Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATION BOARD

DUTRA FARMS, Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 96-CE-58-SAL 24 ALRB NO. 1 (April 27 , 1998)

DECISION AND ORDER

On August 26, 1997, Administrative Law Judge (ALJ) Douglas Gallop issued the attached Decision in this matter. Thereafter, Respondent and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions to the ALJ's Decision with briefs in support of their exceptions and General Counsel and the Union filed briefs in response to Respondent's exceptions .

Pursuant to the provisions of Labor Code section 1146 of the Agricultural Labor Relations Act (ALRA or Act),[1] the Agricultural Labor Relations Board (ALRB or Board) has delegated this matter to a three-member panel of the Board.

The Board has considered the record. and the ALJ's recommended Decision and Order in light of the exceptions and briefs of the parties and has decided that Respondent has not engaged in any conduct violative of the Act .

[1]Unless otherwise indicated, all section references herein are to the California Labor Code, section 1140 et seq.

Respondent excepts to the ALJ's finding that Manuel Nava and Refugio Rosales were discriminatorily laid off from Respondent's blackberry harvesting crew because they concertedly complained that their rate of pay had been changed without notice. Respondent also excepts to the ALJ's further finding that additional crew members were similarly laid off, for the purpose of obfuscating the real reason the named discriminatees were terminated. We find merit in Respondent's contentions.

The pertinent facts briefly summarized are these. Late in the day on May 29, 1996, Nava, who had been employed by Respondent for about one week, and Refugio Rosales, hired three days before, learned that they were no longer earning an hourly wage, but beginning that morning would be paid according to the number of boxes picked. The two employees left the field to walk to Respondent's office where they met with Virgilio Yepez, Respondent's ranch manager, who verified the rate change.[2] They told Yepez they believed it unfair of him to have delayed notifying them of the change and then apprised the supervisor as to the total number of boxes each of them had managed to pick that day. Yepez agreed that their piece-rate earnings were quite low and then promised they would be paid at the hourly wage rate for

[2]Yepez told the men he had instructed the crew foremen to so advise employees early that morning. The ALJ found that only a portion of the crew had been apprised of the change.

that day.[3]

Immediately following his discussion with the two crew members, Yepez proceeded to personally survey the blackberry field in which they had been working-and concluded that the crop had been so damaged by unseasonal rains that it could not sustain the current crew complement of approximately 48 employees. Yepez estimated how many harvesters should be retained in order to maintain an efficient crew under the circumstances and devised *a* method for selecting employees who would be laid off. He examined employee production records, noting wide variances in individual employee performance and determined that all employees who had picked 9 or fewer boxes that day would be terminated. Prior to the start of work the next day, Yepez assembled the full crew of blackberry harvesters and implemented his plan by announcing the immediate layoff of 27 employees as a necessary reduction, in the current work force. Since Nava had picked 8 boxes, and Rosales 4 boxes, they of course qualified for layoff status.

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[3]Even when earnings are measured by the piece, employees are guaranteed at least the minimum wage. It is not clear, however, whether Nava and Rosales were apprised of this legal requirement or of Respondent's intention to abide by it. In any event, Nava and Rosales believed the piece rate was $2.00 per box (Yepez testified it actually was $2.50) and, in their minds, after 9 and 1/2 hours of work, Nava's 8 boxes and Rosales' 4 boxes translated into only $16.00 and $8.00 respectively. Yepez observed that even the highest producer, who also worked 9 and 1/2 hours and picked ,. 15 boxes, -earned a piece-rate wage of $37.50. However, at the then-prevailing minimum wage of $4.25 per hour, according to Yepez's estimate, the same employee's earnings would be $40.37. He noted that were employees to be paid that day on a piece-rate basis, none of them would have made enough to -reach the level of the minimum wage and therefore all employees were "paid on the basis of the hourly rate.

Yepez testified that some of the employees he had released immediately left the area while a few went to the office and were directed to other of Respondent's operations.[4] Others implored Yepez for a "second chance" in the blackberry harvest and promised to strive to improve their output. On this basis, Yepez believes he reinstated upwards of 10 or so employees within an hour of their initial layoff. The record does not disclose whether Nava and Rosales also intended to ask for an opportunity to improve their work performance. In any event, they testified that Yepez rebuffed their efforts to speak with him immediately following the layoff, telling them there was nothing to discuss. The ALJ noted that Yepez did not deny the incident as described by the alleged discriminatees.[5] However, Yepez denied having any

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[4]According to Respondent's secretary, she proposed to several employees who came to the office following the layoffs, including both Nava and Rosales, that they consider seeking rehire in the raspberry crew. At least one employee acted on her suggestion and was hired as a raspberry harvester that same morning. The ALJ noted that while neither Nava nor Rosales mentioned the incident in their initial description of the events of May 30, Nava did concede upon cross examination that he had gone to the office, but denied having spoken with the secretary. The ALJ credited the secretary's testimony concerning the incident over Nava's denial. The ALJ also observed that neither Nava nor Rosales was recalled by General Counsel to respond to the secretary's testimonial account.

[5]While the ALJ acknowledged Respondent's justification for reducing the size of the crew, he nevertheless reasoned that the economic hardship argument was undercut by the almost immediate rehire of many of the laid off employees, including some" who had performed less reliably than had the named discriminatees. For example, on May 29, the critical date for determining who would be retained, Jesus Corrales had picked 7 boxes, his wife, Maria, 6 boxes, Angelina Vidal who, like Nava, had picked 8 boxes, and two employees who, like Rosales, had picked only 4 boxes. Corrales testified that he, like Nava and Rosales, had not learned of the

conversation with Nava or Rosales immediately following the layoff announcement.

It is well settled that, in order to establish a discriminatory layoff or discharge, General Counsel must show that the employee (s) engaged in protected activity, that the employer had knowledge of such activity, and that the employer took adverse employment action because of such activity. All three elements must be established by a preponderance of the evidence.

It is undisputed that General Counsel has established the first two elements. First, Nava and Rosales concertedly attempted to discuss matters contemplated by section 1152 inasmuch as they sought a resolution concerning the manner in which they would be compensated. Next, they discussed the rate of pay with Respondent's ranch manager, thereby establishing the requisite employer knowledge of their protected concerted activity. The final element requires a showing that their layoff was the result of their having exercised their section 1152 rights.

Were the Board to conclude that Respondent indeed was motivated to lay them off because of protected activity, a violation of section 1153(a) will be found. Respondent, however, has generally asserted a business justification defense for its

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change in the method of compensation until late in the day. By contrast, Francisco Carbrera did learn of the change early in the day and was able to increase his 9-box output of May 28 to 15 boxes on May 29. Other employees who also had prior notice of the change more than doubled their production. While early notification to Nava and Rosales may have translated into a stronger work performance, such failure -of notification" is hot in itself a violation of the Act.

action which, if believed, would serve to obviate an unlawful motive for the layoffs and the Board would be compelled to find that the Act was not violated.

There should be no dispute that Respondent was economically justified in trimming the overall size of the crew. As the ALJ found, weather conditions beyond Respondent's control had indeed damaged the crop, resulting in a less than normal harvest, and that the Company actually was losing money. It seems clear, therefore, that the situation was one which justified the Respondent electing to reduce its labor force. Under these circumstances, we find that Respondent has met its burden of showing by a preponderance of the evidence that it was economically justified in effectuating an immediate and mass layoff of berry harvest employees.

As discussed above, neither Nava nor Rosales qualified for retention under Yepez' objective standard of evaluating employee performance on the basis of individual production. Thus, their selection for layoff status was based on the fact that they were among the least productive of the berry harvest employees. In regard to the issue of those employees rehired, the record is clear that all employees who requested to be rehired and promised to work hard were rehired by Yepez. The record does not discuss the circumstances surrounding Nava's attempt to speak to Yepez. Was Nava going to ask for his job back? Was Nava going to promise to work harder? If Nava promised to work harder, would Yepez have rehired him as he did the other 10 employees. We don't know. Had

this matter been further explained in the record, Respondent's proffering of evidence of a valid economic reason for its employment decisions may not have been sufficient.

In light of our finding, based on credible record evidence, that Respondent was justified in its resolve to scale down the blackberry harvest crew at the time material herein, the Board can reasonably conclude that the layoffs were not unlawful.[6]

ORDER

Pursuant to Labor Code section 1160.3, and in accordance with the opinion set forth above, the Agricultural Labor Relations Board finds no violation of the Act, either as alleged in the

[6]Although not alleged in the complaint, but on the basis of fully litigated facts, the ALJ found that Respondent had discriminated against the 25 employees who similarly were laid off at the same time as the named discriminatees. He reasoned that the additional layoffs were implemented in order to conceal the real, and thus unlawful, reason for the discharge of the employees who had openly engaged in concerted activity. Having found no violation of the Act as to the named discriminatees, we likewise find no violation with regard to the remaining employees.

complaint or found by the ALJ.[7]

DATED: April 27, 1998

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

GRACE TRUJILLO DANIEL, Member

[7]All decisions of the ALRB, in their entirety, are issued as precedent for future cases. (Gov. Code 11425.60)

CASE SUMMARY

Dutra Farms
(UFW)

24 ALRB No. 1
Case No. 96-CE-58-SAL

Administrative Law Judge Decision

The Administrative Law Judge (ALJ) found, as alleged, that Dutra Farms had discriminatorily laid off two blackberry harvest employees because they had engaged in protected concerted activity by protesting the change in their rate of pay from a piece-rate to an hourly basis without notice. He also found, however, that Respondent had unlawfully laid off additional employees for the purpose of concealing its true motive for the layoff of the two named discriminatees.

Board Decision

The Agricultural Labor Relations Board (ALRB or Board) found, as had the ALJ, that unseasonal rains had damaged the blackberry crop to such an extent that it was reasonable for Dutra Farms to reduce the size of the harvest crew at the time material herein. On that basis, the Board found that there was insufficient evidence to show that the named discriminatees, or any other employees, were laid off for reasons proscribed by the Act and, accordingly, concluded that Respondent had not engaged in any violations of the Agricultural Labor Relations Act.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: DUTRA FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case No. 95-CE-58-SAL

Appearances:

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For Respondent

Annabelle G. Cortez
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For the Charging Party

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: A hearing in this matter was conducted before me on June 9 and 10, 1997, at Salinas, California. The case arises from charges filed by United Farm Workers of America, AFL-CIO (hereinafter Charging Party or Union) alleging that Dutra Farms (hereinafter Respondent) violated sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter Act_) by discharging Manuel Nava and Refugio Rosales, in retaliation for their Union and protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint alleging these violations. Respondent filed, an answer denying the commission of unfair labor practices. The Charging Party has intervened in the proceedings.

Upon the entire record, including my observations of the witnesses," and after careful consideration, of the briefs filed by the parties, and the arguments made at the hearing, .1 make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Jurisdiction

The charge was filed with the Board and served on Respondent on June 14, 1996.[1] Respondent produces two varieties of blackberries and also produces raspberries on various fields in 'the Watsonville, California area, and is an agricultural employer within the meaning of §1140.4(c) of the Act. Respondent admits that its owner, James Dutra, and manager, Virgilio Yepez were at

[1]All dates hereinafter refer to 1996 unless otherwise indicated.

all material times supervisors as defined in §1140.4 (j), and that Nava and Rosales, while employed by Respondent, were agricultural employees. Respondent further admits that the Union is a statutory labor organization.

2 . The Prima Facie Case

Respondent began hiring employees to harvest Ollalie blackberries in the first or second week of May 1996. Nava worked as a blackberry picker for a week, and informed Rosales, a neighbor, about the work. Rosales applied and was hired, working for three days. As of May 29, there were at least 43 harvesters on their crew.[2] The crew's foreman (or puncher) was' Guadalupe Barbosa, and one of-the row checkers was Bartolo Soto. Yepez was their superior, but his responsibilities extended to Respondent's other operations, which required him to travel to various locations.

The Union filed a Notice of Intent to Take Access and a Notice of Intent to Organize shortly before Nava was hired. In his testimony, Yepez admitted he was aware, as of May, that these actions had been taken. Yepez has actively and openly opposed the Union, but contends that as of May, he knew little about it, arid had not yet formed any opinions. In his testimony, Yepez was unduly reluctant to admit his anti-Union sentiments, regardless of the time reference.

[2]Apoarently, some employees on the crew did not work on May 29.

Nava testified that: on his first day of work (prior to Rosales' hire) , two Union organizers took access, and he spoke with them in the parking area, near Respondent's office. Beyond the proximity of the office, Nava provided no information showing that any of Respondent's agents were aware of this conversation. Nava and Rosales testified that on May 30, one or two Union organizers took access before work in the same area. This time, Yepez was standing outside the office, speaking with other employees. According to Nava, Yepez was very close to them, and was watching. Rosales, however, placed Yepez at least 50 feet away, and did not contend he looked at them.

Nava testified that during his meeting with the Union representative (s) on May 30, he was offered, and accepted a Union button. Nava did not, however, claim that he wore the button. Nava and Rosales testified that during the meeting, they signed a letter identifying them as employee organizers. No evidence was presented showing when, if ever, the letter was delivered to Respondent. For his part, Yepez did not specifically deny having observed any of these activities, or having been informed of them, although, as will be discussed more fully below, he contends he made the decision to terminate the workers' employment prior to May 30.

In further support of the prima facie case, Nava testified that he was harassed and intimidated by Yepez and other anti-Union activists at a Union rally which took place on September *16,* 1996. After listening to Nava's and Yepez's accounts of the

incident, and viewing a videotape of a portion thereof, it is found that Nava and other Union supporters initiated the conflict, and that Nava substantially exaggerated the extent of the purported harassment.

Prior to May 29, employees on the blackberry harvest crew were paid the minimum wage on an hourly basis, because not enough fruit had developed to justify a piece, rate. Yepez testified he directed Barbosa and Soto, on the morning of May 29, to inform the crew that a piece rate would now be paid, and employee witness, Francisco Castillo Cabrera, testified he was so informed on that morning. Nava, Rosales and crew member, Jesus Corrales, testified that they did not learn of the change to piece rate until the 3:00 p.m. break, when Soto told them about the change. Thus, what appears to have taken place is that some of the crew members were informed of the change in the morning, but others were not.

Nava and Rosales were upset about the delay in being informed of the change, and asked Barbosa if, in fact, they were 'now being paid a piece rate. Barbosa was less than definite in his response, so the employees told him they were going to the office to discuss the matter with Yepez, which Barbosa did not protest. Nava contended he invited other employees to accompany them, but Rosales and the other employee witnesses did not corroborate Nava on this point.

When Nava and Rosales first arrived at the office, Yepez was not present, so they spoke with the secretary, Esther Garcia

Yepez Robles (Garcia), who is Yepez's sister. Garcia had not been informed of the change to piece rate, so she could not give a definite response to their inquiry. Rosales acknowledged, however, that Garcia told them that even with a piece rate in effect, if employees did not pick enough berries, Respondent would make sure they would "make their day, " which he understood meant they would be paid at least the minimum wage. Several witnesses testified that Respondent complies with this requirement.[3]

Yepez arrived at the office, and Nava (who did all, or virtually all of the talking in these incidents with Rosales) again asked if the wage basis had been changed. Yepez said they were now being paid by 'the box picked. Nava and Rosales testified that Nava stated the piece rate would be $2.00 per box, and Yepez confirmed this, which is unlikely, since Yepez was corroborated by other witnesses in his contention that Respondent had been paying a piece rate of $2.50 per box. Nava contended that if they were to be paid only at $2.00 a box, they would be earning too little money. Yepez purportedly stated that if they stopped making so much noise, he would pay them on an hourly basis, to which Nava replied that Respondent should pay the whole crew that way. According to Nava, but not Rosales, this prompted a "mocking" look from Yepez. Nava asked if they should return to work, and Yepez "told them it was quitting time. Nava then asked

[3]See Industrial Welfare Commission Order No. 14-80.

if they still had their jobs for the next: day. Yepez said they did, and asked why Nava was assuming he had lost his job.

Yepez testified that when Nava told him the employees had not been informed of the change to piece rate, he told Nava and Rosales he had given the order that morning, a contention confirmed by Rosales, but not Nava. Yepez agreed that Nava protested the change, and that he told Nava he would remedy the problem, but denied stating that if they kept quiet, he would pay them by the hour. Yepez did not recall Nava asking if he still had a job. Garcia, who was present during the conversation between Yepez and Nava, did not testify concerning the contents thereof.

As noted above, one or two Union representatives took access prior to the commencement of work on May 30. When the crew members arrived at the field, Barbosa told them he had been instructed to have them, wait until Yepez arrived, because he wanted to speak with them. Yepez appeared shortly thereafter, carrying employee time cards. According to Nava and Rosales, the first thing Yepez said was that because of one person who opened his mouth, he was going to lose a lot of money, since he could not afford to sell a box (of blackberries) for $50.00 to $60.00. Jesus Corrales (called by General Counsel), however, gave a slightly, but significantly different, account of what Yepez said. His recollection was Yepez said that because of some people, he would lose money. Corrales recalled Yepez explaining that some of the employees had only picked two or three boxes the

day before, and that the company could not sell boxes at $50.00 or $60.00 to pay them. Yepez admitted he mentioned that some employees were unhappy about what had taken place the day before (presumably due to the change from hourly wages to piece rate), but denied he singled out anyone for causing him to take action.[4]

The witnesses agree Yepez told the crew only those who had picked at least nine boxes of blackberries the day before would be retained, and that Nava and Rosales had picked eight and four boxes, respectively, on May 29. In their testimony, neither Nava, nor Rosales, stated that Yepez gave any reason for the layoffs other than one person (presumably Nava) having opened his mouth, causing Yepez to lose money. As noted above, Corrales testified that Yepez stated some employees were only picking a few boxes, and Rosales defended his low production on the basis that the fruit was rotten. Yepez testified he explained to the crew that there were too many employees for the amount of fruit available to be picked, and it appeared the future available work would not be what Respondent had expected. Because of this, only the most productive harvesters would be kept. The employees were then informed who would be retained, Nava and Rosales not being among them.[5]

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[4]0ther witnesses attempted to relate what Yepez said on May 30; however, their recall was so weak that no reliance can be placed on such testimony.

[5]There was a conflict in the witnesses' testimony-as to whether Yepez or Barbosa identified the employees, whether they were identified by name or employee number, and whether those

Respondent's records show that 11 of the laid off employees were rehired by Respondent to the blackberry or raspberry crew on May 30.[6] One or two employees were subsequently rehired to pick blackberries or raspberries. The evidence also shows, however, that Yepez did not invite any of these employees to return, and they were permitted to do so only after approaching him, asking for a chance to improve their production.

Nava and Rosales testified that after they were informed of their layoffs, Nava approached Yepez and asked to speak with him. Yepez purportedly responded he wanted nothing to do with Nava. Yepez testified that Nava and Rosales never asked to be rehired, but did not specifically deny having refused to speak with Nava.[7]

Garcia testified that on the morning of the layoffs, some of the laid off employees returned to the office and, Nava in particular, became highly abusive to her when she could not

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identified were the ones to be retained or laid off. The most noteworthy aspect of this is that Nava, and at least initially Rosales gave the same account of how the layoffs were announced, and were contradicted by all of the other witnesses who testified on the subject.

[6]See Respondent's Exhibits 2 and 3.

[7]Garcia testified that Respondent's policy is to contact employees who are laid off, once work becomes available. There is no evidence, however, that any of the employees laid off on May 30 were contacted for rehire. If anything, it appears Respondent had over-hired for the harvest. At the conclusion of the hearing, the undersigned asked if General Counsel was contending that the failure to rehire Nava or Rosales constituted a discrete unfair labor practice. The Assistant General Counsel responded this was not the case, and the purported refusal to speak with Nava was introduced as evidence to show unlawful animus in the layoffs.

comply with his demand, to be paid, and to employee Fileberto Costa, who had sold them their picking buckets. This nearly provoked an. altercation when two employees came to her assistance. Garcia, who had not, been previously advised of the layoffs, suggested to the employees, including Nava and Rosales, that they ask to be put on the raspberry crew. Garcia was corroborated on this point by employee Angelina Vidal, who took up her suggestion and was rehired for that crew. On direct examination, Nava and Rosales did not mention this incident in their accounts of what took place on May 30. On cross-examination, Nava denied having demanded his final paycheck or having spoken to Garcia on May 30, and only admitted he had spoken to Costa, giving no details. General Counsel did not recall Nava or Rosales to testify after Garcia made these allegations. Garcia appeared to be *a* truthful witness, and her testimony regarding this incident is credited over Nava's denial.[8]

Nava, who has since become a paid employee of the Charging Party, and Rosales returned to Respondent's fields' at noon on May 30 with two Union representatives who were taking access. Yepez testified he became aware of their presence when he was called by Barbosa, who told them that, contrary to instructions, a representative had driven his vehicle into the fields, kicking up potentially disease-bearing dust onto the fruit and blocking the

[8]Nava's credibility will be discussed more fully later in this Decision.

egress of a fruit truck. Nava testified he was preserve to see about regaining his job, arid to serve the Union's charge in this case. While the charge is dated May 30, it was not served until June 14, and Nava did not explain how any attempt was made to serve Respondent on May 30. .Nava and Rosales also failed to show where any request was made, at that time, for their reinstatement. It is, however, agreed that Yepez questioned the presence of Nava and Rosales, and demanded they leave. When one of the organizers made up Union identification tags for Nava and Rosales, Yepez dropped his demand and left the area.[9]

3. Respondent's Defense

It is undisputed that Nava and Rosales were but two of 27 employees laid off on May 30. Three other employees who, like Nava, had picked eight boxes on May 29 were also laid off. As. noted above, however, 11 of these employees were rehired on that same date, including two, who like Rosales, had picked only four boxes on May 29.

Yepez testified, and other witnesses, including Rosales,' acknowledged that unexpected rain had spoiled a substantial amount of the fruit, thus lowering production. It is also clear that some employees were picking far fewer boxes of blackberries than others, and the credible testimony establishes that Yepez at least expressed this as a concern on May 30. In this regard, General Counsel's witness, Corrales, corroborated Yepez's

[9]Nava and Rosales separately returned on later dates to obtain their paychecks. On those occasions, neither asked to be rehired, and no offer of employment was made.

testimony, and contended that some of the harvesters were loafing, because they were being paid on an hourly basis. Nevertheless, the crew's production on May 29 was substantially higher than it had been on the previous four days. Yepez, who inspected the employees' production reports, would presumably have been aware of this and, in fact, did not deny such knowledge. Even so, Respondent demonstrated that as of May 29, it was still losing money with 48 crew members.

When called as an adverse witness, Yepez testified that representatives of the Charging Party took access to the fields on May 29, to see why there was not enough fruit to pick. During this visit, Yepez purportedly observed that not only had much of the ripe fruit been spoiled, but a substantial amount of the developing fruit was damaged to the point where he realized production for the entire harvest would be seriously impacted. Therefore, according to Yepez, on the evening of May 29, he decided to reduce the crew to the level he felt would have enough members to be profitable for both the remaining crew members and Respondent. In his determination, this meant laying off any crew member who picked less than nine boxes of blackberries on May 29.

ANALYSIS AND CONCLUSIONS OF LAW

Section 1152 of the Act grants agricultural employees the right to form, join or assist labor organizations, and to engage in other protected concerted activity related to their employment concerns. Section 1153 (c) makes it an unfair labor practice for an employer to discriminate against employees in order to

discourage or encourage union membership, or to engage in protected concerted activities. Retaliation by an agricultural employer, because employees have engaged in union or other protected concerted activities also constitutes interference, restraint and coercion with the rights set forth in §1152, in violation of §1153(a).

In order to establish a prima facie case of unlawful discrimination, the General Counsel must prove: (1) that the employee engaged in protected activity; (2) that the employer had knowledge of the activity; and (3) that a motive for the adverse action taken by the employer was the protected activity. Lawrence Scarrone (1981) 7 ALRB No. 13. Direct or circumstantial evidence may establish the unlawful motive. Circumstantial evidence includes evidence of animus toward employees who engage in protected activities, departures from established policies or procedures, disparate treatment, the timing of the adverse action and shifting, inconsistent or false explanations given for taking such action. Miranda Mushroom Farm, Inc., et al. (1980) *6* ALRB No. 22.

Once the General Counsel has established a prima facie case of unlawful discrimination, the burden shifts to the employer to rebut the charge. Respondent must preponderantly show that the adverse action would have been taken, even in the absence of the protected activity. Bruce Church, Inc. (1990) 16 ALRB No. 3.

Clearly, there are flaws in General Counsel's prima facie case. Respondent does not dispute that Nava and Rosales were engaged in protected concerted activity when they protested the change to piece rate, and that, through Yepez, it was aware of their conduct. Inasmuch as Nava and Rosales were laid off on the day following the protest, the timing suggests a discriminatory motive. The timing of the adverse action, proximate to the protected activity, in itself, however, does not establish a prima facie case. Some additional evidence of animus is required. Monrovia Nursery Company (1983) 9 ALRB No. 15; Monrovia Nursery Company (1983) 9 ALRB No. 5.

The portrayal of Yepez by Nava and Rosales, as having tried to bribe them into silence, apparently so he could pay the rest of the crew at a sub-minimum piece rate,' is rather illogical, unless several of Respondent's witnesses were lying when they stated Respondent complies with its obligation to pay the minimum wage. Nava's testimony, concerning Yepez's "mocking" look when he told Yepez the entire crew should continue to be paid hourly, was not corroborated by Rosales, and even if accepted, is subject to different interpretations. Furthermore, Nava at least had the tendency to slant and distort the facts, and to conceal those which might place him in a poor light. Thus, he was anything but a wholly reliable witness. Rosales, at times, appeared to be parroting Nava's version of the events, right or wrong, to the best of his ability, although when pressed, he was more likely to admit disadvantageous facts.

On the other hand, Respondent failed to have Garcia corroborate Yepez's version of what he said, which might permit the inference that had she testified on the subject, Garcia would have corroborated Nava and Rosales.[10] Furthermore, if for no other reason than his evasive testimony regarding his anti-Union sentiments, Yepez cannot be considered a candid witness.

General Counsel's key evidence regarding animus, Yepez's alleged May 30 statement, that someone (Nava) had opened his mouth and cost him money, is very suspect. Aside from the lack of evidence that Yepez had any personal financial interest in what employees were paid, and the evidence presented showing that irrespective of what payment system was used, employees at least earned the minimum wage, Corrales contradicted the testimony of Nava and Rosales, testifying that Yepez complained about employees who had only picked a few boxes of blackberries. Thus, while Yepez admittedly mentioned that employees were unhappy about the change to piece rate wages, it is at best questionable whether he singled out Nava's conduct for comment.

General Counsel contends that Yepez's hostile refusal to speak with Nava and Rosales can only be attributed to his animus toward their protected activity, and constitutes disparate treatment, because he spoke with other employees, and apparently

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[10]Evidence Code §413. Richard A. Glass Company, Inc., et al. (1988) 14 ALR3 No. 11, at pages 14-15; cf. The Garin Company (1985) 11 ALRB No. 18. Although not established as a supervisor, Garcia is Yepez's sister and in a position of some responsibility. As such, she could be considered a witness under Respondent's control.

reinstated all who asked. Although Nava's and Rosales' credibility has been established as questionable, Yepez's failure to specifically deny this conduct could permit the inference that had he testified on the subject, he would have admitted it.[11]

General Counsel contended at the hearing, but not in his brief, that Yepez's conduct during the noon access period on May 30, and during the Union rally on September *16* establishes Respondent's animus. The evidence, however, shows that Yepez was already upset by the Union's conduct in driving a vehicle onto the field on May 30, and he was entitled to assurances that Nava and Rosales were present as Union access-takers. As found above, Nava exaggerated and distorted the nature of the confrontation on September 16, and Yepez's actual conduct on that date, remote from the layoffs, adds little, if anything, to the prima facie case.

Even resolving all of the questionable issues in Respondent's favor, however, this was a highly precipitous, hastily executed action, which along with its proximity to the piece rate protest, establishes a prima facie case. Not only did the layoffs take place at the beginning of the workday, with no explanation as to why the employees could not have at least

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[11]See footnote 8, above. Also see Antenna Department West (1983) 266 NLR3 909, at page 912 [113 LRRM 1075] ; People v. Saddler (1979) 24 Cal.3d 671 [156 Cal.Rptr. 871]; Neumann v. Bishop (1976) 59 C.A.3d 451, at page 480 [130 Cal.Rptr. 786].

completed the day,[12] but Garcia and Respondent's office manager were not even informed of the intended action, and no final paychecks were prepared, as Respondent, no doubt, knew was required. Even accepting that production-related problems -existed, the manner in which these layoffs was executed further establishes a discriminatory motive.

Since the evidence establishes a prima facie case for the layoffs of Nava and Rosales, the question arises as to whether a prima facie case has been established that the layoffs of the other 25 employees was similarly unlawful. Indeed, both General Counsel and the Union, in their briefs, attack Respondent's stated reasons for all of the layoffs, and do not argue that Nava and Rosales were unlawfully included in an otherwise lawful economic layoff. In this regard, the Union specifically contends that the layoffs of the other employees were motivated by a desire to mask the discrimination against Nava and Rosales. Certainly, there is case precedent establishing the unlawful nature of such layoffs. Leather Center, Inc. (1992) 308 NLRB 16 [142 LRRM 1093]; Eddyleon Chocolate Company, Inc. (1991) 301 NLRB 887 [136 LRRM 1293].

Since the remaining employees are not alleged in the complaint as having been unlawfully laid off, it must be determined whether consideration of this issue is appropriate. Both the ALR3 and the National Labor Relations Board have

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[12]By sending the employees home, Respondent may well have been obligated to pay each of them four hours of reporting time pay. Industrial Welfare Commission Order No. 14-80.

included unalleged discriminatees where the issues involved in the adverse actions taken against them are closely related to those raised by the complaint, and were fully litigated at the hearing. Scheid Vineyards and Management Company, Inc. (1995) 21 ALRB No. 10, at pages 8-10; Hankins Lumber Company, Inc. (1995) 316 NLR3 837 [150 LRRM 1298] ; Denholme & Mohr, Inc. (1988) 292 NLRB 61 [131 LRRM 1129].

Although General Counsel did not allege the layoffs of the other 25 employees as unlawful, they took place contemporaneously with, and were purportedly caused by the same considerations as the layoffs of Nava and Rosales. Respondent's economic defense was fully litigated at the hearing, and applied equally to all of the layoffs. Accordingly, the issue of these other layoffs will be entertained.

As noted above, the layoffs took place in close proximity to the protected activity of Nava and Rosales, and were highly precipitous in nature. While the layoffs of 25 employees to mask the discrimination against two appears extreme, at first blush, the almost immediate reinstatement of many of these employees lends credence to the discriminatory motive behind their initial layoffs. Accordingly, it is concluded that the evidence establishes a prima facie case with respect to these 25 employees.

The prima facie case regarding anti-Union discrimination is more tenuous, since the evidence regarding Respondent's knowledge of the Union activities, and animus is weak. As discussed above,

there is little evidence that Respondent was aware Nava had met with Union organizers on his first workday. Nava's testimony, that Yepez was watching while he and Rosales met with the Union representative (s) on May 30, was not corroborated by Rosales, and the evidence fails to directly establish that Nava was wearing a Union button, or that the employee organizing committee letter was known to Respondent prior to the layoffs. Nevertheless, given the implications of this evidence, if Yepez was unaware of these employees' Union activity, he should have specifically denied such knowledge, and the failure to do so could permit the taking of an adverse inference.

More fundamentally, assuming Yepez knew that Nava and Rosales engaged in Union activities on the morning of May 30, it would have to be shown that he decided to lay them off thereafter for such knowledge to be of any relevance. This would require discrediting Yepez's testimony, that he made the layoff decisions on the evening of May 29, which is' corroborated by the timing of Yepez's notification to the employees of their layoffs. Thus, if Yepez had decided to lay off Nava and Rosales because they met with the Union representative(s), this would have required rather hasty action, because he met with the employees, time cards in hand, very shortly thereafter, prepared to name those who had satisfied the nine-box requirement.

With respect to animus, General Counsel does not allege that Yepez made any comments linking the layoffs to any Union activity. Yepez's general anti-Union statements, irrespective of

when they were made, are considered protected free speech, and in the absence of threats, promises or ocher coercive implications, cannot establish causation. Monrovia Nursery Company (1983) 9 ALRB No. 15 .

Based on the foregoing, it is concluded that the evidence fails to preponderantly establish that the layoffs were motivated by anti-Union considerations, in violation of §1l53 (c), and said allegation will be dismissed.

Although the evidence fails to establish a prima facie case of anti-Union discrimination, Respondent is still required to rebut the prima facie case of retaliation against the crew based on the piece rate protest. Respondent has established that the availability of work was reduced due to unexpected adverse weather, that ultimately its Ollalie blackberry crop was reduced by 50%, that certain employees were producing far fewer blackberries than others and that it was losing money by keeping all of the crew members employed. Under these circumstances, it cannot be said that the potential for layoffs did not exist.

On the other hand, the timing of the layoffs, at least, 'is still highly suspect. As noted above, Respondent's records show that the action took place following a significant increase in production on May 29. The economic hardship argument is undercut by the almost immediate rehire of many of the laid off employees. Indeed, the evidence fails to show that any employee requesting rehire was denied that request, either to harvest blackberries or raspberries, including two employees who had harvested only four

boxes on May 29. Yepez's testimony, concerning the alleged field inspection by Union representatives, and his purported discoveries on May 29 was vague and uncorroborated although, as-noted above, the sequence of events does suggest that the layoff decision was made on that date.

Thus, although Respondent's economic defense cannot be considered a complete fabrication, the more compelling evidence shows that at the least, the employees' layoffs were accelerated by the protected concerted activity of Nava and Rosales. In this regard, the evidence fails to establish why, if not for Respondent's animus toward the protest, Yepez chose May 30 to suddenly lay off the crew members. It is established that the acceleration of an otherwise lawful layoff, based on prohibited considerations, in itself, is unlawful. Eddyleon Chocolate Company. Inc. (1991) 301 NLRB 887-[136 LRRM 1298]; Gerawan Ranches, et al. (1992) 18 ALRB No. 5. This leads to the conclusion that the layoffs of May 30, 199S violated Section 1353(a) of the Act.

REMEDY

Having found that Respondent violated §1153 (a) of the Act by laying off the 27 Ollalie blackberry harvesters on May 30, 1996, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. In fashioning the affirmative relief delineated in the following Order, I have taken into account the entire record of these proceedings, the character of the violations found, the

nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14.

The affirmative action shall include reinstatement and backpay. As noted herein, it may be that some of the crew members would have been laid off prior to the end of the Ollalie blackberry harvest, even in the absence of Respondent's unlawful conduct. The dates of such layoffs would be uncertain, affected by such factors as overall availability of work, the work performance of the employees after May 29 and employee turnover based on causes unrelated to those found unlawful herein. Thus, with respect to any individual employee, it is impossible to determine whether he or she would have been laid off prior to the end of the" Ollalie blackberry harvest. It is not the employees' burden to be penalized for such uncertainty, but Respondent's, since it created the uncertainty by engaging in the conduct giving rise thereto. Accordingly, backpay will be ordered for all of the laid off employees through the conclusion of the 1996 Ollalie blackberry harvest. Conversely, it will not be presumed that the employees would have been retained to harvest other crops, and the backpay period will terminate as of the end of that harvest.

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

ORDER

Pursuant to Labor Code §11S0.3, Respondent Dutra Farms, its officers, agents, .labor contractors, successors and assigns shall:

1. Cease and desist from:

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

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

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

(a) To the extent that it has., not already done so, rescind the layoffs of the Ollalie blackberry harvest employees on May 30, 1996, and offer those employees 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 laid off from the Ollalie blackberry harvest crew on May 30, 1996 for all wages or economic losses they suffered as the result of their unlawful layoffs, through the conclusion of the 1996 Ollalie blackberry harvest. The award shall reflect any wage increase, including an

increase based, on average piece race earnings, increase in hours or bonus given by Respondent since the unlawful layoffs. The award shall also include interest to be determined in the manner set forth in E.W. Merritt Farms(1988) 14 ALR3 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 translations 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 issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from May 30, 1996, 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 the 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 its 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 laired to work for the company for one year following the issuance of a final order in this matter.

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

Dated: August 26, 1997

Douglas Gallop
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging we, Dutra Farms, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we did violate the law by laying off 27 employees, because employees had protested their wages.

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

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

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

Because you have these rights, we promise that:

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

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

WE WILL offer the Ollalie blackberry crew employees who were laid off on May 30, 1996 immediate reinstatement to their former positions of employment, and make them whole for any losses they suffered as the result of the unlawful layoffs.

DATED: DUTRA FARMS

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 112 Boronda Road, Salinas, CA 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE