this incident in his affidavit. Nevertheless, I found Espejel credible. He was more credible than Castro who often confused or could not recall dates, could not remember information, and was a very suggestible witness as exemplified by his giving contradictory answers because he followed the direction of leading questions.

figuring out how they wanted to approach him when he arrived or the scene and asked why they were not working.

Since they had not decided what they wanted to do, no one spoke for some time. Finally, Vicente Espejel, who had worked for the company since about mid-1992, spoke up.

He complained about the elimination of the rent allowance and stated the workers also wanted a raise. He also complained the ladders and tools were in poor condition, and the ground was not properly leveled which made it difficult for the palmeros carrying the ladders which were heavy and also difficult to balance.

Several other palmeros, Alejandro Diaz, Salvador Sevilla, Jesus Vega, and Salvador Chairez, echoed the concerns expressed by Espejel, and some of them raised additional issues such as medical insurance. However, Espejel was the most vocal. In addition the complaints cited above, Espejel also asked Castro why the palmeros were getting less harvest work each year.

Castro responded that he could not get them all new ladders, and he did not know if he would have more picking or less for them in the 1994 harvest.[14] He then said that the ladders were there

[14]Castro testified he told them he did not know how much harvesting work he would have for them because, as he had already told many of them since they returned in January, the owners were upset because of the trash in the bins in the 1993 harvest. I do not credit this testimony. Castro did not speak to the palmeros at the time the problem occurred except to mention it to Vicente at the end of the harvest after he had laid off the palmeros. Respondent has offered no convincing reason why Castro would have talked to them between January and March when he did not do so at the time the problem occurred. Further, although elsewhere he contradicts himself, Castro testified he did not tell his foreman, Lupe Angulo, that he did not plan to use palmeros in the 1994 harvest because he did not want them to know this since they might

for anyone who wanted to work and that if they did not work he would have to find others to do the job. At that point, Castro left. The palmeros stood around for a while discussing what to do, and then they all returned to work.

During this discussion, all but two or three palmeros wore Union buttons or other insignia. From varying accounts, I find they were: Oscar Zatarian (also known as "El Tiburon"), Roman Moreno, and a worker named Agapito.[15]

Mr. Castro was angered by Vicente's request for a raise because he felt he and his family had done several favors[16] for Vicente, and now he was asking for even more. (679) He became more upset as the day went on and decided to fire Vicente.

That evening, he went to Vicente's house to fire not only him but also his two brothers, Santiago and Mariano Espejel. He testified he fired the brothers too because they were not very

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not do their job properly. This latter testimony does not square with his alerting them to this possibility on March 22.

[15] Alejandro Diaz identified these three as those who were working when the palmeros first gathered and who had not wanted anything to do with the Union. (85, 96, 202-204, 358-359) Espejel identified the three as Oscar, Agapito and Octaviano (also known as Selene) . (359) Jesus Vega identified only two workers--Roman and Pedro (not Pedro Iniguez) as workers who did not want anything to do with the Union. The three Diaz' named were working the Tuffli ranch as was Diaz. For this reason, I credit Diaz as more likely to be correct. (96) Both Espejel and Diaz had stated in affidavits that "all" the workers wore Union buttons, and failed to satisfactorily explain why their affidavits differ from their testimony. However, Respondent acknowledges that there were at least two workers not wearing Union insignia.

[16]Similar "favors," e.g. hiring relatives and making small loans, were done for other workers.

experienced, and Vicente would not be there to oversee them.[17] Additionally, he testified, he had been planning to replace all three of them with machines in a matter of a few days.

Vicente was not home when Castro arrived, so Castro told one of the brothers that they were all fired. Early the next morning, Vicente sought out Castro and asked why he had fired them. Castro replied they were going to use the machines for the rest of the pollenization. Vicente remonstrated that there were some short trees the machines could not do. Castro answered only that "they" had decided, and he did not have anything else to say. Vicente testified without contradiction that he had previously worked for Castro on the machines and that he had never been disciplined for poor work or ever told his work was not good.[18]

Castro acknowledged that at the time he fired the Espejels most of the ranches had tall trees where the machines could have

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[17]Santiago had worked for Sun Valley or Sun Gold since March of 1993, and had not previously worked as a palmero. Mariano had worked for Sun Valley or Sun Gold since November 1993, and had about 6 months previous experience as a palmero working at another company with Vicente.

[18]There is no evidence Castro believed Vicente or his brothers were responsible for the trash in the bins in 1993. In its brief, as at hearing, Respondent makes much of the fact that when Vicente testified on redirect examination he stated that Castro told him the problem had occurred on only one ranch and only for a few days but had not mentioned that on cross. However, on cross, he was asked where and when the discussion occurred and volunteered that when Castro told him there had been a problem that he had reminded Castro he had been absent for the previous several days. He was not asked to recount what each of them said, and his testimony on redirect is not necessarily inconsistent with what he answered on cross. In any event, Castro never indicated that he mentioned it to Vicente because he thought Vicente was to blame. He specifically testified he did not know who was responsible. (655)

been used. He gave no explanation why he had planned to use them at the Mecca ranch where the Espejels were assigned rather than at any of the other ranches. Nor did he explain why he replaced the Espejels with general laborers in the second and third rounds of pollenization on the smaller trees on the ranch since the Espejels had done the first round and in years past would have finished the latter two rounds.

I do not credit Castro's explanation that he fired Vicente's brothers because he believed they were inexperienced and would not be able to do the work properly without him to guide them. Both had been doing the most difficult work at the company. Santiago had been there a year, and Mariano for several months. Additionally, Mariano was not inexperienced when he was hired.

There is no evidence any special skill was required to get in the bucket of the crane and be lifted into the trees. Once in the tree, the work was the same as when performed with ladders. With only 20 to 25 palmeros, I do not believe that Hernan, who was responsible for the day to day operations of the ranch work, did not know their levels of experience. Thus, I find no evidence they could not do the job, and no reason for Castro to be mistaken about their abilities.

Further, I do not credit his testimony that he had already planned to replace all three of them in just a few days with machines. The prompt firing and the fact that the machines were

first used immediately thereafter[19] coupled with the fact that Castro gave no reason why he planned to lay off the Espejels versus any other workers convinces me his testimony is an after the fact justification asserted to limit Respondent's liability.

After Castro fired the Espejel brothers, the level of Union activity increased. The Union came to the ranches several times, passed out leaflets and talked to the palmeros giving them Union flags, bumper stickers, buttons, etc.[20] which they displayed at work. Alejandro Diaz, Salvador Chairez, Jesus Vega, Juan Sevilla, Vicente Espejel and other unnamed palmeros also distributed flyers and authorization cards at work.

Both Castro and Lupe Angulo, the foreman of the palmeros, observed the activity and, in fact, went to the various ranches and talked to the palmeros about the Union. There is no evider any workers other than the Espejels were discharged or otherwise discriminated against for any Union or other protected concerted activity during the remainder of the pollenization season or the tie-down or wrap seasons.[21]

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[19]See RX17 which indicates the machines were first used at the Mecca Ranch the week ending March 31.

[20]The palmeros who testified all stated the "majority" of the palmeros visibly supported the Union. Those who gave affidavits on the subject declared that "all" of the palmeros wore Union buttons. Castro was also imprecise, testifying that it seemed everyone was wearing Union buttons and insignia and then saying hi "might" have seen the four palmeros he hired in the 1994 harvest wearing Union insignia.

[21]I do not credit Vega's conclusory testimony that Castro questioned him after March 22 about who was organizing the workers. Nor do I credit Chairez' testimony that Castro told the workers if the Union came in wages would go down. Immediately

THE 1994 HARVEST

Normally, the palmeros are called to work about mid-October. So, about October 17, 1994, Jesus Vega went to *ask* Castro when work would start. Castro told him the ranchers had not given him the go ahead yet. Later that same week, Vega again sought out Castro and received essentially the same answer.

Also in October, Salvador Chairez asked Castro about work, and Castro said he would give the palmeros harvest work. Later, he also asked Lupe Angulo about work, and Lupe said the dates on the trees the palmeros were going to harvest would not be ripe for a week to a week and a half. He checked back in about a week, and Lupe said he did not know when they would start but he would lee them know.[22]

On or about November 9, Vega and Salvador Sevilla went to tell Alejandro Diaz the machines were working on the palm trees the palmeros usually were assigned. The next day, these three, accompanied by Salvador Chairez, Artnando Verduzco, Agapito Garcia and Oscar, also known as Soline or Selene, went to see Castro who told them he was not going to give them any harvest work because it was cheaper to use the machines, and he already had his

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after so testifying, Chairez stated Castro had said he did not know how it would affect the palmeros if the Union came in. (480)

[22]Castro contradicted himself as to when he told Angulo he planned to mechanize and replace palmeros. (Compare 719, 729, 734) I find it improbable that this close to harvest, Angulo did not know Castro was replacing the palmeros.

people.[23]

They asked Castro why he had not previously told them he would not be using them for the harvest. He answered that he had been waiting for the ranchers to give the order to start.

They then asked why he had less senior workers than they doing the harvest. Castro replied he thought they were the best ones for the job. He admittedly did not check to see what experience other workers such as Diaz had on the machines . Moreover, the evidence shows palmeros who worked on the ladders would have been able to work on the cranes since no special experience or skill was needed to ride in the bucket.

In the 1994 harvest, one crane was used with workers from Sun Valley. The other with a machine operator and four palmeros: Fernando Bautista, Ignacio Vargas (Hernan's father-in-law), Francisco Guiterrez and Roman Moreno.[24]

Castro was equivocal as to whether any of the four had engaged in Union activity. (813.) I have previously found that at least one, Roman Moreno, had not done so. I conclude his

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[23]Castro's recollection was hazy. First, he testified this meeting was the first time he saw the palmeros about the harvest and that it was in October. The next day on redirect, he testified the meeting might have been in November and that he might have talked to some of the palmeros before this time. (Compare 700 with 729.) The palmeros' recollections were more specific, and I credit their account regarding each of the meetings with Castro. Lupe Angulo did not testify, and I credit Chairez' account of his conversation with Angulo.

[24]Castro's testimony regarding the experience of these individuals is unclear. He testified only one of them had worked on the cranes in the preceding harvest. On redirect on the next day of hearing, Castro testified all four had previously worked on the cranes but did not say when. (Compare 812 with 827-828.)

father-in-law did not do since there is no clear evidence he was working for Sun Gold then.[25] (702)

Castro acknowledged he hired new workers to work as general laborers in both the 1994 harvest and the 1995 dethorning and pollenization seasons which were the ones that had begun as of the date of the instant hearing.[26] He testified generally that he had previously offered palmeros work as general laborers, and they said they would rather collect unemployment benefits. Therefore, he did not offer any of this work to the palmeros who had previously worked for him.

According to Castro, he decided in November or December 1993 to mechanize as much as possible. He cited discussions with the controller, Lee Osborne, over several weeks wherein Osborne said it would be cheaper[27], more efficient, and safer to use machines as the reason for the decision.[28] He was asked if there were any

[25]Salvador Chairez testified that only three of the four were regular palmeros which is consistent with the fact that Castro was asked whether each of the four, specifically identified by name, except his father-in-law, had worked for him before, Castro could not remember if his father-in-law had worked in the tie down season in 1994. (828)

[25]As was true elsewhere, his testimony as to how many was contradictory. (791-792, 795-799, 812-818)

[27]One reason it was cheaper was because general laborers in 1993 and 1994 earned $5.50 to $6.00 per hour whereas the palmeros' earnings translated into an hourly amount, generally would have been $10 to $12 per hour. In the 1993 harvest, however, this was not a factor because everyone was paid by bin weight.

[28]Castro was not especially convincing since he had no idea how much the cranes cost. The crane on which Sun Gold had a lease/ option (the Budget crane) cost $35,000, a sum one might be expected to know when comparing costs. Although he testified the cranes would save money by reducing on the job injuries, Castro

other reasons, and he replied, "No." (658) He did not mention the trash in the 1993 harvest as a factor.[29]

In December 1993, the company traded some equipment with Sun Valley for a crane (hereafter called the Sun Valley crane) which it used until about mid-January but which then needed repair and was out of commission until the last week of March. (661-663.) After this one broke down, Castro leased another crane from Sun Valley in January. (662-663.)

As noted above, the company also signed a lease/option on a second crane with a company named Budget Crane. This was in December, but the crane was not delivered until March. Castro and Osborne both testified they could not recall whether it was delivered before or after the March protest. Osborne acknowledged the company had documents which would show the date. This cran had problems and was never put in service. (659-663 .)[30]

Castro used the leased crane and the Sun Valley crane to do the pollenization in March and April, and he used the two cranes thereafter in the tie down and wrap until the harvest. (693-694.) It will be recalled that he had used two cranes in the 1993

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had no idea how much the company was paying for workers' compensation insurance nor any information how much the company could expect to save. (compare 658 and 764 with 770.)

[29]The next day in reply to a question from Respondent's counsel, he added trash as a reason for mechanizing. ((822.)

[30]Castro was very suggestible. Having testified only moments before that he began the purchase of the Budget crane in December, he agreed with Respondent's counsel that he bought that crane after the Sun Valley crane developed problems in mid-January, (compare 659-660 with 662.)

harvest, so despite his commitment to mechanize he had no more equipment in 1994 than he did in 1993.[31]

THE 1995 SEASON

Castro hired several new general laborers to work, in the dethorning without offering such work to Chairez, Vega, Diaz, Sevilla, Octaviano Cuevas, Armando Verduzco or Oscar Zatavian or any other palmeros . No palmeros at all worked in the dethorning. The company did not use any cranes. Instead, it used the forklifts and general laborers.

Similarly, in the 1995 pollenization season, Respondent did not hire any new palmeros but did hire new general laborers . Again, Respondent did not offer any of the palmeros work.

ANALYSIS AND CONCLUSIONS

In cases of discrimination in employment under Labor Code sections 1153(c) and (a), General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union activity was a motivating factor in the employer's action which is alleged to constitute a violation of the Act. General Counsel must show, by a preponderance of the evidence, that: (1) the alleged discriminatee engaged in activity in support of the union; (2) the employer had knowledge of such conduct; and (3) there was a causal relationship between the employee's protected activity and the employer's adverse action.

Where it is clear that the employer's asserted reasons for

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[31]ln both 1993 and 1994, he used the cranes for the trees over 35 to 40 feet. (753)

its actions can be viewed as wholly lacking in merit, i.e., pretextual, the presentation of General Counsel's prima facie case is in itself sufficient to establish a violation of the Act. In 1980, the National Labor Relations Board (NLRB or national board) acknowledged that in certain cases, in which the record evidence disclosed an unlawful as well as a lawful cause for the employer's actions, the classic or traditional pretext case analysis proved unsatisfactory, and decided that such cases should not depend solely on the General Counsel's prima facie showing.

In order to devise a standard approach for what came to be characterized as "dual-motive" cases, the NLRB modified the traditional discrimination analysis. Thus, in Wright Line A Division of Wright Line, .Inc., (Wright Line) (1980) 251 NLRB 1083 [105 LRRM 1169], enf' d (IstCir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 453 U.S. 989 [109 LRRM 2779], as approved in NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857], the national board established the following two-part test of causation in all cases of discrimination which involve employer motivation:

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

The discharge of Vicente Espejel is the quintessential discriminatory discharge. Castro admittedly fired him because

asked for a raise, and Castro did not like it. The request for a raise for Espejel and the other palmeros was protected concerted activity. Castro fired Espejel because of that activity, and the discharge violates section 1153 (a).

I find further that Castro fired Espejel because instead of coming to Castro individually, he did so as part of a group who had gone to the Union. Castro denied he was upset by Espejel and the other palmeros having gone to the UFW. in view of Castro's preference that the palmeros come to him one on one with their concerns, as expressed in his pre-March 22 conversation with Espejel, I find their going to the Union was one step beyond organizing amongst themselves and was even less to Castro's liking. Consequently, I find the discharge also violated 1153(c).

Respondent contends that it did not violate the Act by firing Vicente's brothers because firing relatives of an employee who engages in protected union or other concerted activity is not an unfair labor practice if the only evidence of unlawful motive is the existence of the relationship. (See pages 12-16 of Respondent's brief.)

Neither case cited by Respondent controls the result here because of significant factual differences between those cases and this one. Here, Castro acknowledges he fired Mariano and Santiago because he fired Vicente. Thus, unlike George Lucas and Sons (Lucas) (1978) 4 ALRB No. 86 and Licrhtning Farms (Lightning) (1986) 12 ALRB No. 7, there is more than just the existence of a relationship. The discharges are causally related by Castro's own

admission.[32]

It is well established that firing a worker' s relatives in retaliation for the worker's protected activity violates the Act. (Visalia Citrus Packers (1984) 10 ALRB No. 44.) In the case at bar, in addition to Castro's admission, it is clear the three brothers were linked together because Santiago and Mariano were hired and they were all put to work at the same ranch at Vicente's request. In Lightning there was no evidence the activist and his relative were hired together, worked together or had any connection at work. In Lucas, the layoff of relatives was not unlawful in part because there was nothing unusual about a layoff occurring when it did. In this case, the firing the night of the very day Vicente acted as spokesperson clearly was unusual.

Based on the foregoing, I find the discharge of Santiago a Mariano Espejel was the direct result of Vicente's unlawful discharge and violates sections 1153 (a) and (c) of the Act.

I turn now to the refusal to rehire virtually all of the palmeros for the 1994 harvest. It is undisputed that Respondent's normal practice would have been to recall the palmeros. (Anton Caratan & Son (1982) 8 ALRB No. 83.)

The discharge of the Espejels and Respondent's false assertion that it intended to replace them with machines in a few days support General Counsel's contention that Respondent falsely

[32]I have not credited Castro's explanation that Mariano and Santiago did not have the experience to continue without Vicente. The fact that Castro asserted a pretextual reason does not alter, and in fact reinforces, the finding that the firings were causally connected.

used the justification of mechanization in the harvest to conceal its true unlawful motivation there too.

Also supporting the General Counsel's case is the fact that two of the four palmeros in the harvest did not engage in Union activity, that Respondent did not establish these four were more qualified than the rest of the palmeros,[33] and the fact that the mechanization defense is undercut because Respondent was no more mechanized in the 1994 harvest than it was in the 1993 harvest.[34] Additionally, Respondent gave false and inconsistent reasons to the palmeros regarding their rehire which is indicative of an unlawful motive.

Timing is an especially important factor in assessing discriminatory motive. Respondent argues timing mitigates against finding a prima facie case here since the palmeros completed two seasons while engaging in union activity. However, it is just as reasonable to view the harvest as Respondent's first opportunity to rid itself of a significant number of palmeros.

This is so because in each of the other seasons, even if Respondent used the cranes to supplant the palmeros, the worker had to climb out of the crane's bucket and get into the tree.

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[33]The evidence consisted of Castro's professed "belief" which he acknowledged had no objective basis and which I have not credited. Respondent could easily have produced objective evidence at least as to the relative work experience at Sun Gold. Its failure to do so warrants an adverse inference, (see California Evidence Code, section 412.)

[34]Moreover, Respondent's failure to produce evidence in its control as to whether it obtained the Budget crane before or after the March protest warrants an adverse inference that it did so after and in response to the protest.

Only the palmeros (both kinds) were used Co doing this in the t~~" trees. Working on a 50 foot palm swaying in the wind is a far cry from the normal work of a general laborer, and there is no evidence Respondent would have been able to get all the work done in a timely fashion if it had gotten rid of all but a few palmeros as it did in the harvest.

Respondent also claims it was cheaper to use general laborers and this valid business justification undercuts General Counsel's case. As with timing, there are two sides to this argument. In the 1993 harvest, general laborers and palmeros were paid the same, and there is no evidence it was necessary to change this practice in 1994.

Weighing all the factors, I find the General Counsel has established a prima facie case that the failure to recall virtually all of the palmeros for the 1994 harvest violated sections 1153 (a) and (c) of the Act.

Respondent now has the burden of proof to establish that it would have taken the same action even absent the palmeros' protected conduct.[35] Despite Castro's lack of information to support his view that it would be cheaper to mechanize, I find Respondent's acquisition of the Sun Valley crane in December supports its contention that it intended to mechanize for

[35]In Sam Andrews' Sons (1987) , the Board found the employer did not violate section 1153(c) by changing its irrigation practices for a discriminatory reason because it rebutted the prima facie case by showing its motivation was lawful and would have been instituted even absent the strikers' offers to return to work.

nondiscriminatory reasons. The same is true as to its execution of the lease/option at that same time; however, not taking possession until March right after the protest, indicates Respondent accelerated its mechanization program.

Reduction of its labor costs by using more general laborers is a valid business reason. However, Respondent has produced no evidence this motivation was any stronger in the fall of 1994 than at any prior time when it used both palmeros and general laborers. Nor did it produce any evidence why it changed its wage structure in the 1994 harvest. The only evidence of any changed circumstance is the union activity which was confined to the palmeros, and half of the few palmeros it hired were not involved. with the Union and the other two were not among the very active Union supporters.

Respondent contends the fact that it did not rehire palmeros who did not speak at the March protest and who were not active during the ensuing union activity indicates its refusal to rehire was not unlawfully motivated. Firing both union activists and non-union activists, or in this case less visible and less vocal activists, to disguise the effort to rid oneself of the activists is unlawful. (Hardin, The Developing Labor Law, 3rd ed. (1992) pp. 195-196.)

I find Respondent has not rebutted the prima facie case.[36]

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[36]In order to rebut a prima facie case, it is not enough simply to articulate a legitimate nondiscriminatory reason. Rather, Respondent must affirmatively introduce sufficient evidence to persuade the Board that the adverse action would have taken place regardless of the employee's protected activity and

Although it was planning Co mechanize, the various factors set above convinces me its wholesale refusal to rehire the palmeros would not have occurred as it did absent their Union activity. Consequently, I find Respondent violated sections 1153 (a) and (c) of the Act.

I reach a different conclusion with regard to the continued refusal to rehire the palmeros in 1995 . Sun Gold no longer had any ranches with very tall trees. General Counsel did not establish that the remaining ranches had trees that were assigned to palmeros in the past. Although Sun Valley succeeded to most of the ranches Sun Gold "let go" (in Osborne's words), without more, I do not find that Sun Gold divested itself of most of its business in order to avoid rehiring palmeros.[37]

ORDER

By authority of Labor Code §1160.3, of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent Sun Gold, Inc., (Respondent)its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging, 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 or union

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the employer's anti-union animus. (Hardin, p. 192.)

[37]While the transfer of work to Sun Valley appears suspicious, suspicion does not equate with proof of unlawful conduct. Rod McLellan Co. (1977) 3 ALRB No. 71.

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 Vincente Espejel, Santiago Espejel, Mariano Espejel, Alejandro Diaz, Jesus Vega, Salvador Chairez, Salvador Sevilla, Oscar Zatarian, Octaviano Cuevas, Agapito Garcia and Armando Verduzco, immediate and full reinstatement to their former positions of employment, or if their positions no longer exist, tc substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

(b) Make whole the employees who were discharged or refused rehire for all wages or other economic losses they suffered as a result of their unlawful discharges or failure to be rehired. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharges. The award shall also include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5;

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay and/or make whole amounts due those employees under the terms of the remedial order as determined by the Regional Director;

(d) Upon request of the Regional Director, sign the

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

(e) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from March *22,* 1994, until the date of the mailing of the notice.

(f) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's property for 60 days, the period(s) and place (s) of posting to be determined by the Regional Director, and exercise due care to replace any Not' which may be altered, defaced, covered or removed;

(g) Arrange for a Board agent to distribute and read the Notice in all appropriate languages to all of Respondent's agricultural 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 a reasonable rate of compensation to be paid by Respondent, to all non-hourly wage employees in order to compensate then for lost time at this reading and during the

question-and-answer period;

(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this manner;

(i) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the dates of its 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;

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

Dated: July 19, 1995

Barbara D. Moore

BARBARA D. MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, Sun Gold, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging Vicente Espejel, Santiago Espejel, and Mariano Espejel for protesting their wages and working conditions and supporting the United Farm Workers of America, AFL-CIO (Union) and, for the same reasons, refusing to rehire Salvador Chairez, Alejandro Diaz, Jesus Vega, Salvador Sevilla, Oscar Zatarian, Octaviano Cuevas, Agapito Garcia and Armando Verduzco.

The ALRB has told 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 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.

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 discharge or otherwise retaliate against employees because they protest about their wages, hours or other terms and conditions of employment or because they support the Union.

WE WILL offer the employees who were discharged or not rehired immediate reinstatement to their former positions of employment, and make them whole for any losses they suffered as the result of our unlawful acts.

DATED: SUN GOLD, INC.

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, EL Centro, CA 92243. The telephone number is (619) 232-0441.

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

DO NOT REMOVE OR MUTILATE