Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DOLE FARMING, INC., a California Corporation, doing business as DOLE FARMING COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 94-CE-34-VI 94-CE-35-VI 94-CE-36-VI 94-CE-37-VI 94-CE-38-VI 94-CE-39-VI 94-CE-40-VI 94-CE-41-VI 94-CE-42-VI 94-CE-43-VI 94-CE-44-VI 94-CE-78-VI 22 ALRB NO. 8 (July 30, 1996)

DECISION AND ORDER

On March 27, 1996, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached decision in the above-referenced case, in which she found that Dole Farming, Inc., doing business as Dole Farming Company (Dole or Employer), violated section 1153(a) of the Agricultural Labor Relations Act (ALRA)[1] by discharging 18 of its employees because they engaged in a concerted refusal to work in support of demands regarding terms and conditions of employment. The ALJ found that statements and conduct of the Employer led the employees to reasonably believe that they had been fired, and that they therefore did not voluntarily quit their employment as argued by the Employer. The Employer timely filed exceptions to the ALJ's decision and the General Counsel filed a brief in response.

[1]The ALRA is codified at California Labor Code section 1140, et seq.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's decision in light of the exceptions and briefs submitted by the parties and affirms the ALJ's findings of fact[2] and conclusions of law,[3] and adopts her

---

[2]The Employer asserts that the rule of Giumarra Vineyards Corp. (1977) 3 ALRB No. 21, codified in Regulation 20236 (Cal. Code Regs., tit. 8, § 20236), which protects the confidentiality of worker witnesses until after they have testified, prevents a respondent from having an opportunity to prepare an adequate defense and allows the General Counsel to withhold exculpatory evidence. These arguments were considered and rejected in Giumarra, as well as in numerous cases involving the National Labor Relations Board (NLRB), which has the same restrictions on discovery. We decline to revisit this well-settled issue. We also find no merit in the Employer's claim that it was prejudiced by the General Counsel presenting testimony which varied from the summary of the facts at issue contained in the Prehearing Conference Order. The Prehearing Conference Order does not have the legal effect of a stipulation and some variance, as long as it does not constitute surprise as to the material issues in dispute, is both expected and permissible. Nor do we find prejudice in the General Counsel's failure to indicate until several weeks before the hearing that it intended to call as witnesses various managerial and supervisorial personnel which the employer had already included on its list of witnesses. For the reasons cited by the ALJ in footnote 8 of her decision, we reject the Employer's claim that the ALJ erred in refusing to admit into evidence the entire declarations of employee witnesses called by the General Counsel.

[3]We agree with the ALJ that binding precedent of the NLRB controls the result in the present case. (Hale Manufacturing Co., Inc. (1977) 228 NLRB 10; Ridgeway Trucking Co. (1979) 243 NLRB 1048.) We take particular note of the fact that, in the view of the NLRB, when employees ask for immediate payment of unpaid wages, it is an indication that the employees believe they have been discharged. Disputes over whether employees voluntarily quit or were discharged after engaging in protected activity often include circumstances steeped in ambiguity, and therefore present close factual questions. This case is no exception. However, as stated by the NLRB in Brunswick Hospital (1982) 265 NLRB 803, 810, the test in these types of cases is as follows:

> In determining whether or not a striker has been discharged, the events must be viewed

(continued...)

recommended remedy, as modified.[4]

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent DOLE FARMING, INC., a California Corporation, doing business as DOLE FARMING COMPANY, 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 the

---

[3](...continued)

> through the striker's eyes and not as the employer would have viewed them. The test to be used is whether the acts reasonably led the strikers to believe they were discharged. If those acts created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer.

[4]Dole asserts that the remedy ordered by the ALJ is improperly overbroad, and therefore punitive, because it requires, at least on its face, mailing and reading to all of Respondent's agricultural employees and posting at all of its properties. Dole has thousands of employees at many locations throughout the state. Since the conduct at issue affected only employees at one location and the conduct is not of the nature that it was likely to become widely known, we have clarified the order to provide that the reading, posting, and mailing remedies be restricted to the Employer's operations at Rancho Loma.

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 the employees listed below 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:

Martin Alvarez	Javier Alvarez
Jose D. Amezuca	Enrique Martinez
Alfonzo Benavidez	Francisco Montoya
Manuel Benavidez	Artemio Pantoja
Fermin Cervantes	Aurelio Pantoja
Cruz Chavarria	Adan Quintana
Nemesio Fernandez	Fidel Salazar
Miguel Gonzalez	Manuel Soto
Luis A. Llanes	Jose G. Lopez

(b) Make whole the employees listed above for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful conduct, the makewhole amount to be computed in accordance with established Board precedent. The award shall reflect any increase in wages, hours or bonuses given by Respondent since the unlawful discharge. 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 and its agents for examination, photocopying and

otherwise copying all payroll records, social security payment records, time cards, personnel records and reports and all other records relevant and necessary for a determination by the Regional Director of the backpay period and any amounts of backpay due under the Board's Order;

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, as determined by the Regional Director, reproduce sufficient copies of the Notice in each language for the purposes set forth in this Order;

(e) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the date 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 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) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at its Rancho Loma operations at any time during the period from May 11, 1994 until May 10, 1995.

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places at Respondent's Rancho Loma operations 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;

(h) Arrange for a Board agent to distribute and read the attached Notice in all appropriate languages to all of Respondent's agricultural employees at its Rancho Loma operations 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 and/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 time lost at this reading and during the question-and-answer period;

(i) Provide a copy of the attached Notice to each agricultural employee hired, transferred, or otherwise employed by Respondent at its Rancho Loma operations during the twelve (12) month period following the issuance of this Order and;

(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 30, 1996

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

Dole Farming, Inc., dba
Dole Farming Co.
(UFW)

Case No. 94-CE-34-VI
22 ALRB No. 8

Background

On March 27, 1996, Administrative Law Judge (ALJ) Barbara D. Moore issued a decision, in which she found that Dole Farming, Inc. (Employer) violated section 1153(a) of the Agricultural Labor Relations Act by discharging 18 of its employees because they engaged in a concerted refusal to work in support of demands regarding terms and conditions of employment. The ALJ found that statements and conduct of the Employer led the employees to reasonably believe that they had been fired, and that they therefore did not voluntarily quit their employment as argued by the Employer. The Employer timely filed exceptions to the ALJ's decision and the General Counsel filed a brief in response.

Board Decision

The Board summarily affirmed the ALJ's decision, but modified the remedy to clarify that the mailing, reading, and posting requirements apply only to the Employer's operations at Rancho Loma. The Board also noted that this case, while it presented a close factual question, was controlled by binding precedent of the National Labor Relations Board, which holds that, in determining whether or not a striker has been discharged, the test to be used is whether the words or conduct of the Employer reasonably led the strikers to believe they were discharged and that the employer has the burden of resolving any ambiguity created by its conduct. In addition, the Board rejected the Employer's claims of denial of due process, declining to reexamine the rule of Giumarra Vineyards Corp. (1977) 3 ALRB No. 21, which protects the confidentiality of worker witnesses until after they have testified, and finding no prejudice from an immaterial variance between testimony and the summary of facts contained in the Prehearing Conference Order or from the General Counsel's failure to indicate until several weeks before the hearing that it intended to call as witnesses various managerial and supervisorial personnel which the Employer had already included on its list of witnesses. The Board also affirmed the ALJ's refusal to admit into evidence the entire declarations of employee witnesses called by the General Counsel.

* * *

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, DOLE FARMING, 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 18 employees in the spray crew at Rancho Loma for protesting their wages and hours.

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 (union);
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation,-
4. To bargain with your employer about your wages and working conditions through a bargaining representative chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

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

WE WILL offer the employees who were discharged on May 11, 1994 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: DOLE FARMING, 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 711 North Court Street, Visalia, CA 93291-3636. The telephone number is (209) 627-0995.

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: DOLE FARMING, INC., a California Corporation, doing business as DOLE FARMING COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 94-CE-34-VI

Appearances:

Marvin Brenner
Victor E. Salazar
for General Counsel

Howard Sagaser
Sagaser, Hansen, Franson & Jamison
Fresno, Ca
for Respondent

Carlos R. Perez
Marcos Camacho A Law Corp
Keene, CA
for Charging Party

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge: This case was heard by me from January 30 through February 2, 1996, in Bakersfield, California. It arises out of a complaint, issued on September 27, 1994, which is based on a charge filed by the United Farm Workers of America, AFL-CIO ("UFW" or "Union") with the Visalia regional office of the Agricultural Labor Relations Board ("ALRB" or "Board") alleging that Respondent, Dole Farming, Inc. of California, doing business as Dole Farming Company ("Respondent," "Company," or "Dole") violated the Agricultural Labor Relations Act ("Act" or "ALRA"). The complaint, as amended at the Prehearing Conference, alleges Dole violated section 1153 (a) of the Act[1] by discharging 18 of its employees[2] because they engaged in protected concerted activity and by refusing to rehire two crew members, Francisco Montoya and Manuel Soto, who made unconditional offers to return to work. The charge and complaint were duly served on Respondent.

Respondent filed and duly served an answer to the complaint wherein it denied it violated the Act. Respondent claims the workers were not fired but, rather, voluntarily quit.

The General Counsel and Respondent were represented at the hearing and were given a full opportunity to participate in

---

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

[2]General Counsel amended paragraph 5 of the complaint to delete Lupe Lopez and to add Martin Alvarez and Javier Alvarez as discrimantees.

the proceedings.[3] The General Counsel and Respondent filed post-hearing briefs.

Based on the entire record,[4] including my observations of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties,[5] I make the following findings of fact and conclusions of law.

JURISDICTION

Dole is a California corporation with its principal place of business in Bakersfield, California, where it farms fruits including grapes, stone fruit and citrus, and is an agricultural employer within the meaning of section 1140.4(c). The UFW is a labor organization within the meaning of section 1140.4 (f), and the alleged discriminatees named in the amended

[3]The UFW intervened but chose not to formally appear or participate in the hearing although it had an informal observer present for all but the last day of the hearing. Respondent argues it was denied due process because the Board limits prehearing discovery. As I stated at the hearing, this a matter to be raised to the Board itself since I am bound to follow Board precedent.

[4]References to the official hearing transcript will be denoted as: volume number:page number. Official exhibits will be denoted GCX number and RX number for General Counsel's and Respondent's exhibits, respectively. Respondent requests that I take "administrative judicial notice" of a transcript Respondent prepared based on the tape recording of the prehearing conference. (Resp. brief, p.7, fn.2.) Administrative notice is inappropriate. I also decline to admit it as evidence. It is not an official transcript. Moreover, a quick reading shows several errors. However, the tape recording and the Prehearing Conference Order are part of the official record. (8 Cal. Code of Regulations, section 20280.)

[5]By letter dated March 15, 1996, the UFW indicated it would not file a brief but joined in the arguments submitted by the General Counsel.

complaint are agricultural employees within the meaning of section 1140.4(b).

COMPANY OPERATIONS

At all times material herein, David Lopez was ranch manager of Rancho Loma, and Bob Gustafson was assistant ranch manager.[6] Brad Ray supervised Juan Martinez and Glen Cawalti each of whom was foreman of a spray crew. (II:20.) There were 20 or 21 people in the two crews combined.

THE EVENTS OF MAY 10 AND 11

At the end of the workday on Tuesday, May 10, foreman Juan Martinez told both spray crews that only half of them would work the next day, May 11, and the other half would work the following day, May 12. Then, both crews would return to work on the 13th and work through the weekend. For three weeks or so, both crews had regularly worked 7 days a week, often working 14, 15, or 16 hours a day, thus earning substantial overtime.[7] Lopez acknowledged that one of the benefits of working in the spray crew was the chance to earn overtime pay.

After Martinez' announcement, members of the crews

---

[6]Subsequently, in about November 1994, Lopez was promoted to Director of Farming for Dole for the San Joaquin Valley which was the position he occupied at the time of the hearing. At the time Lopez was promoted, Bob Gustafson was promoted to Lopez' job.

[7]Lopez believed the workers got overtime for any work beyond 10 hours a day or 60 hours a week. I take administrative notice that California law provides that agricultural workers are to receive time and a half for work over 10 hours in any one day and for the first eight hours on the seventh day and double time for additional hours.

talked amongst themselves and then asked him why their schedule was being changed. They said if they were not going to work seven days and get overtime, they wanted their day off to be Sunday rather than a weekday. Martinez told them it was not his decision, and they would have to speak to Lopez. They told Martinez they wanted to do so. So, Martinez contacted Lopez and told him the workers were upset about the change and wanted to meet with him. Lopez agreed he would talk to them, and Martinez informed them they[8] could speak with Lopez the next morning at 7:00 a.m.

The next morning, foreman Glen Cawalti and his boss, Brad Ray,[9] arrived at the yard where the crews[10] normally

[8]Although Luis Llanes prepared a declaration shortly after the events wherein he stated Martinez told the half of the crew that was to work May 11 to meet with Lopez then, and the other half to meet with him the following day, neither Martinez, Lopez nor any other witness so testified. I find Martinez did not say that. Respondent requests that I reconsider my ruling not to admit the entire declarations of Llanes and the other two worker witnesses called by General Counsel, arguing they contain statements which are inconsistent with the witnesses' testimony. (Resp. brief, p.5, fn.2.) Respondent was given full opportunity during the hearing to examine the witnesses about any inconsistencies and to have such portions of the declarations admitted as prior inconsistent statements. (Cal. Evidence Code sections 770 and 1235.) Such statements are admissible as an exception to the hearsay rule, and it is incorrect to admit the rest of the declaration because: (1) it is inadmissible hearsay unless it comes within another exception, (2) the witness should be given an opportunity to explain the inconsistency in which case the inconsistent statement has been read into the record and it would be cumulative to admit it again, and (3) the rest of the declaration is irrelevant since Respondent only wanted to use those portions which are inconsistent statements. Caterpillar. Inc. (1994) 313 NLRB 626 [145LRRM 1129].

[9]At the time of the hearing, Ray was no longer working for Dole, and he did not testify.

gathered for work. Ray told Cawalti to block the gate with his company truck which Cawalti did.[11] Ray also told Cawalti not to let the workers go into the yard. (II:32.)

He told Cawalti there was going to be a meeting between David Lopez and the crew because the crew did not like the schedule change. Ray did not say that the crew was refusing to work. (II:33.)

A little later, the crew arrived and gathered outside the yard. Cawalti stayed by his truck which remained parked across the gate, and Ray went to talk to the workers. Ray addressed the group and told them to stay outside and wait for Lopez. (II:37.)

He and the crew continued to discuss the situation with Ray asking who wanted to work for him and Lopez, meaning, of course, on the new schedule, and the workers telling him they all wanted to work, but, first, they wanted to speak to Lopez.[12]

---

[10]Since both crews were together for all the material events, for simplicity's sake, hereafter, I will use the singular although referring to both.

[11]Both Gustafson and Lopez testified they did not recall seeing anything or anyone blocking the gate. Lopez, in fact, testified the gate was open. However, Cawalti acknowledged Brad Ray told him to park his truck so as to block the gate.

[12]Cawalti heard the beginning of the conversation when Ray asked the crew about working the new schedule, and he never testified Ray asked the workers why the 10 people who were scheduled to work had not yet begun as Respondent contends in its brief. (p.2.) He testified only that Ray asked if they were willing to work the new schedule, and they replied they wanted to talk to Lopez. (II:39.) General Counsel did make the statement cited by Respondent but that was during the prehearing conference. Obviously that is not evidence, but merely states General Counsel's position.

Ray asked why they wanted to talk to Lopez because Lopez would tell them the same thing he told them. He appeared angry and told the workers to leave and go to the Maricpoa Highway which was a mile or two away.

Both at trial and in its brief, Respondent characterized the remark about the Maricopa highway as a directive from Ray to the employees to wait there for Lopez. (I:38-39.) Cawalti testified that Ray did not appear angry.[13] The workers, in contrast, testified that Ray's manner and tone of voice indicated that he was angry and that he was telling them to go away because he was exasperated with their insistence at wanting to talk to Lopez instead of accepting the new schedule. I credit their testimony. Not only did they testify in a frank, open manner, but there is absolutely no evidence Lopez intended to meet with them along the highway.

Since the workers were expecting to meet with Lopez, they did not leave, but Ray did. A while later, Lopez arrived with Bob Gustafson. At some point thereafter, time estimates varied widely, Ray returned and went over to Cawalti who was still in the yard.

Lopez is the only company witness to offer any meaningful testimony as to what occurred in his meeting with the crew. Martinez was not present. Cawalti remained in the yard about 15 to 20 feet from the group of workers and did not hear

[13]In its brief, General Counsel erroneously states it is uncontested that Ray was hostile and combative. (at p.18.)

any significant part of the exchange between Lopez and the workers. The discussion was in Spanish which Bob Gustafson does not understand well, so he could tell only that the subject was days and hours.[14] The demeanor of the two workers who testified for Respondent was terrible. They appeared very confused and uncertain. They had great difficulty remembering what happened and when it happened.[15]

General Counsel called three members of the crew,[16] Luis Llanes,[17] Adan Quintana[18] and Guadalupe ("Lupe") Lopez,[19]

---

[14] Additionally, Gustafson was not a very reliable witness. He did not see Cawalti's truck blocking the gate. Nor did he see Brad Ray speak to the crew although he was in the shop area, and the yard is visible from there. (I:74,76.) Although he recalled that Ray addressed the crew in English, during Lopez' discussion with them, he could not remember what Ray said. When General Counsel asked him if a list of workers' names was read and those specific individuals were asked if they would work, he looked over at the company attorney and David Lopez for guidance. Quite properly, they did not react, and he then said he did not remember.

[15] Ricardo Ayala had a hard time following questions. He testified inconsistently that he left before the 5 to 10 minute break to find Lopez to ask for work and so did not know what happened after the break. Then, he said he did not leave until after Lopez did, but he still could not say what had happened. Humberto Espericueta did not know why they were meeting with Lopez and repeatedly said he could not remember.

[16] Because I have not relied on the testimony of the two worker witnesses called by Respondent, for simplicity's sake, when I refer to worker witnesses I mean those who testified for General Counsel.

[17] Luis Llanes had worked for Dole as a member of the spray crew since March 1993.

[18] Adan Quinatan had worked for Dole for six years with the last three years being in the spray crew.

whose testimony about the discussion differs from Lopez' in several ways. Llanes and Quintana are named as discriminatees, but Lopez was amended out by the General Counsel at the prehearing conference. Thus, he has no financial stake in the case.

There is no major disagreement about what occurred during the first part of the meeting. Lopez approached the group of workers and asked them what was happening. Adan Quintana and Lupe Lopez acted as primary spokespersons, but various workers spoke up throughout the meeting. Quintana asked why the company was making the schedule change.

Lopez replied they had been working a long time without a day off and would probably have to work on the weekend in order to spray the trees on the appropriate schedule, and he wanted them to have a day off.[20] He mentioned that the company wanted to limit the amount of overtime and also said that preventing

---

[19]Jose Guadalupe Lopez is known as "Lupe" Lopez, and I will so refer to him in order to distinguish him from David Lopez and the Jose Lopez, discussed later, who did not get a check. Lupe is not related to either David or Jose, and David and Jose are not related. Lupe had worked for Tenneco West since 1979 or 1980 and stayed on when Dole took over Tenneco in 1988. He had been in the spray crew for 4 or 5 years by the time his work ended on May 11.

[20]Normally, the crew might work seven days, often 14 to 16 hours a day, almost the whole time from late April to July. Lopez could not recall ever before laying off the spray crew midweek and then working them on Sunday. (I:60.) In other operations, crews were sometimes rotated so they had time off during the week if they would be working on the weekend whereas, according to Lopez, one of the benefits of working in the spray crew was being paid overtime. (I:52.)

accidents[21] was part of his reason for wanting them to have a day off.[22]

Various crew members told him if they were not going to work seven days straight and earn overtime pay, they did not want a day off during the week but wanted to be off on Sunday. The crew also reiterated its concern about losing the overtime pay.

Lopez replied that he made the rules, not them and they could not dictate the schedule.[23] He then told them he would give them some time to make up their minds as to what they were going to do and walked off to talk to Ray, Cawalti and Gustafson. After 5 or 10 minutes, he went back to the crew.

According to the three workers, during the break they decided they would work the new schedule, but before going to work they wanted to use the opportunity to talk to Lopez in order to resolve some other work problems which their foremen had ignored. They wanted the pay for the work they did in the yard

---

[21]Respondent's brief (p.4) states Lopez said the accident rate of the sprayers was high, but what Lopez actually testified was that the accident rate on the ranch was high. He did not say whether it was high in the spray department. (IV:7.)

[22]The crew members who testified only remembered Lopez mentioning the company wanting to save on overtime. It is not surprising that more than a year and a half after the incident this is what would stick with them since overtime was their main concern. I do not view the fact that the workers failed to remember the other things he said as meaning he did not do so. This is especially true since Luis Llanes recalled Lopez saying a number of things which he could no longer remember by the time he testified. (II:111.)

[23]Although each side characterized Lopez' statement from its own perspective, Lopez painting it as a moderate expression of necessary management authority and the workers as dismissing their views as insignificant, the basic message was clear.

raised to equal the pay they received when they were actually spraying. They also had concerns about some of the spray equipment such as boots and gloves.[24]

So, when Lopez returned and asked if they had come to an agreement, they told him they had some problems they wanted to discuss.[25] (I:78-79.) Lopez acknowledges they specifically mentioned the pay differential. They did not get to the point of raising the boots or gloves because Lopez told them he wanted an answer about whether they were going to work the new schedule. (I:78-79;II:114, 164-165; III:112; IV:24.) There are some significant differences in the parties' accounts of what occurred next. So, I will set forth each side's version.

---

[24]Respondent argues that General Counsel should not be allowed to present the evidence about the pay differential and equipment because it is not specifically alleged in the complaint nor was it mentioned during the prehearing conference. It also argues it was unfairly surprised and prejudiced by the lack of notice. (Resp. brief, pp. 22-23.) This evidence surfaced on the second day of a four day hearing, and Respondent had ample time to prepare a response. All it had to do was determine from Lopez and its other witnesses to the conversation if the equipment was mentioned since Lopez acknowledged the workers raised the pay issue. I find no prejudice. The evidence is sufficiently related to the allegation in the complaint so that it is not barred because the issue is not specifically mentioned therein. Although I agree with Respondent that General Counsel should have asserted these facts at the prehearing conference, it would be unfair to strike them after the hearing. Respondent also argues that General Counsel--and presumably any other party--should not be able to adduce evidence which varies from its statement at the prehearing. Although such deviation is a factor to consider when making credibility and other determinations. I decline to establish the absolute rule Respondent propounds.

[25]The crew had decided that if they went back to work without getting the various problems resolved, things would stay the same and they wanted to be able to return so they felt comfortable with the equipment they were using.

According to Lopez, the workers responded that either they all worked or no one worked. (1:79.) Lopez replied the company had to be able to manage its business and could not have the workers dictating when they worked.[26] (IV:9.)

He then had Brad Ray read the names of the 10 workers who were supposed to work that day, and they all refused to work.[27] (I:83.) Lopez then said, "Fine," and started to walk away.

From behind him he heard a worker say they wanted their checks. (IV:10.) He identified the speaker as Javier Alvarez because when he turned around Javier was looking directly at him, and he recognized Javier's voice even though he had only spoken to him once before when he (Lopez) was making his rounds in the field. (IV:26.)

Lopez acknowledged that neither Lupe Lopez nor Adan Quintana, whom he identified as the spokespersons to whom he primarily addressed himself, nor, indeed, any of the other workers, said anything about checks or stated they agreed with Alvarez. Nonetheless, he inferred from all of their expressions that they agreed with Alvarez. (IV:29, 35.)

Lopez told them the office was not open, and it would be an hour or an hour and a half before he could get the checks.

---

[26]It is not clear whether he made such statements both before and after the break. (Compare I:80; II:170; III:12, 52, 79,114; IV:9.)

[27]Lopez acknowledged a few workers did go to work. See discussion post.

He left and arranged with the office to prepare checks, and then he returned with them two hours or so later.

The three workers painted a different picture. According to them, they told Lopez they did want to work but added that first they wanted to talk about the problems. (II:114.) Lopez cut them off saying they made him tired with their complaints even though there had been no previous problems with the crews, and insisting they say if they were going to work the new schedule. (II:114-115,162; III:14.) Thus, they never got to the point of specifically telling Lopez they would because he would not listen to them. (II:163-165; II:55; III:57,114.)

Lopez then told them if they did not want to work, to go home and he would bring them their checks in an hour or an hour and a half.[28] (II:115, 173; III:79,116.) Initially, Lopez denied he told them if they did not like "it" they could go home, but later he acknowledged that after Ray read the workers' names and they refused to work, he did tell them to go home. (Compare 1:83 with IV:9.)

Each of the three workers testified he was sure Lopez was the first one to mention checks.[29] (II:173-174;

---

[28]Respondent states that all the parties agree that on the ranch when someone asks for his/her check, it means the person is quitting. (Resp. brief, p.9.) Not only do the parties not agree, there is no evidence in the record that this is the case.

[29]At the hearing, Respondent's counsel asserted Llanes testified that he could not hear everything that was said. Based on his demeanor and his actual words, it is clear Llanes was saying no one but Lopez mentioned checks. (11:173-174.) Respondent argues I should draw an adverse inference because General Counsel did not call Alvarez to deny he asked for the

III:14,62,116.) Both sides agree that after Lopez said he would get the checks, he left.[30] He returned a couple of hours later to distribute them,[31] but there was no further discussion between him or anyone else in management and the crew.

Four workers, Antonio Lopez, Ricardo Ayala, Humberto Espericueta, and Antonio's brother, Jose Lopez, did not receive checks. The first three regularly worked in other departments on the ranch and were temporarily assigned to the spray crew. Each of the three indicated to Lopez that he was not allied with the spray crew and its protest.[32]

Jose Lopez, however, stayed with the crew and left when everyone else did. David Lopez gave no real explanation why he

---

checks and that Lopez' testimony is uncontroverted. To the contrary, Llanes, Quintana and Lupe Lopez all unequivocally disputed David Lopez' testimony, and it is at least as reasonable to expect Respondent to have called Alvarez to corroborate Lopez' uncorroborated testimony as for General Counsel to have called him to be the fourth person to contradict Lopez. I do not consider Ayala's testimony corroborative of Lopez' because Ayala twice said he left before this subject came up.

[30]He told Gustafson and Ray to get workers from other parts of the ranch to do the spray work which they did.

[31]Normally, Lopez would not be involved in giving workers their checks; their supervisors would distribute them. (1:84.) Additionally, Friday was the normal payday.

[32]Early in the discussion, Lopez asked Antonio if he were part of the group. Antonio responded he did not know what to do. Lopez asked if he wanted to return to his original department. Antonio said he did and worked that day. Ayala and Espericueta both physically stood apart from the group and left during the break and went to their usual departments. (III:139, 160, 162.) Also, Ayala went to Lopez later, told him he was not part of the group and wanted to work.

did not have a check prepared for Jose.[33] I credit the workers that Jose was present throughout, left when they did, and that the reason he was allowed to work the next day was because his brother and David Lopez were friends.

Having carefully considered the witnesses' testimony and mindful that one's perceptions are colored by one's perspective, especially with the passage of time, I make the following credibility determinations. I do not credit Lopez that after the break the workers said " [e]ither we all work or no one works." It is not consistent with the undisputed fact that the workers wanted to resolve the pay differential. If they did not intend to work, there would be no reason to want to resolve this issue.

I find the workers planned to work the new schedule if the pay and equipment issues were resolved.[34] However, they never told Lopez they were prepared to work the new schedule because they did not get to that point because he would not let them talk. Instead, he told them he could see they were not going to work, he was tired of their complaints, and to go home.

---

[33] In its brief, Respondent states Lopez got checks for all but the four workers who agreed to work. (Resp. brief, p.2.) There is no evidence that Jose Lopez agreed to work, and the evidence shows he left with the crew but was allowed to work the next day.

[34] I would reach the same conclusion even if I did not credit them about the equipment. I have carefully considered the fact that the equipment issue did not surface until the trial, but, based on their demeanor, I do not believe the witnesses added it as an after the fact justification. Rather, I think it did not come up earlier because it was of much less importance than the schedule and the pay.

The question of who first mentioned the checks is a tough call. All of the witnesses displayed a credible demeanor, and there is no extrinsic evidence which points in one direction or another.

On balance, I credit Lopez that it was the crew. Although I have some doubt that Lopez would remember the voice of a worker to whom he spoke only once, he was definite about Alvarez and had reasons why he thought Alvarez was the one, i.e. Alvarez was looking directly at Lopez when Lopez turned to face the group.[35] Also, if he were going to fabricate, why not identify one of the two spokespersons?

Lopez denied being angry with the crew testifying he wanted them to go back to work and being angry would not solve that. (IV:25.) Lupe Lopez, on the other hand, said that from having observed him over many years, it was clear that Lopez was quite angry. (III:122.)

I credit Lupe Lopez. David Lopez seemed to be a generally amiable, reasonable person. Yet, he would not listen to the worker's concerns.[36] Instead, he told them he was tired

---

[35]In its brief, Respondent states that at a hearing before the California Unemployment Insurance Appeals Board David Lopez identified Martin or Javier Alvarez as the person who asked for the paychecks. (Resp. brief, p.35.) This statement is highly improper. Not only is it not part of the evidence in this case, I specifically ruled that none of the evidence from the hearing nor the Administrative Law Judge's decision in that matter was admissible. Thus, Respondent has tried to backdoor in evidence specifically excluded at a point when General Counsel and the Union have no opportunity to respond. (I:24.)

[36]I do not imply that he was obligated to do so, but the fact that he did not seems out of character.

of their complaints although there had been no previous problems with the crew, and Cawalti and Martinez considered it a good crew. These facts all indicate he was irritated at the situation which is certainly understandable since it was the busy season, and the protest was an added concern.

Also indicating he was angry is the fact that although he considered Lupe Lopez and Adan Quintana the spokesmen and focused on them during the discussion, he did not say anything to them when Alvarez asked about the checks. Additionally, rather than viewing the crew as engaging in a legitimate protest, he considered the workers to be insubordinate as indicated by the entries on the termination notices (see discussion below) and the fact that he testified he would have disciplined them if they had not asked for their checks.

THE TERMINATION NOTICES

After the checks were distributed, David Lopez had the personnel office prepare a document entitled "Notice of Termination/Layoff." GCX 1 is a representative example of the form prepared for each worker who got a check. In the section calling for a statement of the reason for the worker's discharge or quit, the form states: "Insubordination, refused to work" which David Lopez acknowledged was entered by the office staff at his direction.

GCX1 contains a section labeled "Termination Codes." At the time Lopez signed the form, the number 1 indicating a voluntary quit was circled rather than the number 4 which

indicates a discharge. However, there is another box labeled "Termination Code" where one writes in the code number rather than circling a preprinted number. This was not filled in when Lopez signed the form, but it was added later at Lopez' direction to indicate the workers should not be rehired. Lopez testified he did not want them back in the crew, at least not right away, because they had quit and left him in a bind.

REQUESTS FOR REHIRE

According to Juan Martinez, on May 12, Francisco Montoya, a member of the spray crew, asked Martinez for his job back. Martinez informed Lopez of this the same day. Lopez told him not to rehire Montoya but to wait, and Lopez would see what they were going to do. Martinez told Montoya he would have to wait to see what the company was going to do.

Montoya returned the following day. Martinez again spoke to Lopez who said he still had not decided, so Martinez told Montoya he still did not know. Lopez never said anything further to Martinez about Montoya's request, and no one from the company ever contacted Montoya. Montoya did not return to look for work after that second time.[37] (II:64.)

Lopez agreed that Martinez spoke to him about Montoya a couple of days after the May 11 incident, but he testified he told Martinez that Montoya would have to talk to him (Lopez). Montoya never came to talk to him and so was not rehired.

---

[37]General Counsel asserts Montoya asked several times if he could return to work, but the record is clear that he came only on Thursday and Friday. (GC brief, p.11.)

I credit Martinez rather than Lopez. Martinez was more precise, his manner more certain, and his testimony more consistent with the fact that Lopez had the personnel forms marked so the workers were not eligible for rehire. Montoya, like the others in the crew, was not rehired because of what occurred on May 11, not because he did not talk to Lopez.[38]

There is no evidence that any other worker asked to go back to work except for Jose Lopez who returned to work on May 12 . However, as noted above, he is in a different category than the other workers because he never got a check.

Luis Llanes did not ask for work after May 11 because Francisco Montoya told him the company had told Montoya he could not return because he had been terminated.[39] Llanes spoke to Montoya on May 12 and applied for and obtained work at another company the next day, May 13 or 14. Lupe Lopez knew of Montoya's experience, but testified he did not fail to ask for his own job because of Montoya not being rehired.

David Lopez was not sure when he decided to fill the vacancies in the spray crew but thought it was 3 or 4 days "later" -- apparently referring to after Martinez spoke to him about rehiring Montoya. (IV:20.) Cawalti testified no new workers were hired for the spray crews at any point shortly after

---

[38]Martinez was sure he did not tell Montoya he needed to talk to Lopez to get his job back.

[39]I sustained a hearsay objection so Montoya's statement cannot be used to establish that Martinez made the remark, but only to show why Llanes thought it was useless to ask for his job back.

May 11. Dole did not call any of the old crew members to see if they wanted to work.[40]

UNION ACTIVITY

Lupe Lopez and Adan Quintana saw the mechanics in the shop wearing "No Union" buttons on their caps around the time of the May 11 incident. Additionally, Lupe had seen some Union people in the fields, but the spray crew had nothing to do with that Union activity.

ANALYSIS AND CONCLUSIONS

Labor Code Section 1152 guarantees agricultural employees the right, inter alia, to engage in "...concerted activities for the purpose of collective bargaining or other mutual aid or protection...." Section 1153(a) makes it an unfair labor practice for an agricultural employer "to interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.

While normally motive is not an element in a section 1153(a) case, in discharge cases, this Board applies the same standard whether the allegation is a discharge for engaging in protected concerted activity in violation of section 1153(a) or a discharge for engaging in union activity in violation of section 1153(c).[41] Therefore, in order to establish a prima facie case

[40]There is no seniority list at the company. Workers show up at the appropriate time and are rehired based on performance and availability to work.

[41]Lawrence Scarrone ("Scarrone") (1981) 7 ALRB No. 13; rev. den. 10/22/82.

the General Counsel must prove by a preponderance of the evidence that the employer knew or believed that the discharges employee engaged in protected concerted activity and discharged her/him for that reason.

Where it is clear that the employer's asserted reasons for its actions can be viewed as wholly lacking in merit, i.e., pretextual, the presentation of General Counsel's prima facie case in itself sufficient to establish a violation of the Act. In 1980, the NLRB 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")[42] 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

[42](1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1stCir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 453 U.S. 989 [109 LRRM 2779]. The Board adopted the Wright Line standard for section 1153(a) cases in Royal Packing Company ("Royal Packing") (1982) 8 ALRB No. 74.

> 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 first element in General Counsel's case is to establish that the crew was engaged in protected concerted activity and the employer knew it. Here, neither employer knowledge of the protest nor its concerted nature is at issue, but Dole claims it was not protected because it was an intermittent, partial or recurrent strike.

In support of its contention, it cites Excavation Construction, Inc. v. National Labor Relations Board (Excavation) (4th Cir. 1981) 660 F. 2d 1015 in which the court determined workers were engaged in an unprotected partial, intermittent or recurrent work stoppage. But that case deals with circumstances that are quite different from the instant case which falls within the rule, not disputed by the court in Excavation, that work stoppages which protest wages, hours or other working conditions are presumptively protected.

The reason the workers' conduct in Excavation and the cases it cites was unprotected is because the workers were not really on strike. Instead, they evidenced their intent to continue working but only on days or hours acceptable to them.

The workers appeared for work on a Saturday but were assigned to one particular project for which overtime pay was not guaranteed. They refused to work that Saturday. They were

willing to work on Saturdays in the future unless they were assigned to that project. If they had refused to work on the Saturday in question to protest the change in overtime and to support their ongoing effort to get the employer to change the policy, their conduct would have been protected.[43]

In this case, the workers did something different than those in Excavation. They simply refused to work until they could discuss their grievances with David Lopez.

There is no evidence they intended to conduct an intermittent, partial or recurrent strike. To the contrary, the evidence shows they engaged in a single work stoppage to protest the schedule change which expanded to include the pay differential.[44] This is a straightforward case of a work stoppage to protest hours and wages and is protected. (Mike Yurosek & Son. Inc. (1992) 306 NLRB 1037.) The cases cited by

---

[43]In First National Bank of Omaha v. N.L.R.B. (First National) (8th Cir. 1969) cited by Excavation, the court found that workers who walked off the job at 6:00 p.m. in defiance of a directive to work overtime until 7:00 p.m. were engaged in protected concerted activity in support of their demands that the employer do something to reduce the chronic overtime. Again, the issue was whether they assumed the status of strikers. The court found they did because the record did not show the workers intended to continue to refuse to work overtime while continuing to work regular hours. Similarly, a refusal to work overtime on Palm Sunday to protest the employer requiring workers to work on a religious holiday and a refusal to work on a Saturday to support the Union in contract negotiations where the employer's overtime policy was a major issue were both protected. (NLRB v. Lasaponara & Sons (2d Cir. 1976) 541 F.2d 992; NLRB v. Gulf-Wandes Corporation (5th Cir. 1074) 595 F.2d 1074.)

[44]I consider the protest to be expanded rather than changed from one over hours to one over wages because the crew never indicated to David Lopez that it had decided to work the new schedule.

Respondent recognize this distinction.

The next issue is whether the workers were discharged or whether they quit. In a recent decision, Boyd Branson Flowers. Inc. (Branson) (1995) 21 ALRB No.4, the Board ruled that an employer was guilty of an unlawful discharge where it caused workers to reasonably believe they were discharged for engaging in protected concerted activity. This is so even if the employer did not intend to convey the message that the workers were fired. In the Board's words, even if "the entire affair was the result of a misunderstanding..., it was incumbent upon [the employer], if he did not intend to fire the employees, to clarify the situation." (Branson. p. 2, fn. 4.)

In Branson. the Board found the employer angrily responded to workers' request for a guarantee of hours by telling them "the raise was at their homes, there was no more work for them, and to go." The boss also told one worker to vacate the trailer in which he was living and told another to remove his vehicle. The workers reasonably interpreted these remarks as meaning they were discharged.

In Sequoia Orange. Co., et al (Sequoia) (1985) 11 ALRB No.21, citing Uukegawa Brothers (1983) 9 ALRB No. 26), the Board found an unfair labor practice where a group of workers refused to continue working until they could talk to the labor contractor about a pay raise. The labor contractor's foreman told them there would be no raise. He told them either to work, or, if they were not going to work, to leave because "there would no

longer be anymore work." The foreman refused to hire the workers a few days later telling them there was no work for those who previously had refused to work.

The Board found the refusal to work because of a wage protest was protected concerted activity, and the employer committed an unfair labor practice when the foreman told the workers there was no more work for them because of the protest and later, for the same reason, refused to allow them to come back to work.

Two NLRB cases are instructive to consider in some detail because there are many factual similarities to the instant case. In both cases, the NLRB, like this Board in Branson. found that where the employers had not used the words "discharge" or "termination" or similar terms, but employees reasonably believed they had been fired and the employers did not clarify that they had not been discharged, the employers had committed an unfair labor practice. In both cases, the employers' failure to ascertain whether the employees were quitting was an important factor since if had they not fired the workers, they logically would have clarified the situation.

In Ridgeway Trucking Company (Ridgeway) (1979) 243 NLRB 1048, enf'd. (5th Cir. 1960) 622 F2d. 1222, a group of workers reported to work but refused to begin work until they could talk to the boss to discuss a dispute about their pay. The boss had not yet arrived, and the service manager saw them standing around and asked them what the problem was. They told him they wanted

to talk to the boss because the company was not paying them the proper commission.

When the boss arrived, one of the workers told him they wanted to discuss a wage problem. The boss refused to talk to them as a group, and the workers refused to talk to him one on one. Shortly thereafter, the service manager went out to where the workers were still gathered and threatened to call the local authorities and have the workers removed. Out of the presence of the employees, the dispatcher asked the boss if the workers were going to work. The boss replied he did not know but that if they did not want to work, they could go someplace else and work. That remark was not repeated to the workers.

A short time later, the boss went out to the workers and told them they could go to work, or, if they were not going to work, they should leave the premises. If they did not leave, he said, he would have no choice but to call the authorities since they did not want to work. Several of the drivers went to work. One or more of those who did not asked if they could get their paychecks. The boss replied they could not get their checks until someone came in who could sign them. Several workers returned later that day to get their checks although it was not a regular payday. Some workers asked if they could get their personal belongings, and the boss allowed them to do so.

The NLRB found the workers were engaged in protected concerted activity by engaging in a work stoppage about their pay, and, although the employer had not told them they were

fired, the test was whether the boss's words and conduct would reasonably lead them to believe they had been discharged, not whether he used formal words of firing.[45]

Ridgeway relied on an earlier case, Hale Manufacturing Co., Inc. (Hale) (1977) 228 NLRB 10, which had articulated the same test for determining whether workers were unlawfully discharged. In Hale, two workers believed they were not paid the proper monthly bonus for February. One of them complained to the boss which led to a heated discussion. Several days later, that worker and several co-workers complained to their boss that they wanted the bonus system replaced with a straight hourly wage which would include a raise. After some discussion, the boss angrily told them there was no way he would pay the increase and said "...you are all going to have to go home."[46] (at p. 11.) One worker then asked whether the boss needed postage to mail his check. The boss replied that he could handle that but said nothing further.

---

[45]The NLRB footnoted that its conclusions were supported by the boss's earlier comments to the dispatcher which indicated either they went to work or they would no longer be employed. However, its discussion makes clear it would have reached the same decision even if this remark had not been made. One Board member dissented, but also found both that the workers had quit and that they were on strike and never reconciled these different findings. Even the dissenting member indicated that had the boss told the workers to go home she would view the case differently.

[46]The ALJ, affirmed by the Board, found the boss was fed up with the worker's constant complaints, but, in two of the instances cited, the evidence indicates the boss was not in fact upset because the workers were making suggestions which would improve production. The remaining instance was the heated discussion which occurred about a week earlier.

In the next few days, three workers spoke to non-supervisory personnel who ask why the group had quit. All replied they had been fired. None of them contacted management to inquire about their status,[47] and no one from management contacted the workers to say they had not been fired and could return to work.

Despite credited evidence that the company was in a very busy period and had trouble replacing the workers who left, the NLRB determined that the boss had indeed fired the workers because if that were not the case, he surely would have ascertained whether they were quitting when the one worker made the remark about getting their checks.[48] It further found that the workers reasonably believed from their boss's words and acts that they had been fired and that even if they had intended to strike if their demands were not met, they never got that far because the boss terminated them for their protest. It further opined that had the workers gone on strike, clearly, it still would have been unlawful to fire them for that reason.

In Apex Cleaning Service (Apex) (1991) 300 NLRB 250,

---

[47]The employer's contention the NLRB should find the workers quit because they did not contact management after these conversations to clarify whether they had actually been fired was rejected.

[48]The NLRB discounted testimony that one of the workers had told the boss shortly after the incident that they had quit because they did not get what they wanted because the workers' testimony showed he was easily confused. In one breath he said he had quit, and in the next said he was fired, and he confused walking out, in the sense of simply leaving, with a walkout or strike.

the NLRB affirmed the principle stated in Brunswick Hospital Center (1982) 265 NLRB 803 that in assessing whether there has been a discharge, events must be viewed through the strikers' eyes not as the employer viewed them. If the employer's acts reasonably caused the strikers to believe they were discharged or created a climate of ambiguity and confusion which caused the belief, or at least indicated their employment status was questionable because of their strike activity, then the burden of the results of that ambiguity must fall on the employer. Both cases were followed in Hormigonera Del Toa, Inc. (1993) 311 NLRB 956, where the NLRB found that a letter from the employer to striking employees stating the employer considered they had resigned from and abandoned their jobs constituted a discharge.

The same rule was set out in a refusal to rehire case. In Anthony Harvesting. Inc. et al. (1992) 18 ALRB No. 7, employees refused to continue working because they protested they were entitled to overtime if they worked any longer that day. The employer refused to pay overtime and brought the workers their paychecks. It was a normal payday, and the Board found the foreman did not tell the workers they were fired.

Nonetheless, it found that the workers did not quit but were engaged in a protected work stoppage.[49]

In this case, even viewing the facts most favorably to

---

[49]Citing Sunbeam Lighting Company. Inc. (1962) 136 NLRB 1248 (at p. 1267), the Board held when they showed up for work and attempted to ask for work, they had made an unconditional offer to work and were entitled to reinstatement since there was no showing that permanent replacements had been rehired.

Respondent, I conclude it committed an unfair labor practice. Initially, the workers refused to work under the new schedule until they spoke to Lopez. After the hiatus in the meeting with Lopez, they tried to present at least their complaint about the differential pay. Lopez refused to talk about it and told them to go home. As the NLRB noted in Ridgeway, such remarks are indicative of a discharge. Even though one of the workers then asked about their checks, that remark does not mean they were quitting, but is entirely consistent with believing they were fired.

Lopez failed to clarify whether the workers were quitting, when they had only moments before indicated they wanted to resolve issues, thus indicating they expected to continue working. At a minimum he failed to meet the employer's obligation to clarify any ambiguity. More than that, I find that, as in Ridgeway, it evidences that Lopez did not inquire because he considered he had already terminated the relationship. This is especially true- since Lopez said nothing to the two spokesmen.

This conclusion is supported by Lopez' subsequent unwillingness to rehire any of the workers and by his indicating on the termination papers that they were ineligible for rehire because they were insubordinate in refusing to work. The only refusal to work was their protest over the schedule changes and the pay differential. Firing them for this reason, violates the Act.

Moreover, I find the evidence is even stronger. I have credited the workers that Lopez told them he was tired of their complaints, that they were not going to work and they should go home. This brings the case even closer to the facts in Ridgeway. Additionally, the facts that Lopez allowed the three workers who disassociated themselves from the group to work and that he did not bring a check for Antonio Lopez' brother, Jose Lopez, even though he was part of the group, point toward a discharge. So does the fact that he allowed Jose Lopez to return to work the next day. This conduct is more consistent with Lopez not wanting to fire Jose Lopez because he was friendly with his brother Antonio than with Lopez viewing everyone, including Jose's brother, as having quit. I am convinced the workers did not quit.

General Counsel urges me to consider the fact that Lopez paid the workers immediately as evidence that Lopez fired them. Under California law, when an employer discharges employees, it is required to pay any unpaid wages immediately. Conversely, an employer has 72 hours to pay unpaid wages to employees who quit except in the case of an agricultural employee where payment is due on the next regular payday.[50] Striking employees also must receive any unpaid wages on the next regular payday. Wages not paid in accordance with section 201 continue to accrue as a penalty for up to 30 days. (Section 203.) Discharged employees are to be paid at the place of discharge

[50]Compare Labor Code sections 201, 202, and 205.

whereas employees who quit are to be paid at the office or agency of the employer in the county where the employee has been working. (Section 208.)

I consider the timing of payment of limited significance in analyzing unlawful discharge cases, since it would be easy for an employer to manipulate the time and manner of payment to suggest a quit rather than a discharge which would be to its advantage since the maximum of 30 days' wages would often amount to far less than the amount due under the ongoing backpay obligations if an unfair labor practice were found. Thus, although the immediate payment is consistent with a discharge, that is a minor consideration.

The fact that Lopez personally returned with the checks rather than leaving it to the crew's supervisor is more significant. The departure from the norm suggests a discharge rather than a simple quit.

General Counsel also argued at hearing that concurrent union activity on the ranch might have caused Respondent to discharge the crew to stifle any budding union support. There is no evidence the minimal Union activity had any bearing on Lopez' decision to discharge the crew. Since I have determined the crew was discharged, I need not resolve the issue of whether any workers made unconditional offers to return to work.

Based on the foregoing, I find Respondent has violated section 1153 (a) of the Act and issue the following:

ORDER

By authority of Labor Code §1160.3, of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent DOLE FARMING, INC., a California Corporation, doing business as DOLE FARMING COMPANY, 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 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 the employees listed below immediate and full reinstatement to their former positions of employment, or, if their positions no longer exists, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

Martin Alvarez	Javier Alvarez
Jose D. Amezuca	Enrique Martniez
Alfonzo Benavidez	Francisco Montoya
Manuel Benavidez	Artemio Pantoja
Fermin Cervantes	Aurelio Pantoja
Cruz Chavarria	Adan Quintana

Nemesio Fernandez	Fidel Salazar
Miguel Gonzalez	Manuel Soto
Luis A. Llanes	Jose G. Lopez

(b) Make whole the employees listed below for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful conduct, the makewhole amount to be computed in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5;

Martin Alvarez	Javier Alvarez
Jose D. Amezuca	Enrique Martniez
Alfonzo Benavidez	Francisco Montoya
Manuel Benavidez	Artemio Pantoja
Fermin Cervantes	Aurelio Pantoja
Cruz Chavarria	Adan Quintana
Nemesio Fernandez	Fidel Salazar
Miguel Gonzalez	Manuel Soto
Luis A. Llanes	Jose G. Lopez

(c) Preserve and, upon request, make available to the Board and its agents for examination, photocopying and otherwise copying all payroll records, social security payment records, time cards, personnel records and reports and all other records relevant and necessary for a determination by the Regional Director of the backpay period and any amounts of backpay due under the Board's order;

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, as determined by the Regional Director, reproduce sufficient copies of the Notice in each

language for the purposes set forth in this Order;

(e) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the date 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 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) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from May 11, 1994 until May 10, 1995.

(g) Post copies of the attached 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 ;

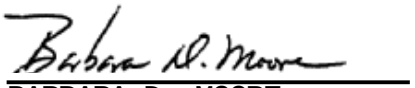
(h) Arrange for a Board agent to distribute and read the attached Notice in all appropriate languages to all of Respondent's agricultural employees on company time and property at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have

concerning the Notice and/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 time lost at this reading and during the guest ion-and-answer period;

(i) Provide a copy of the attached Notice to each agricultural employee hired to work for Respondent during the twelve (12) month period following the issuance of this Order and;

(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: March 27, 1996



BARBARA D. MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, DOLE FARMING, 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 18 employees in its spray crew for protesting their wages and hours.

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 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.

WE WILL offer the employees who were discharged on May 11, 1994 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: DOLE FARMING, 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 711 North Court Street, Visalia CA 93291-3636. The telephone number is (209) 627-0995.

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

DO NOT REMOVE OR MUTILATE