Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TSUKIJI FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 96-CE-182-SAL 97-CE-11-SAL 97-CE-11-1-SAL 97-CE-32-SAL 97-CE-39-SAL 24 ALRB No. 3 (May 19, 1998)

DECISION AND ORDER[1]

On December 31, 1997, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached decision in which she found that Tsukiji Farms (Tsukiji, Respondent or Employer) had violated section 1153 (c) and (a) of the Agricultural Labor Relations Act (ALRA or Act)2 by threatening employees concerning their activities in support of the United Farm Workers of America, AFL-CIO (UFW or Union) , and refusing to rehire nineteen Union supporters for the 1997 season. Exceptions to the ALJ's decision were timely filed by Tsukiji, the UFW, and the General Counsel.

The Agricultural Labor Relations Board (ALRB or Board) has considered the attached decision of the ALJ in light of the record and the exceptions and briefs submitted by the parties and

[1] All decisions of the Agricultural Labor Relations Board, in their entirety, are issued as precedent for future cases. (Gov. Code, § 11425.60.)

[2] The ALRA is codified at Labor Code section 1140 et seq.

affirms the ALJ's findings of fact and conclusions of law, and adopts her recommended remedial order as modified herein.[3]

Remedy for Refusal to Rehire

In her recommended remedial order for the Employer's refusal to rehire the nineteen Union supporters, the ALJ ordered the Employer to offer the employees immediate and full reinstatement to their former positions of employment, or, if those positions no longer exist, to substantially equivalent positions, and to reimburse them for all economic losses resulting from their unlawful discharges or refusals to rehire. We find that the ALJ's remedy is somewhat overbroad, in that it orders the Respondent to offer backpay and reinstatement to nineteen discriminatees when the evidence indicated that Tsukiji hired only fourteen workers in 1997, and a few of them were apparently former employees who had supported the Union. Thus, there were apparently not enough jobs in 1997 to offer re-employment to all of the discriminatees even if the Employer had hired workers in a totally non-discriminatory manner. We will therefore adopt a remedial order requiring the Employer to offer

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[3] Chairman Stoker and Member Richardson agree with the ALJ that irrigator and truck driver Arturo Lemus acted as Respondent's agent in informing employees when work would start each year, as well as which employees could be offered re-employment (generally all those who had worked the prior year). However, they do not believe the employees would reasonably have assumed Lemus was acting on behalf of the Respondent when he told them in 1996 that the Employer was not going to hire union supporters the following year. Just as Lemus had no control over how much acreage Tsukiji planted, he did not have authority to make the actual decisions on whom to hire, and the evidence does not support a finding that employees perceived him as having such authority.

reinstatement to those of the discriminatees who would currently be employed but for Tsukiji's unlawful refusal to rehire them or consider them for rehire, and to make whole all discriminatees who have suffered wage losses or other economic losses as a result of the Employer's refusal to rehire them. The matter of how many jobs were available and when, as well as which particular employees, in the absence of any discrimination, would have been hired into those jobs, is a matter to be resolved in compliance proceedings.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent Tsukiji Farms, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

a. Threatening employees with loss of employment because of their involvement in protected concerted and union activities or support thereof;

b. Changing its hiring practices because of its employees' involvement in protected concerted and union activities or support thereof;

c. Refusing to rehire or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or

she has engaged in concerted activity or union activity protected by section 1152 of the Act;

d. In any like or related matter interfering with, restraining or coercing agricultural employees in the exercise of their 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 to those discriminatees[4] who would be currently employed but for Respondent's unlawful refusal to rehire them or consider them for rehire, immediate and full reinstatement to their former positions of employment, or if their former positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

b. Make whole all discriminatees who have suffered wage losses or other economic losses as a result of Respondent's unlawful refusal to rehire them. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonuses given since the unlawful refusals to rehire. The award shall also include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5;

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[4] The discriminatees are Cayetano Avalos, Iran Colimote, Rosendo Colimote, Francisco Garcia, Juan Garcia, Merced Garcia, Ramona Garcia, Fernando Lopez, Jesus Lopez Avalos, Jesus Lopez Rincon, Jose Lopez Rincon, Margarito Lopez, Octavio Lopez, Rodolfo Lopez, Jose A. Martinez, Arturo Ramirez, Benigna Ramirez, Bernardo Sandoval and Gabriel Tapia.

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 amounts due those employees named in Paragraphs 2 (a) and (b) above, under the terms of the remedial order as determined by the Regional Director;

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

e. Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season;

f. Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from May 27, 1996 to May 26, 1997.

g. Post copies of the attached Notice in all appropriate languages, for 60 days, in conspicuous places on its property, the exact period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to

replace any Notice which has been altered, defaced, covered, or removed.

h. Provide a copy of the signed notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order;

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

j. Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to

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

DATED: May 19, 1998

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

GRACE TRUJILLO DANIEL, Member

JOHN D. SMITH, Member

MARY E. McDONALD, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB or Board), the General Counsel of the ALRB issued a complaint which alleged that we, Tsukiji Farms, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by threatening and refusing to rehire the piece rate crew.

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

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

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

Because you have these rights, we promise that:

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

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

WE WILL offer the employees who were unlawfully refused rehire in 1997 immediate reinstatement to their former positions, and we will reimburse them with interest for any loss in pay or other economic losses they suffered because we refused to rehire them.

DATED: TSUKIJI FARMS

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California. 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.

CASE SUMMARY

Tsukiji Farms
(UFW)

24 ALRB No. 3
Case No. 96-CE-182-SAL, et al.

ALJ Decision

The ALJ found that the employer had violated Labor Code section 1153(c) and (a) by unlawfully threatening employees concerning their concerted activities in support of the United Farm Workers of America, AFL-CIO (UFW) and by refusing to rehire nineteen UFW supporters for the 1997 strawberry picking season. The ALJ recommended that the employer be ordered to cease and desist from its unlawful conduct, offer the discriminatees immediate and full reinstatement, and reimburse the discriminatees for all wage losses and other economic losses.

Board Decision

The Board affirmed the ALJ's findings of fact and conclusions of law. However, the Board modified the ALJ's remedial order, which it found overbroad. The Board noted that, because of the employer's reduction in acreage, there were apparently not enough jobs in 1997 to offer re-employment to all of the discriminatees even if the employer had hired workers in a totally non-discriminatory manner. The Board therefore adopted a remedial order requiring the employer to offer reinstatement to those of the discriminatees who would currently be employed but for the employer's unlawful refusal to rehire them or consider them for rehire, and to make whole all discriminatees who had suffered wage losses or economic losses as a result of the employer's refusal to rehire them. The Board stated that the issue of how may jobs were available and when, as well as which particular employees, in the absence of any discrimination, would have been hired into those jobs, was a matter to be resolved in compliance proceedings.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: Case Nos.96-CE-132-SAL TSUKIJI FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, _____Charging Party.	)	Case Nos. 97-CE-11-SAL 97-CE-11-1-SAL 97-CE-32-SAL 97-CE-39-SAL

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge: This case was heard by me in two phases over four weeks in July and September 1997, in Salinas, California. It arises from five charges filed by the United Farm Workers of America, AFL-CIO ("Union" or "UFW") with the Agricultural Labor Relations Board ("ALRB" or "Board"). The Regional Director of the Board's Salinas regional office consolidated the charges and issued a First Amended Complaint ("Complaint"), portions of which "were amended on August 29, 1997, which alleges that Respondent Tsukiji Farms ("Respondent," "Company" or "Tsukiji Farms") violated sections 1153 (a) and (c) of the Agricultural Labor Relations Act[1] ("ALRA" or "Act") by: (1) interrogating and threatening employees in its piece rate crew; (2) laying off three crew members; (3) reducing its acreage for the 1997 season,[2] and (4) refusing to rehire 22 crew members[3] for the 1997 season all because of the

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

[2]At the close of General Counsel's case, I granted Respondent's motion to dismiss this allegation which is contained in Charge 96-CE-39-SAL since it was filed more than six months after the Union knew of the reduction. See discussion infra. I also dismissed paragraph 13 of the Complaint for lack of evidence.

[3]On August 29, 1997, the Salinas Regional Director issued an Amended Complaint deleting Juan Avalos because Avalos was rehired

crew' s support: for the Union. Respondent' s Answer denied it interrogated or threatened employees and admitted the reduction in acreage, the layoffs and the refusals to rehire but denied they were unlawful.

The Union intervened, and all parties were represented at, and given full opportunity to participate in, the hearing. General Counsel, Respondent, and the Union each filed post-hearing briefs. Based on the entire record,[4] including my observation of the witnesses, and after consideration of the parties' arguments and briefs, I make the following findings of fact and conclusions of law .

JURISDICTION

Respondent is an agricultural employer, the Union is a labor organization, and the alleged discriminatees are agricultural employees within the meaning of sections 1140.4 (a), (f) and (b), respectively, of the Act. Howard Tsukiji, John Tsukiji and Luis Calderon occupy the positions set forth in paragraph 10 of the Complaint and are supervisors within the

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and deleting a duplicate listing for Jesus Lopez leaving 21 workers claiming they were discriminatorily refused rehire.

[4]References to the hearing transcript will be denoted by page number in parentheses . Respondent' s and General Counsel' s exhibits will be identified as RX or GX number, respectively.

meaning of section 1140.4 (j) of the Act.[5] Arturo Lemus' supervisory status is resolved infra.

STATEMENT OF THE CASE

Tsukiji Farms is an informal partnership consisting of John Tsukiji and Howard Tsukiji, with its principal place of business in Watsonville, California, which has been in the business of growing and harvesting strawberries for over 40 years. When the events in this case occurred, John Tsukiji had semi-retired and had turned over day to day management to his son Howard who has been involved in the company for about 22 years.

In 1996, the Company had some 63 acres planted in strawberries.[6] There were two crews: an hourly crew of about 24 or 25 workers which worked only on the San Juan Ranch and a piece rate crew of about 63 workers at peak (RX4) which worked on both the Riverside (also known as Basor) and Pini ranches. Workers usually returned to Tsukiji Farms each year; many of the alleged discriminatees had worked for Respondent for more than a decade--

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[5]In the interest of brevity, I will sometimes refer to Howard or John Tsukiji by their given names, and when I use only the surname, I am referring to Howard Tsukiji.

[6]Howard Tsukiji originally testified it was 54 to 56 acres, but his later testimony was more precise. (Compare 11-12 with 1439.)

some close to 20 years.

In early May 1996, for the first time in the 40 years Tsukiji Farms had been operating, it was faced with a union organizing campaign.[7] Only the piece rate crew was involved in the organizing.[8] A few days later, on May 10, Howard Tsukiji had a labor management consultant speak to the crew, a number of whom noisily voiced their support for the Union and said they did not want to listen.

Soon thereafter, on May 18, for the first time in the Company's history, there was a layoff. Howard laid off 16 workers, and two days later the vast majority (approximately 46 out of 63) of the piece rate crew refused to start work demanding that Howard rehire the laid off workers.[9] He did' so, but then on

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[7]On May 6 and 13, 1996, the UFW presented Howard Tsukiji with lists of the names of 49 piece crew workers who were organizing co-workers. '(GCX 6. The English and Spanish forms are essentially the same. (552.)) The UFW then filed three Notices of Intent to Take Access beginning on May 23, 1996, (GCX 1-3) and two Notices of Intent to Organize (on May 24 and August 6, 1996; GCX 7-8 .)

[8]Hereafter, references to "the crew" will refer to the piece rate crew unless otherwise stated.

[9]Those workers shown on GCX5 to have worked 4 hours on May 20 participated in the work stoppage (7 of these had been laid off); the 13 who worked 5 hours did. not participate. Five people worked less than 4 hours, and it is not known whether they engaged in the stoppage or not. (621-622.)

June 7 laid off 10 workers.

Thereafter, again for the first time in its hiscory, the Company reduced the acreage planted for the next year's harvest (i.e. 1997) by more than 50% (from about 63 acres to 31 acres). The reduction in acreage affected only the piece rate crew where the Union organizing had occurred, not the San Juan crew which did not engage in Union activity.

Thus, whereas in all past years there had been work for everyone who wanted to return, in 1997, the Company hired only 15 workers for the piece rate crew compared to the approximately 68 it hired in 1996. Also, Howard Tsukiji changed the hiring system so that in 1997 workers in the piece rate crew had to report personally to him rather than being able to report either to him, his father or Arturo Lemus. In 1997, there was no Union activity in either of the two crews.

The primary issues in this case are whether the above actions were llegally motivated to curb and retaliate for the .crews' support for the Union or were motivated by legitimate business considerations which coincidentally affected only the crew which had supported the Union.[10] Additionally, there are

[10]As noted above, I dismissed the allegation that the reduction in acreage was unlawfully motivated (paragraph 18 of

allegations that workers were unlawfully interrogated and threatened which Respondent denies.

COMPANY OPERATIONS

Tsukiji Farms provided strawberries for both an export market, i.e. Japan, and for the domestic (also called "commercial") market. The hourly crew at the San Juan ranch picked primarily for export whereas the piece rate crew picked mainly for the domestic market. The berries picked for export generally required more time because they were smaller or needed more sorting so the piece rate crew could not make as much money harvesting them. However, the piece rate crew would did pick for export if needed to help fill an order.

There was no interchange between the crews (except that one worker went from the hourly to the piece rate crew). The Tsukijis supervised the hourly crew. Luis Calderon was the

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the Complaint) because the charge was not filed within the requisite six months. (Section 1160.2.) By October or November the Union knew Respondent has planted so little that it would •need very few workers the next season, but the charge was not filed until June 29, 1997. Additionally, the Complaint does not allege the May layoff was unlawful, and I will not consider it as a separate unfair labor practice. However, evidence of both events is properly considered as background evidence which may shed light on the other claimed unfair labor practices. (Mechanics Laundry and Supply, Inc. of Indiana (1979) 240 NLRB 302 citing Local Lodge No. 1424, International Association of Machinist, AFL-CIO, et al. (1960) 362 U.S. 411.)

foreman of the piece rate crew and did not super-vise the hourly crew.

Some employees began work in February or March with pre-harvest chores. Most returned when the harvest began which was usually late March or early April. Some workers typically left before the end of harvest while others remained through the late summer/fall planting and left in late October or November.

THE SUPERVISORY STATUS OF ARTURO LEMUS

At all times material, Arturo Lemus was an irrigator and truck driver who regularly had other duties which call his status into question. Each year in February or March, Lemus and other workers performed weeding, thinning, and correcting erosion problems from the winter, referred to as laying down the plastic. Foreman Calderon was not present because he did not begin work until April or May. Howard Tsukiji testified he was in charge of the workers, deciding, for example, when and where they would put down the plastic, but he also acknowledged that he was sometimes at the ranch for only an hour or two a day and might even be absent for a day or two. Thus, Lemus was the only person regularly on the ranch to direct the day to day work.

In addition to directing the pre-harvest work, Lemus testified he super-vised the harvest until Calderon arrived--

usually a week or two after the harvest started. Thereafter, Lemus filled, in for him on Sundays (because Calderon did not work that day) and also for short periods during the other workdays when Calderon was absent.

At the start of each harvest season, including 1996,[11] Howard Tsukiji told the crew that when Lemus and two other workers (Alejo and Adrian) gave directions to the crew, it was the same as Tsukiji himself doing it. Calderon was periodically absent during the day, and Lemus would instruct the crew to make sure they maintained a quality pick because the cooler paid substantially less for "standard" grapes. , Lemus would also tell workers which rows to pick. According to Howard Tsukiji, neither of these functions required independent judgment because Lemus simply passed on information from the cooler about quality, and the workers knew which rows to pick.

Numerous crew members testified they were hired by Lemus because they reported to him at the start of the season, and without checking with Howard or John he would put them to work immediately or tell them to start the next day. Howard Tsukiji acknowledged that absent instructions to the contrary

[11]All dates hereafter are 1996 unless otherwise stated.

from him, which was uncommon, Lemus had the authority to put people to work if they had worked the prior season. New workers, on the other hand, had to be hired by Howard or John Tsukiji.

Several workers testified that in 1994 Lemus fired a worker named Pedro Delgado. Lemus denied ever firing Delgado or anyone else. According to Howard Tsukiji, Lemus did not have the authority to fire anyone; in fact, Calderon credibly testified that even he could not fire a worker.

Additional indicia of supervisory authority are: (1) Lemus was paid the same hourly wage as Calderon (and Alejo Padilla) while the crew was paid a lower hourly wage with a piece rate bonus; (2) Calderon, Lemus, Padilla and Adrian Garcia did not have employee numbers as did the rest of the crew; and (3) their names were listed at the top of the payroll sheets separated from the crew members numbers.[12] (RX4 .)

Section 1140.4 (j) provides in pertinent part that a supervisor is:

> any individual having the authority in the interest of the employer, to hire...discharge, assign, reward, or - discipline other employees, or the responsibility to direct them. . .or

[12]Tak Tsuchimoto, a driver and sometime irrigator, is also listed at the top of the crew sheets.

> effectively to recommend such action, if...the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statute is worded in the disjunctive, so the presence of any one element is sufficient.

Since Lemus was generally able to put people to work without checking with anyone, it is clear why workers believed he hired them. However, I credit Howard Tsukiji that Lemus did not exercise any discretion or independent judgment because, except for 1997, there was always room for returning workers. Thus, his role in hiring does not make him a supervisor.

I do not find the evidence that Lemus fired Delgado convincing. Workers' recollections as to what occurred varied, and there is ho evidence that Lemus had more authority than Calderon. I consider now his role in directing the crew.

This case has many similarities to Taylor Farms ("Taylor") (1994) 20 ALRB No. 8. In Taylor, an irrigator was paid a salary and provided with a company truck. He made sure the irrigators moved the main lines, set the water properly, and transferred irrigators to other fields in compliance with his superiors' instructions. He replaced the foreman every other Sunday, although on these occasions he consulted with the ranch

manager. The Board found he was merely an assistant to the ranch foreman and was not a supervisor.

In another ALRB case,[13] the Board held that subforemen who did not do the same work as their crews but merely followed the orders of the ranch foremen and conveyed those orders to the crew were not supervisors even though they were paid at a higher rate than the crew and even though the crew was told that the subforemen's orders are the ranch foremen's orders. The subforemen had no authority to hire, fire or impose discipline.[14]

Based on the foregoing, I find that Lemus' duties of filling in for Calderon and directing the work of the crew do not make him a supervisor. Similarly, the pay differential and the

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[13]Ukegawa Brothers, Inc. ("Ukegawa II"} (1983) 9 ALRB No. 26; See also, National Labor Relations Board v. Swift & Company ("Swift") (9th Cir. 1957) 240 F. 2d 65, where the Ninth Circuit upheld the finding of the National Labor Relations Board ("NLRB" or "national board") that plant clerks were not supervisors because their duties in filling in briefly in the foremen's absences and in directing other workers were "merely routine or clerical [in] nature." (at p. 66.)

[14]See also Ukegawa Brothers ("Ukegawa I") (1982) 8 ALRB No. 90 and Superior Farming Co. v. Agricultural Labor Relations Board ("Superior Fanning") (1984) 151 C.A. 3d 100. which found no supervisory status where the direction of work was similar to this case. I do not rely on Tenneco West (1981) 7 ALRB No. 12 cited in Respondent's brief at p. 46 because the Board specifically declined to address the supervisory status of the foreman's assistant.

separata listing on the payroll records are insufficient to establish supervisory status. (Superior Farming, Ukegawa. II.)

However, the inquiry as to whether Respondent is liable for his conduct does not end here because the question remains whether he is an agent. The seminal case under the ALRA is Vista. Verde Farms v. Agricultural Labor Relations Board ("Vista Verde") (1981) 29 Cal. 3d 307 where the California Supreme Court applied longstanding precedent under the National Labor Relations Act ("NLRA") that technical rules of agency and strict principles of respondeat superior do not control in determining whether an employer is responsible for the coercive conduct of others.

In appropriate circumstances, an employer may be held responsible for unlawful conduct by a nonsupervisor even if the employer did not direct, authorize or ratify the conduct if the nonsupervisor has apparent authority to speak for the employer. (Vista Verde; Frank Foundries Corporation (1974) 213 NLRB 391.) Such liability attaches if employees could reasonably believe the 'coercing individual was acting on behalf of the employer, or if the employer has gained an illicit benefit from the misconduct and could either prevent future such conduct or alleviate the deleterious effect of such misconduct on the workers' statutory

rights.

The test is subjective, and the employer may be responsible even if it is "utterly unaware of the unlawful coercive actions of a subordinate." (Superior Farming p. 122.) However, the rule is not one of strict liability. Responsibility must be assessed based on the broad policies of the underlying statute.

In Vista Verde, the employer was held liable for the coercive conduct of a labor contractor because, like a supervisor or foreman, he could hire and fire workers, so his coercive conduct would have a strong effect by virtue of his authority. The court noted, however, that even in the absence of such authority liability could attach. It cited an early case under the NLRA where an employer was held responsible for the actions of lead men who could not hire or fire, but exercised general authority over other workers, and so "were in a strategic position to translate to their subordinates the policies and desires of the management."[15]

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[15] I.A. of M. v. Labor Board (1940) 311 U.S. 72, (at p. 80.); See also Superior Farming and Paul W. Bertuccio and Bertuccio Farms ("Bertuccio") (1979) 5 ALRB No. 5 for other instances where nonsupervisors without the authority to hire or fire who relayed management's instructions and directed employees were deemed

In this case, the crew could reasonably believe Lemus had authority to act on behalf of the employer. Except for 1997, at the start of each season, workers could talk to him or Respondent's owners John or Howard Tsukiji in order to start work. Although I have found Lemus did not have the authority to hire within the meaning of the statute, the issue here is the workers' subjective belief and Lemus' apparent authority. The evidence shows the workers viewed each of the three as equally able to give them work and were unaware of any limitations on Lemus' ability to hire.

Additionally, at the start of each harvest, the crew was told to follow Lemus' directions as if they had come from Howard. In the pre-harvest work, Lemus oversaw the day to day work of the workers, and he directed the work at the beginning of the harvest until foreman Calderon's arrival. Thereafter, he regularly filled in for Calderon and passed on work instructions from management.

In keeping with the basic policy of the Act that employees should be able to freely choose whether to have a union or not, I find that Respondent, having routinely used Lemus to

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agents.

act on its behalf, should be held liable for his conduct. To find otherwise would allow Respondent, assuming arguendo that Lemus made the remarks attributed to him, to gain an illicit benefit because of the intimidating effect the comments would have on support for the Union while avoiding responsibility.

UNION ACTIVITY AT THE COMPANY

As noted above, on May 6 and 13, the UFW handed Howard Tsukiji lists of piece rate crew workers who were members of the Union's ranch organizing committee. He testified he tossed them in his pickup and did not look at them until the spring of 1997 when the General Counsel sought an injunction in this matter. In any event, as of May 10, he knew that the piece rate crew was the source of the union activity since he had labor consultant Joe Sanchez speak only to that crew.

Every alleged discriminatee' s name is on the lists except possibly Jose A. Martinez. (GCXS.) I cannot be sure about him because there are two illegible signatures. Forty nine workers' names are on the lists; only five of them were hired in 1997.[16]

Each of the 21 alleged discriminatees wore UFW buttons

[16]Juan Avalos, Jose Hipolito, Miguel Martinez (senior) Guillermo Rodriguez and Salvador Villagomez.

at work in the presence of the Tsukijis, Luis Calderon and Arturo Lemus. Each of them was among the approximately 46 workers, supported by the presence of UFW organizers, who participated in the work stoppage on May 20. Howard Tsukiji knew which workers participated in the stoppage by the number of hours each individual worked that day.

THE LABOR CONSULTANT' S SPEECH

On May 9, just a few days after the UFW gave Howard Tsukiji the ranch organizing committee list, he asked Joe Sanchez, a labor management consultant whom he had known for about 28 years, to come to the ranch because he was "having some labor problems...some Union organizing activity....." (558.) The next day, Tsukiji gathered the piece rate crew together on paid work time, and Sanchez addressed them.

The crew was reluctant to listen to Sanchez, and several workers loudly stated they had decided to join together, already knew their rights and did not need to listen to him.[17] Sanchez had to speak loudly in order to be heard.

Howard Tsukiji, Luis Calderon and Arturo Lemus were present during the speech. Sanchez and Tsukiji testified the

[17]It will be recalled that most of the crew had already signed the organizing committee lists. (GCX6.)

purpose of the speech, was to inform workers about their rights under the law, and Sanchez testified that after he identified himself that was the first thing he told the crew.

In contrast, the workers called by General Counsel characterized the speech not as one informing them about their rights but as an anti-union speech with Sanchez telling them the Union was no good, e.g. it would take their money but not help them. (See testimony of Jose A. Martinez, Jesus Lopez Avalos, and Iran Colimote.) Martinez described Sanchez as scolding and trying to terrify the workers.

General Counsel's witnesses all testified Sanchez told them about, and even named, local companies which closed after the Union came in and specifically warned them this could happen to them too. Their recollections differed somewhat, as one would expect, but the essential thrust of their testimony was consistent.[18] Their testimony was confirmed by Respondent's witness, foreman Luis Calderon. Calderon tried to support management by testifying that it was not an anti-union speech, and that Sanchez, in fact, told the workers the Union was "pretty

[18]In addition to the testimony of the witnesses named above, see also the testimony of Juan Garcia, Merced Garcia, Gabriel Tapia, and Jesus Lopez Rincon.

good."[19] (231.)

Even by Sanchez' own account, however, his speech was less about telling the workers what their rights were than about why the Union was not a good idea and could cost the workers their jobs. He told them they had the right to join or not join the Union and to sign papers or not. He told them they would have to pay Union dues and initiation fees.

But, the primary thrust of his speech, and the message the workers took away from the meeting, was that bringing in the Union could mean they would lose their jobs. He admonished them that the Union had caused people to be fired because they did not attend Union meetings, did not comply with certain Union demands or did not pay for the Union's Citizen Participation Day. Thus, he urged them to check out what kind of power the Union would have over them and to demand' a copy of the Union constitution.

His own accout shows he spent much of the time telling the crew about specific local companies which had closed down after the Union had won elections, and he in no uncertain terms attributed the closures to the Union's presence. He told them that one of the first strawberry companies to have a contract

[19]I do not credit this statement since it is at odds with Sanchez' own account of what he said about the Union.

with the UFW (Pik-N-Pak} closed down, thereby putting about a thousand workers out of work.

He also stated that the day after the UFW was elected at Interharvest, the company called a press conference to say it was shutting down. He sarcstically told the crew that he guessed the workers no longer had to worry about the harassment they had complained about from the foremen because there was no longer any company and so no more foremen. He told them they needed to know such information and to investigate.

In addition, he told them about companies even closer to home. He listed three Watsonville companies--J.J. Crosetti (spelled "Procetti" in the transcript) , West Coast Farms and Sakata Farms which had closed and cautioned the crew that "since the Union had come in most of those companies were gone now and, you know, the workers were left at their own, you know, findings."[20] (574.)

[20]General Counsel, in an apparent effort to show that a -recent example of closure would have an even more chilling effect than the examples Sanchez acknowledged using, tried to establish that Sanchez identified a Salinas company named VCNM as having disked its fields and shut down after its workers voted for the Union. I take administrative notice of the Board's files that in 1996 the General Counsel settled a case wherein it alleged that VCNM had unlawfully disked its fields after the UFW won an election; however, I find the recollection of the workers is not clear enough to support a finding that Sanchez named VCNM.

In addition to the foregoing, several of General Counsel's witnesses testified, in essence, that Sanchez stated that if the Union came in the workers would lose because Howard had a lot of money and, if he chose not to plant or to disk the fields, he could afford to keep going for a long time, but the workers would lose because they needed the money from their jobs.[21] (See testimony of Jose A. Mart Inez, Juan Garcia, Merced Garcia and Gabriel Tapia.)

Foreman Calderon did not recall such remarks. Howard Tsukiji testified he could not understand much of Sanchez[1] speech because his Spanish is not that good.[22] None of the three workers called by Respondent testified about this incident; nor did Arturo Lemus. So, the only direct contradiction of the workers' testimony is Sanchez' denial that he did not make the remarks because they would be illegal, that he had conducted 350

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[21]Especially in the second phase of the hearing, I found Martinez quite credible. Here, too, he struck me as sincere and balanced. He confirmed Sanchez' testimony that the workers did not want to listen to Sanchez, and he seemed to try to be accurate and careful. For example, he stated that Sanchez did not actually say Tsukiji Farms would close but instead told them about a company that had closed because of the Union and that this could happen to them.

[22]He could speak and understand Spanish well enough to communicate about normal work issues but use Calderon who speaks both English and Spanish if he had to do more than this.

to 400 campaigns and knew what was legal and what was not.

It is not as easy as Sanchez suggests to draw the proverbial bright line between a threat and a legitimate prediction. He did not read from a prepared text or even from notes. Nor did he record the speech which, of course, would be the best way to tell what was actually said. His manner was in fact quite casual about such an important issue.

I have taken these things into account as well as the testimony of General Counsel's witnesses which was corroborative without sounding contrived. I am inclined to believe that Sanchez did not make such a blatantly unlawful statement, but instead conveyed the desired message through his other remarks which were closer to the line.

Thus, I find that Sanchez told the workers it would not be good for them to support the Union which would take their money but not protect them; it would have control over them and could cause them to lose their jobs if they did not follow its rules. Most importantly, he told them that several companies in the Salinas and Watsonville area had gone out of business because the Union had come in and the same thing could happen to them.

Threats to shut down the employer's business are viewed by the NLRB as among the most serious violations. (NLRB v. So-Lo

Foods, Inc. (4th. Cir. 1993) 985 F.2d 123 citing NLRB v. Jamaica Foods, Inc. (2d. Cir. 1980) 532 F. 2d 208.) The seminal case setting forth the guidelines for distinguishing between permissible pre-election predictions and unlawful threats of reprisal is NLRB v. Gissel Packing- Co. ("Gissel") (1969) 395 US 575. Under Gissel, an employer is free to tell its employees its general views about unionism and even its specific views about a particular union, as long as the communications do not contain a "'threat of reprisal or force or promise of benefit.'"

The employer may also make predictions as to the precise effects s/he believes unionization will have on the company. But, in doing so, the prediction must be "carefully phrased on the basis of objective fact to convey [his] belief as to demonstrably probable consequences beyond his control...." (p. 618). Quoting from the court below, the Supreme Court opined that "' [conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant 'is not a statement of fact unless, which is most improbable, the. eventuality of closing is capable of proof.' 397 F.2d 157." (pp.618-619).

According to the Supreme Court, "the focus of the

inquiry as to whether statements are unlawful is " ' [w]hat did the speaker intend and the listener understand? In finding that the remarks violated the NLRA, it noted the realities of the workplace where employees are "particularly sensitive to rumors of plant closings, [and] take such hints as coercive threats rather than honest forecasts." (p. 619-620.)

Sounding a similar note, the California court in Abatti Farms, Inc. v. Agricultural Labor Relations Board (1980) 107 C.A.3d 317, opined that in balancing an employer's right of free speech and its employees' right to choose a bargaining representative in a noncoercive atmosphere, it had to be mindful of the economic dependence of the employees on their employer and the consequent tendency of the former to "'pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.'" .(quoting from Labor Board v. Virginia Power Co. (1941) 314 U.S. 469). (at p. 327.)[23]

[23]The court in Abatti upheld the ALRB's determination that a foreman was threatening an employee with reprisal when he warned that if the UFW won, everything would get "fucked up" and instead of improving his situation, the employee would end up with nothing. The court considered that the statement as well as.. various interrogations were made in the context of a contested union election between the UFW and the Teamsters in which the employer "bitterly opposed" the UFW. See also, Akitomo Nursery (1977) 3 ALRB No. 74 where a threat to close was found unlawful absent any cited proof by the employer that it would have to

Limitations on employer free speech, are greater during "'a. nascent union organizational drive, where employers must be careful in waging their anti-union campaign. ' " (Prohoroff Poultry Farms v. Agricultural Labor Relations Board (" Prohoroff") (1980) 107 C.A.3d 622 quoting Gissel.) Keeping in mind employees' sensitivity to intimations of job loss, the Fourth Circuit Court of Appeals held that a manager's statements to employees that he had worked as a manager at a unionized plant where there had been a strike and the plant had closed constituted a threat because the natural implication was that there was a causal relationship. The NLRB and the court discounted the manager's protestation that he never implied the union situation had anything to do with the closure. (Fieldcrest Cannon, Inc. (4th Cir. 1996) 153 LRRM 2385, 2617, enforcing in pertinent part 318 NLRB No. 54.)

The manager's statement was one of only a number of unfair practices. In that same case, the company posted fliers threatening closure. One showed a group of workers outside a

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close or curtail operations because of the union; Jasmine Vineyards, Inc. (1977) 3 ALRB No. 73 where the employer unlawfully said he would have to pull up his vines if the union won.

plant with, a "closed" sign on the gate and the caption: "In the past decade, scores of textile mills have closed in North. Carolina. Thousands of workers have lost their jobs. Fieldcrest Cannon lost $41 million last year. Vote No Union." These, too, violated the NLRA.[24]

In contrast, accurate, fact-based expressions of potential consequences of unionization beyond the employer's control are not unlawful. (Action Mining, Inc./Sanner Energies, Inc. ("Action Mining") (1995) 318 NLRB 652. The fact that the employer had adequately repudiated various unfair labor practices was a significant factor in the NLRB' s evaluation of the totality of the circumstances against which the plant closing statements were considered.[25]

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[24]Similarly, sending employees newspaper articles which talked about store closings in the area and/or employees losing jobs, and using them in discussions with the employees before the election, strongly suggested that the employees currently had job security, but if the union won that security would be jeopardized. The NLRB found the articles did not provide the necessary objective basis for Respondent's implicit claim that unionization would imperil employee job security for reasons beyond its control. (So-Lo Foods, Inc. (1991) 303 NLRB 749, enf'd. NLRB v. So-Lo Foods, Inc. (1993) 985 F. 2d 123.)

[25]In Dierks Forest, Inc. v. N.L.R.B.. (8th Cir. 1957) 385 F.2d 43, the court refused to enforce the NLRB's decision finding a supervisor's threat that the owners of the company had plenty of money and would shut the plant down if the union came in even

Applying tine foregoing legal principles to the instant case, I find that Sanchez' remarks were unlawful. Unlike the evaluation of Lemus' supervisory status, the issue here is not the workers' subjective reaction to the speech. Instead, the test is objective, i.e. whether the statements "could reasonably be construed to threaten, restrain or coerce employees in the exercise of their section 1152 rights." [26]

Although the remarks found unlawful in Fieldcrest go further than Sanchez' admitted comments in that the former urge a "no union" vote, there is a common thread. In both cases, there is a clearly implied threat that other companies closed when a union was elected and the same thing could happen to the workers listening to the speeches.

I find the conclusion one would expect a reasonable person to draw from Sanchez' remarks is that supporting the Union could lead to Tsukiji Farms disking its fields and closing, just

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though there were various anti-union comments by a supervisor where there was no systematic pattern of intimidation absent "other circumstances fairly representative of the Company's anti-union attitude." (p. 50.') Although there had been no repudiation as in Action Mining, in evaluating the surrounding circumstances, the court considered that the company had bargained amicable with various unions at other plants and reached numerous contracts.

[26]See Ukegawa, supra.

as the companies described by Sanchez had done. Under Gissel and the other cases cited, I find the remarks were an unlawful threat rather than a permissible, fact-based prediction of consequences beyond Respondent's control.

INTERROGATION

On a rainy day in May, John Tsukiji pointed to several crew members who were wearing UFW buttons and asked why they were supporting the Union and wasn't-he a good boss.[27] None of the workers responded, and Howard Tsukiji indicated to his father that he should be quiet.

An interrogation as to union activity or sympathy is not a per se violation of the law. ' The test is whether under all the circumstances the questioning reasonably tends to coerce, restrain or interfere with employees' free exercise of their statutory rights.[28] The test is objective, i.e. whether a reasonable person would be coerced, etc.

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[27]Although John Tsukiji denied the incident, his memory was faulty, and Howard Tsukiji did not contrad.ict the workers' testimony.

[28]Abatti Farms, Inc., and Abatti Produce, Inc., ("Abatti"} (1979) 5 ALR3 No. 34; Rossmore House (".Rossmore") (1984) 269 NLRB 1176 , enf' d sub nom. Hotel Employees and Restaurant Employees Union, Local 11 v. National Labor Relations Board (9th Cir. 1985) 760 F.2d 1006; Blue Flash Express, Inc. (Blue. Flash} (1954) 109 NLRB 591.

Although, some cases suggest the NLRB is less likely to find violations where the employees interrogated are open and active union supporters, in each case the NLRB considered the surrounding circumstances. In a later case, the NLRB specifically held the same analysis applies to all interrogations whether or not the employees are open union supporters. (Compare B.F. Goodrich Footwear Co. (1973) 201 NLRB 353 and Rossmore with Sunnyvale Medical Clinic (1985) 277 NLRB 1217.)

Among the circumstances the NLRB considers in determining which interrogations interfere with employees' free-exercise of their rights are: time, place, personnel involved, the employer's known position as to the union, information sought and method of interrogation, whether there was a proper purpose to the inquiry and an assurance there would be no reprisals. (Stoody Company (Stoody} (1995) 320 NLRB 18; Liquitans Corp. (1990) 298 NLRB 292; Rossmore.)

Thus, whether the person asking the questions is a high 'level manager or owner, whether the incident occurs in the manager's office or a neutral setting, whether there is a history of casual conversation about unionization and other work issues between the persons, whether there are other unfair labor

practices, and other such, factors are relevant. ("Stoody"; "Rossmore"; "Abatti. ") .

The incident with John Tsukiji is the only alleged interrogation. A number of the surrounding circumstances are similar to those in cases where a violation was found. The incident took place the very same month organizing began, and it was the owner of the company asking the questions. Both factors are likely to have a chilling effect. There was no history of casual discussion between management and workers of issues such as unionization, no valid purpose to the inquiry, no assurances there would be no reprisals, the conversation was at work, and he was clearly upset as evidenced by his asking whether he had not been a good boss.

Other circumstances mitigate against finding a violation. At the time of the incident there is no evidence any unfair labor practices had occurred because it is not clear whether the labor consultant's speech had already taken place. Also, the questions were directed to the workers generally as a group even though he pointed to some of them.

There is also a suggestion from the tenor of the witnesses' testimony that John Tsukiji was not expecting a

response but instead was expressing concern and. frustration. Further, any coercive effect was mitigated somewhat by Howard's prompt directive to his father to stop. Considering all the circumstances, I find the evidence is insufficient to establish a violation of section 1153(a).

THE LAYOFFS

As noted above, on May 18 Respondent had the first mid-season layoff in its 40 years of operation when Howard Tsukiji laid off 16 workers from the piece rate crew.[29] He first laid off those who had only begun work in 1996 and followed with those who did not complete full seasons so that when the latter left, he would not be short-handed. Of the 16 workers laid off, only two (Ricardo J. Corona and Guadalupe Garcia) did not sign the organizing committee list, and 5 of them are alleged discriminatees .[30]

Tsukiji testified he felt the layoff was necessary for several reasons. There was a lack of work primarily caused by 12

[29]I have explained previously that I will not entertain a claim the layoff constituted a separate unfair labor practice but will consider it only as background evidence which may shed light on the other specifically alleged unfair practices.

[30]Miguel Alvarado, Iran Colimote, Rosendo Colimote, Fernando Lopez, and Jorge Martinez.

acres of Selva berries en the Riverside ranch being infestated with two-spot ted mite and also a fungus causing root rot and crown rot. The low production from this acreage, which he disked under in late June or July, made it uneconomical to harvest the berries, although he gave no specific economic data to support his assertion.

Additionally, he believed (erroneously) that he had to pay employees for a minimum 4 hours,' work each day even if they worked less, and he was having to create work in order not to pay them for doing nothing.[31] Lastly, he feared if workers were not earning enough they would leave, and when those who did not generally finish the season left, he might have too few people to harvest his remaining crop.

Tsukiji's testimony about the condition of the 12 acres was corroborated by Mike Nakagawa, a licensed pest control

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[31]Industrial Welfare Commission Order 14-80 provides that an employer must pay a worker who is scheduled and appears for work for at least half of the normally scheduled workday. Thus, only if the normal workday is 8 hours would an employer have to pay for a minimum of 4 hours' work. The rule does not apply where the lack of work is caused by for circumstances beyond the employer's control such as weather. General Counsel showed Howard payroll records for late April and early May 1995 where workers were paid for less than four hours' work on three occasions. Tsukiji could explain only one of them and speculated it might have rained the other two days.

advisor (PCA) , who testified, for Respondent. Nakagawa identified RX3, 9 and 10 as photographs of the 12 acres showing the mite infestation and the fungus.[32]

Nakagawa also testified that Howard Tsukiji followed various recommendations Nakagawa made to try to get rid of the problems. Respondent cites this testimony as evidence that it did everything possible to save the crop and did not cease harvesting and disk it under in order to provide a reason for laying off Union supporters. However, the evidence is of limited usefulness[33] since all of Nakagawa's recommendations, except letting the plants dry out, were made and implemented before the Union activity was evident.[34]

Cutting down on water to let the plants dry out

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[32]The crown is the area of the plant where the green stems stop. In both crown and root rot, insufficient nutrients are brought to the leaves. In the photos, the crowns and roots should be whiter than they are; the reddish leaves show the presence of the two-spotted mite.

[33]The costs of implementing the recommendations are meaningful to the extent that they added to Respondent's overall investment in the crop.

[34]RX 14 is an invoice for a chemical respray dated May 2. RX 15 (a-d) are invoices for predator mites dated March 18 and 27 and April 2 and 26. RX 15 (a-d) are invoices dated. April 2, 4, 24 and 25 for chemicals shipped to Respondent on those dates. May 6 was the earliest evidence of Union activity.

somewhat was Nakagawa's recommendation to combat the fungus. According to Nakagawa, the photos show the furrows are dry because they are light colored. His testimony corroboratas that of the workers that the fields were not being watered and contradicts that of Arturo Lemus 'that he never let up on the watering of the twelve acres.

Despite Nakagawa' s repeated trips to the fields and his expertise regarding the condition of the plants, Howard Tsukiji did not consult him about whether to disk the fields. Nakagawa testified he did not recommend to Howard Tsukiji that he disk them because it would be an economic decision whether to do it.

Respondent did not cite specific economic date to support Tsukiji's contention that it did not make economic sense to continue harvesting the 12 acres by, for example, comparing ongoing cost to harvest with income received. However, Tsukiji's assertion is corroborated to some extent by Nakagawa's testimony that only 30 to 50 percent of the crop was marketable. Additionally, he recouped some money by returning the 12 acres to the lessor after he disked it since the lessor was able to make use of the acreage.

RX5 shows that the 12 acres of Selva berries were last harvested on May 14, and RX3 shows a substantial drop in the

number of cartons harvested piece rate after that time. RX1 shows earnings dropping off the week before the layoff, and RX4 shows an increase from 1 to S hours of non-picking work from the week of May 5 to 11 to the week of May 12 to 18.[35]

The first regular workday after the layoff was Monday, May 20, when over two-thirds of the piece rate crew engaged in a work stoppage, demanding that Howard Tsukiji rehire the laid off workers and explicitly telling him they wanted him to keep the whole crew working. He told them he would try it, but on June 7 he laid off 10 workers. This actually left him with 13 fewer workers than he had on May 13 since some of those laid off did not return to work and others left for unknown reasons. (RX1 and RX2.)

On advice of counsel, he changed the criteria and laid off the most recently hired. With one exception, he followed that advice.[36] Of the 10, only one (Juan Sandoval) was not on

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[35]RX4 are the daily payroll records. The number outside the grid to the right shows the' number of hours each employee picked for the week. Where there are two numbers separated by a diagonal line, the bottom number reflects hours picking berries, and the top number shows other hourly work such as weeding.

[36]Armandc Deloera was hired in 1996 but was not laid off because he was the only person who volunteered to replace the worker who had quit as a stacker. The UFW's brief takes exception to this variation, but I find the explanation

the organizing committee lists, and at least seven had participated in the work stoppage.[37] Only three are named discriminatees.[38]

Tsukiji testified he decided to make the second layoff because he had to create work by giving the crew one half to an hour of work such as weeding to keep them busy for the four hours a day he believed he had to pay. Otherwise, he would be paying them for doing nothing. When he decided to make the second layoff, they were taking one or two days off and might have gone to three days. As of June 3, he was not harvesting the 12 acres of Selva at all and did not expect to because he was not seeing sufficient flowers to indicate berries ready to pick in 2 to 4

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satisfactory. Similarly, I do not find it significant that Tsukiji only went back three years since there is no evidence any of the retained workers had less seniority than those laid off.

[37]The parties were not sure whether employees shown on RX4 as having worked less than 4 hours participated in the stoppage.

[38]Abram Colimote, brother of Iran and Rosendo Colimote, both of whom are also named discriminatees; Jorge Garcia and Miguel Alvarado. Colimote and Garcia participated in the stoppage; Alvarado did not testify, and it is not clear from RX4 whether he participated. Even though the charge names only three workers, generally the complaint would encompass everyone laid off when, as here, General Counsel contends the entire layoff was discriminatory. General Counsel did not explain why it seeks relief for only the three.

weeks.

He claimed an additional reason for the layoff was that at least three workers complained to him about the lack of work. However, Respondent did not produce any workers to corroborate his testimony, and it is uncontested that over two-thirds of the crew told him on May 20 they did not want layoffs but wanted the crew kept intact.[39]

RX4 corroborates there was an increase in the non-picking hours from the week of May 2-11 up to the June 6 layoff, and, of course, an increase in hours thereafter since fewer people were working.[40] It also confirms that for the week of May 26 through June 1, most people worked only four days which Tsukiji testified is not normal for that time of the season. Similarly, RX1 corroborates that workers earned less in the weeks after May 11 and more after the June layoff.

General Counsel contends the layoffs were in retaliation for the crew's recently disclosed support for the

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[39]Clearly, Howard Tsukiji did not have to agree to the crew's wishes. I cite the crew members' position only as evidence contrary to his claim.

[40]The 16 hours shown on June 8 reflects the two days' severance pay Respondent paid to the laid off workers, and I did not count them in determining the increase in nonpicking hours.

Union. In addition to the large number of Union supporters affected, General Counsel points to the timing of the layoffs so soon after organizing began as well as shifting reasons advanced for the layoffs as shown by Respondent' s claim at hearing being different from that given in two letters sent by Respondent' s counsel in June and September (GCX 10 and 11) which both state:

> Like many strawberry growers in this area, Tsukiji Farms has suffered unfavorable growing conditions this spring. Unseasonable rains and poor weather reduced the amount of crop that was ready for harvest in May. Before the layoff in question, Tsukiji Farms had to take repeated days off, and have short working days as well. Picks and paychecks were down because of the difficult conditions. Empoyees were not getting the income they require to support themselves and their families. Some quit, and others said they were considering quitting.

Neither letter mentions the two-spotted mite or root or crown rot.[41]

The Complaint alleges the June layoff violated section 1153(c), and, derivatively, section 1153(a), of the Act. Section, 1153(c) makes it an unfair labor practice for an employer "[b]y discrimination in regard to the hiring or tenure of employment,

[41]Respondent claims in GCX 10 and 11 that workers quit because of the slow work but there is no specific evidence why people left, and I make no such inference.

or any term or condition of employment, to encourage or discourage membership in any labor organization. "

In order to establish a prima facie case of discriminatory layoff, General Counsel must show by a preponderance of the evidence that Respondent knew or believed that the workers engaged, in protected concerted or union activity and that there is a causal connection or nexus between the protected activity and the adverse action. Respondent then has the burden of proving.by a preponderance of the evidence that it would have taken the action even absent that protected conduct.[42]

It is uncontested that most of the employees in both layoffs were Union supporters and that Respondent knew this. The timing of both so soon after Union activity began, the fact that mid-season layoffs had never occurred before, the large number of Union supporters laid off, the threat by Sanchez, and the shifting reasons cited by Respondent for the layoffs (i.e. GCX10 and 11 did not mention the mites or. fungus) are sufficient to establish a prima facie case of illegality.

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[42]Dole Farming, Inc., a. California Corporation, doing business as Dole Fanning Company ("Dole") (1996) 22 ALRB' No. 8; NLRB v. National Transportation Management Corp. ("NTMC") (1983) 452 U.S. 989; Hoyal Packing Company ("Royal Packing") (1982) 8 ALRB No. 74.

Respondent now has the burden of proving it would have taken the same action absent the Union activity. Respondent has established that half or -more of the 12 acres was unmarketable, and that it was not economically feasible to continue to harvest that acreage. Documentary evidence corroborates Tsukiji's testimony that production was significantly reduced and that increasingly he was supplementing picking hours with other work.

Although I find that the 12 acres was allowed to dry out as claimed by the workers, that may well have been in response to Nakagawa's recommendation. Respondent had a large financial investment in the crop and giving up the acreage meant abandoning hope of earning money to recoup that investment.

Although many factors raise a suspicion that the disking was retaliatory, suspicion does not rise to the level of a violation. (Rod McLellan Company (1977) 3 ALRB No. 71.) On balance, I find that Respondent has met its burden of showing it would have conducted the May layoff even if there had been no Union activity. Thus, I do not consider this layoff as supporting the Complaint's allegation that the second layoff constituted an unfair labor practice.

Turning to that second layoff, the contentions regarding it are much the same as for the first one. Therefore,

I again find General Counsel has established a prima facie case. In addition to the factors previously noted, Tsukiji's contention that the layoff was partially in response to complaints from workers about the reduced hours and pay is undercut by the fact that more than two-thirds of the crew were more concerned about the layoffs.

In rebuttal, Respondent has established that the second layoff was justified by the same factors as the first one. By June 6, the number of non-picking hours continued to grow and wages dropped even lower. Additionally, in the week before the layoff, the crew worked only 4 days when 6 would have been normal that time of the season. Finally, it is plausible that Tsukiji would believe that even in view of the crew's stated wish that there be no layoffs, people would seek work elsewhere if their earning continued to be low.

I find Respondent has established that it would have taken the same action absent the Union activity. Accordingly, I shall dismiss paragraph 16 of the Complaint.

THREATS BY ARTURO LEMUS

Nine witnesses testified for the General Counsel that after the June layoff, Arturo Lemus made threats that the crew's

support for the Union would cost them their jobs.[43] I foreclosed testimony from further witnesses about the same threats as cumulative and allowed General Counsel to make offers of proof.

Several witnesses testified that as they were passing by the truck where they dropped off the berries to be taken to the cooler, they heard Lemus say to foreman Calderon words to the effect that with the layoff the Company had started to get rid of the Union supporters and that "little by little' others would be gotten rid of as well. There were some variations in the wording, but the essential message was unchanged, and the "little by little" phrase was used by most witnesses.

Gabriel Tapia, one of the most active Union supporters, testified he heard Lemus say it to Luis Calderon and Alejo Padilla when Tapia happened to be passing by in the morning as he was starting to pick. Merced Garcia described an instance one afternoon when he heard Lemus say it to Calderon.

Merced, his brother Francisco Garcia, Jorge Martinez and Iran Colimote, another very active Union supporter, all testified they heard Lemus make that same essential comment at

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[43]Although the Complaint refers only to threats on or about June 7, at the first Prehearing Conference General Counsel stated it was alleging additional threats. (See Prehearing Conference Order dated July 1, 1997.)

various times throughout the season. Of the above five witnesses, only Jorge Martinez contended Lemus made the statement 'to workers as well as to Calderon and for this reason I do not credit him. In fact, except for Martinez and Merced Garcia, who said Lemus spoke loudly as if he did not care who heard him, every other witness who commented on it said that Lemus spoke to Calderon in a tone which made it difficult to hear everything. I discount Merced's testimony since he later changed it and said it was not easy to hear Lemus because he had his back to Garcia.

In addition to the foregoing, there were other treatening comments ascribed to Lemus. Jorge Martinez Lopez testified that Lemus said the employer was only going to plant a little, and they were only going to hire those who did not support the Union. Merced Garcia often heard Lemus say things such as there would be work for only 20 people in 1997, that he already had his people, and the Union supporters should look elsewhere for work.

Another of Merced's brothers, Juan Garcia, heard Lemus on various occasions after the layoff say to Calderon, "...brother, we have gotten started and we are going to finish with all of these hotheads who are involved in the Union." (327.) He also heard Lemus say that the non-Union supporters

would be hired in 1997 and that if Howard did' not plant, it was because of the hotheads from the Union. (328.)

Juan Garcia readily acknowledged, as claimed by Lemus, that Lemus did not spend most of his time with the crew, but Garcia insisted he heard Lemus' comments. Francisco Garcia estimated he would take about 20 seconds or so at the truck dropping off the boxes and punching his card. I find no reason the same would not be true for the other workers as well.

Jesus Lopez Avalos[44] testified he was working near the end of a row and heard Lemus come up to the truck and tell Calderon "...we already started', brother, to fire people." (353.) Jesus Lopez Rincon testified he was dropping his boxes at the truck one day and heard Lemus tell Alejo that the layoffs were because of the Union. Jose Martinez testified he repeatedly heard Lemus say to the workers that they had gotten fucked up because of the Union, and that the employer was not going to plant the next year. In fact, he testified he repeated Lemus' comment to Howard Tsukiji in about October, and Howard said Lemus was crazy and did not know what he was talking about. Arturo

[44]Mr. Lopez is the father of Jesus Lopez. Rincon and Jose Lopez and the uncle of Iran, Abram and Rosendo Colimote.

Ramirez[45] was the only one to testify he heard Lemus remark that the 12 acres of Selva on Riverside had a disease, but Respondent actually had disked the fields to get rid of the Union.

Lemus readily acknowledged that he did not support the Union, wore a "No Union" button at work and put out "No Union" buttons for workers to take if they wanted. He also testified that the first day the organizers came to the ranch, he and Calderon discussed amongst themselves whether or not the Union was good, and they both decided not to support it. (645.) Lemus testified this was one of only two conversations he had with Calderon about the Union, and he denied making any of the alleged threatening comment. Calderon corroborated Lemus' denial.

Additionally, Respondent called four worker witnesses who were among the few rehired in 1997 to dispute that Lemus made the alleged threats. Maria Fernandez answered in the negative even before Respondent's counsel could tell her what comment he was asking about. (752-753.) Juan Avalos, Guillermo Rodriguez and Jose Guadalupe Garcia testified they never heard the "little by little" comment nor heard Lemus say the June layoff was because of the Union. Garcia and Rodriguez added they never

[45]Ramirez is the brother-in-law of Merced, Francisco and Juan Garcia.

heard Lemus say the fields were disked because of the Union.

Rodriguez also denied ever hearing Lemus say Respondent was planting only a little to get rid of the Uniion or the hotheads in the Union although he did hear Lemus say in February 1997 that there might be work for only 16 to 18 people because of the few acres planted. He further testified he never heard Lemus talk about the Union or Union organizing but he did acknowledge that he did not work from mid-July until November. Garcia also left in July.

That Lemus had strong negative feelings about the Union was evidenced by a heated monologue he delivered accusing a UFW organizer of stealing his car phone because someone picked it up along with a briefcase and camera left at the Company by a UFW organizer which Lemus had in his truck intending to take to the Union. He also accused the UFW of puncturing his tires although he almost immediately stated he was not sure it was the Union and was not saying it was. (6SO-662.) The other main impression left by Lemus was that he was excitable and very vocal.

I do not credit the testimony about the "little by little" remark. Lemus and the workers spent limited time at the truck. For so many people, on so many occasions, to happen to hear such a brief comment would mean that Lemus repeated the same

thing to the same person over and over. I find that most improbable.

I do credit Juan and Francisco Garcia that Lemus made the remarks they ascribed to him. Both testified forthrightly and were not hesitant to admit facts which were not in their favor. Juan readily admitted that Lemus did not spend most of his time at the truck and that he could not hear everything Lemus said. Francisco acknowledged he was only at the truck for a short time. I do not credit Jorge Martinez and Merced Garcia because of the inconsistencies I described above. Jose Martinez, on the other hand, I found quite credible. He was a strong witness, and his testimony, which I credit, that he told Howard Tsukiji about Lemus' remarks supports his testimony about Lemus.

I found these witnesses more persuasive than Lemus and Calderon. Given Lemus' tendency to be very vocal and his strong views about the Union, I, was not convinced that he mentioned the Union only twice over the entire season. The remarks ascribed to him seem more in character. Two of Respondent's worker witnesses were absent for much of the season, and Fernandez' testimony-was not persuasive since she did not even wait to hear what Lemus was supposed to have said before denying it. I did not have any particular problems with Calderon's testimony but since it is

contradicted by several General Counsel witnesses whom I found believable, I credit the latter.

THE REDUCTION TN ACREAGE

In the late summer and fall of 1936, Respondent drastical cut back on the acreage it planted. It reduced the acreage to be harvested in 1997 by more than half. (63 acres in the 1996 harvest season versus only 31 acres for 1997.) Never before had there been such a change. In fact, the acreage generally remained about the same from year to year.

The reduction fell exclusively on the acreage harvested by the piece rate crew which was the only crew to engage in Union activity; the acreage fell from 48 acres to 13.[46] The San Juan crew, which had not engaged in any Union activity, saw its . acreage increase from 15 in 1996 to 18 in 1997 although 3 of these flooded and could not be used.

Respondent hired only 16 workers for the piece rate crew as compared to 68 in 1996 (a 76 percent reduction). The San Juan crew dropped from 31 or 32 workers to 26 to 28 people. The reason he had proportionately more workers for San Juan (26 to 28

[46]In 1996, there were 12 acres on the Pini ranch and 36 on the Riverside (also known as Basor) ranch. In 1997, the only acreage for the piece rate crew was 13 acres on Pini.

workers for 13 (ultimately 15) acres versus 15 or 16 people for the 13 acres on Pini) was because the Japanese market was more labor intensive, and the San Juan crew mainly picked for export.

Although I dismissed the allegation on this issue, whether the reduction in acreage, and personnel, was for legitimate business reasons and coincidentally affected only the crew which supported the Union, as claimed by Respondent, or whether it was discriminatory, is appropriately considered as background evidence. (See footnote 10, supra.)

According to Howard Tsukiji, he decided to reduce the acreage he planted in 1996 because Respondent had not made a profit in either 1994 or 1995.[47] The losses were much higher than the only other losing season Respondent had experienced in the last 10 or twelve years.[48]

If he had planted the normal acreage in 1996 for harvest in 1997, Respondent would have had between $200,000 and $250,000 in pre-harvest costs it would have to pay in 1996 which

[48]Despite its drastic reduction in acreage, as of the date of the hearing, Respondent still had all the farming equipment it had used in 1996, which Tsukiji acknowledged was more than needed in 1997. He kept it because it served as back-up and, except for a couple of spray rigs which might be worth $6,000, was used from time to time.

would result in a substantial loss for 1996 as well.[49] (RX2S, 27 and 28.) By not spending this money, Respondent ended 1996 with a small profit and better cash flow. (RX28.)

Tsukiji testified he chose not to reduce the San Juan ranch acreage because he believed his cash flow was better from the Japanese or export market than from the domestic (or commercial) market.[50] The Japanese market typically pays about $9 or $11 per crate at the start of the season and remains fairly steady at around $20-21, but can go up to $24. The domestic market is more volatile.

Tsukiji estimated Respondent's break even point in the Japanese market as about $7 or $7.50 per crate; in the domestic market it was about $5 to $5.50. In 1996, the domestic market was paying from $3 to $5 or $6. The break even point shifts, dropping when the yield is high; both fluctuate from day to day. Respondent did not offer any specific evidence as to how much of

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[49]On top of these costs which Respondent would incur in 1996, he estimated Respondent would spend another $1,500 per acre in pre-harvest costs after January 1997.

[50]Although the piece rate crew sometimes picked for the export market, clearly, it was primarily the San Juan crew which did so. There was virtually no interchange between the crews so I do not infer that any of the piece rate crew should have been assigned to San Juan.

its 1996 crop it was able to sell at or above the break even point.

Although the Japanese market paid more, Tsukiji testified there are reasons he does not want to plant just for it. It is more expensive to grow for the Japanese market than the domestic, partly because it is more labor intensive. The Japanese are more inflexible in their demands for certain varieties of berries and the condition of the berries at harvest, and they want a minimum number of acres committed to them.[51]

Thus, according to Tsukiji, Respondent needed a balance of the two markets. In 1996, that balance was about 20% Japanese and 80% domestic (12 of 63 acres versus 51 of 63.) In 1997, the Japanese market accounted for over half of Respondent's acreage (18 out 'of 31.)

General Counsel and the Union contend Respondent reduced its acreage in order to rid itself of its workers who supported the Union. It is clear that the reduction accomplished

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[51]After all the testimony on this point, on cross-examination, General Counsel asked Tsukiji whether he decided to concentrate more on the Japanese market than the domestic in 1997 in the sense that it was a factor in deciding to reduce acreage, and Tsukiji stated it was not a factor. (1567.) In the overall context, I infer that he meant that absent the need to reduce costs, he would not have chosen to focus more on that market.

that. Only a few of the S3 workers in the piece rate crew even went to Tsukiji Farms in 1997 seeking work whereas in the past most workers came back each season. And, there was no sign of Union activity in 1997.

The reduction is certainly suspicious. However, it is an extreme step for a businessman to cut his business by more than 50%. Respondent introduced valid economic considerations for its decision, and I conclude that Respondent's action was motivated primarily by those economic factors.

Although more expensive to pick for, the Japanese market was more steady, and the potential return was more lucrative than the domestic market. Even though the balance between the two markets shifted radically in 1997, the prior balance had led to losses for two years in a row and would have resulted in a loss in 1996 if Respondent had planted the usual acreage. Thus, even if Respondent was pleased that it was able to eliminate the Union supporters, I find it would have reduced its acreage even absent the Union activity.

THE FAILURE OR REFUSAL TO REHIRE

It is undisputed that in 1997, for the first time, all returning workers had to talk to. Howard Tsukiji in order to be hired rather than being able to see either him, his father or

Arturo Lemus. Tsukiji instructed both his father and Lemus to send everyone to see him.

None of the workers who finished the 1996 season was told about the change. Thus, in 1997,[52] workers who usually reported to John Tsukiji or Arturo Lemus did so, and there is disputed testimony as to whether when they did they were told they had to see Howard in order to work.[53] None of them were ever told that they would be hired in the order in which they asked Howard for work.

According to Howard Tusikiji, the change in hiring was made so he could ensure that only the required number of workers would be hired, not in order to avoid hiring UFW supporters as evidenced, by the fact that he hired a mix of pro-Union and non-Union people. It is notable that of the 14 workers he initially hired, eleven apparently were not Union supporters.[54] Since less

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[52]All dates hereafter are 1997 unless otherwise stated.

[53]See discussion below.

[54]Beatriz Garcia, Maria Sanchez, Maria Fernandez, Hector Magana, Baltazar Magana, were known to be against the Union. Guillermo Rodriguez signed the May 6, 1996, organizing, list but did not participate in the May 20 work stoppage and testified he wore a "No Union" button for a while, Abel Deloera, Alberto Deloera, Adrian Garcia and his daughter Maria Gonzalez had given no sign of supporting the Union since they did not sign the organizing committee lists and did not participate in the work

than 25% of the crew had not supported the Union in 1396, (IS workers out of 63 equals about 24%) the composition of the 1997 crew at over three-fourths non-Union (11 divided by 14 equals about 79%) is remarkable.

In addition to wanting to make sure that too many people were not hired, Respondent asserts Howard decided to do all the hiring because with so few opening there were choices to be made among applicants, and Lemus had never exercised discretion in whom to hire. This argument is not particularly persuasive since Respondent acknowledges Howard intended to hire people in the order they reported to him which, does not involve using discretion.[55]

The "first in time" method is at odds with both of the

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stoppage. There is no evidence Marisella Samudio supported the Union since she does not appear on the 1996 payroll records. Jose Guadalupe Garcia was not on the list but did participate in the stoppage; however, he wore a Union button only for a short time, removing it because he realized " [i] t was. not worth it for me." (720.) Only Salvador Villagomez and Jose Hipolito were both on the list and participated in the work stoppage. (See RX30-33. RX30 uses the employee numbers from 1996; thereafter, the records are renumbered.) Although Gonzalez and Sumida do not appear on the first week's payroll, Tsukiji had already promised them work.

[55]There was one instance, however, where discretion was involved in that he hired one woman, Merisel Sumida,. and allowed her not to report until the second week of harvest because of child care concerns.

criteria Howard used, in the 1996 layoffs. In May 1996, he was very concerned that he not be left short-handed after workers who typically did not finish the season were gone. Yet, when he hired his crew for 1997, he did not factor in that consideration. Similarly, despite the fact that on advice of counsel he laid people off in June in order of seniority in order to avoid any appearance of discrimination, Tsukiji testified he did not consider rehiring workers in 1997 in order of seniority. If he had used seniority, many of the discriminatees would surely have been hired.

Although he intended to hire people in the order they asked him for work, Tsukiji kept only a mental list of who spoke to him. Only after the crew was full and he did not expect to hire anyone else did he create a written list noting not only the date but the time of day people spoke to him. Since there were 68 workers from the prior season who might have sought work, the absence of a written record is suspicious, especially since he found it useful to prepare one after he believed he would not have to use it.

According to Howard Tsukiji, all of the 14 people discussed above asked him for work before the harvest started on

April 2.[56] The only other person who did so was Juan Garcia. He testified Garcia asked him for work around the end of February or early March just as they finished the pre-harvest work of putting down the plastic. He told Garcia there was no work at that time and to check back in two or three weeks in March. (1512)

He expected Garcia would work in the harvest, and on or about April 1, he asked Garcia's brother, Esteban, or his uncle, Sergio Sanchez, about Juan and was told he was in Mexico. Since he did not know the circumstances of Garcia's absence, after a few days he decided not to keep a place for him. He contrasted this action to his saving places for Jose Guadalupe Garcia[57] and Salvador Villagomez who went to Mexico for emergencies after-they had been hired.

Juan Garcia testified he asked Tsukiji for work about the time he returned from Mexico on February 4. Tsukiji said there wasn't much work. He did not tell him he was hired for the

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[56]Jose Guadalupe Garcia worked one day, April 1, then left •-to seek work elsewhere. He returned about the second week of the harvest and. asked Howard Tsukiji for work. Howard agreed although he told Garcia there might be trouble because others had applied before him and he might have to lay him off.

[57]As noted above, Jose Guadalupe Garcia left to look for work and was rehired by Tsukiji even though by that time there were others on the waiting list.

harvest but only said to check back and did not give a time frame. Since he had no assurance of work, he went back to Mexico and did not return to Watsonville until April 4. He testified that his brother could have reached him in Mexico if Howard had told his brother that Juan would lose his place if he did not appear.

I credit Juan Garcia that he spoke to Tsukiji in early February[58] and that Howard Tsukiji did not tell him that he was rehired nor give him a time frame to check back. I contrast Tsukij's treatment of Juan Garcia, one of the main Union supporters, with that of various non-Union supporters.

Tsukiji assured Adrian• Garcia and his daughter, Beatriz Garcia, they would be hired and told them that work would start the end of March or early April. (1513.) He also told at least six other workers[59] when the harvest would start. Since they spoke to Tsukiji right before the harvest began, I do not find their situations as significant as those of Adrian and Beatriz

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[58]His testimony is corroborated by Arturo Lemus who acknowledged that Juan Garcia asked him for work in what could have been the first week of February and that he saw Garcia speak to Howard the next day.

[59]Abel Deloera, Alberto Deloera, Maria Fernandez, Maria Sanchez, Marisella Samudio and Jose Guadalupe Garcia.

Garcia who spoke to him much earlier as Juan Garcia had done.

According to Tsukiji, no one else asked him for work until April 1, by which time he had all the people he thought he needed. I credit Bernardo Sandoval and Jose A. Martinez that they asked Howard for- work before the harvest started.

Sandoval testified he asked sometime in March and was told that maybe later' there would be work when the Pajaro berries were ready but that probably only 20 people would be hired. Jose Martinez testified he asked Howard Tsukiji for work in February or March and that Howard said there was very little work, that he was hiring only a few people because of all the problems in 199.6. Although I generally found Martinez quite credible, for reasons discussed below, I do not believe Tsukiji made the comment about problems.

After the crew was full, Howard started a waiting list, noting the date and time of day that people spoke to him. (RX34 and 35.) Ultimately, he hired three people, Saul Delgado, Juan Avalos[60] and the senior Miguel Martinez, from the waiting list.

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[60]Avalos testified he only wore the Union button for a short time in 1996. I credit Avalos that he and Fernando Lopez saw John Tsukiji, and Avalos told him John he no longer supported the Union. John Tsukiji asked Avalos for his phone number but did not ask Lopez for his. The next day Avalos was hired. Although this incident reflects anti-union aimus, I find it unnecessary to

(RX34 and 35.) He never adequately explained why he needed a list then and not before.

The only other workers who spoke directly with Tsukiji did so on April 7. Juan Garcia, Gabriel Tapia, Jesus Lopez Avalos, Arturo Ramirez Heraandez,[61] and Merced Garcia[62] were in a group, and all asked him for work. He'told them he had a complete crew, did not need any more workers, and if they found work elsewhere they should take it.

The workers' claim that when they asked why there were people in the field working, and they were not, Howard pointed to those who were working and said they had not caused him any problems the prior year but the 5 of them had. Arturo Ramirez returned the next day and spoke to Howard alone.[63] According to

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decide if John told Howard what Avalos said because Avalos was hired in order off the waiting list.

[61]This was the first time he asked for work. He had tried to speak to Lemus on April 4, but Lemus drove off. I credit Lemus that he was not avoiding Ramirez but simply did not stop because he was busy with work. There is no evidence Lemus tried to avoid speaking to workers.

[62]This was the first time he sought work. ' His wife, Ramona Garcia, did not apply for work because he was always told by Lemus or Calderon to bring her a week or two after he began.

[63]Ramirez' wife, Benigna Ramirez, usually started work a week or too after he did, whenever Lemus said it was time for her to come. Since Arturo was not hired, she did not apply for work.

Ramirez, Tsukiji said Ramirez had given him "problems" the prior year, and if he hired Ramirez, the others would want work too.

Tsukiji denied he told the workers he was not hiring them because of the problems of the prior year and had instead hired people who had not caused problems. I credit Tsukiji. I find it improbable that he would make such an admission after never having made any such anti-Union statements before.[64]

The testimony as to when various alleged discriminatees asked for work is net very precise and is sometimes conflicting. I find the weight of the evidence establishes the following.

Many workers asked Lemus for work. Lemus confirmed that a group of about 8 or 9 workers asked him for work about mid-March.[65] The group consisted of Iran Colimote, Jesus Lopez Avalos, Rosendo Colimote, Jesus Lopez Rincon, Jose Lopez Rincon, Rodolfo Lopez, Gabriel Tapia and Juan Avalos who was deleted as a

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[64]For this reason, I do not credit Jose A. Martinez that Tsukiji said he would not hire Martinez because of "problems" the 'year before.

[65]Several of the workers placed the conversation at about this time. I find the weight of the evidence puts it then despite Iran Colimote' s testimony that there were 15 to 13 people picking which could indicate it occurred later. Jesus Lopez Avalos testified also that people were picking but he called them sharecroppers who were not crew members and named several people who were not among those hired in the crew.

discriminatae because he was hired by Respondent.

Although not all the workers agreed, the weight of the evidence establishes that Lemus told them they had to see Howard but did not tell them Howard was hiring people in the order in which they spoke to him. That information was never given to any of the workers.

Lemus acknowledged he told them that only 14 or 15 people would be hired. According to the workers, Lemus told them they should not waste gas coming to look for work because they would not get any because of their "fucking around" about the Union. Lemus says he told them not to waste gas coming to see him, that they had to 'talk to Howard.

Lemus told the workers they could wait for Howard or look for him at the cooler. The workers left and drove by the cooler but since they did not see Howard's vehicle, they did not stop.

I credit the workers rather than Lemus. They were credible, and his remark is consistent with his tendencey to speak hastily and with the threats he made in 1996. Even though Lemus is not a supervisor, his role at the Company was such that the workers reasonably viewed him as the person to whom they reported in order to be hired. Thus, it was reasonable for them

to believe what he told them about the hiring situation in 1997.

Within a day or two, Lemus told Howard about the group having asked for work. Howard replied that "the day that I see them I will communicate to them whether or not there [is] work for them, but if there isn't any, oh, well." (1307.)

The following workers asked John Tsukiji for work in January or February: Cayetano Avalos, Rosendo Colimota, Francisco Garcia, Fernando Lopez, Jesus Lopez Avalos,[66] Octavio Lopez,[67] and Bernardo Sandoval. I credit the workers that John Tsukiji either simply told them he did not know about work or told them to talk to Lemus, 'except that he told Francisco Garcia to talk to either Lemus or Howard. John Tsukiji's memory was not very good, and I find the workers' recollections more reliable.

Cayetano Avalos, Fernando Lopez, and Margarito Lopez did not seek work again until they spoke to John Tsukiji about April 19, when he told them Respondent did not need any more

[66]He is misidentified as Jose Lopez Avalos in volume VII of the transcript which is hereby corrected.

[67]Octavio Lopez did not seek work after he spoke with John Tsukiji. He returned from Mexico on April 18 and was told by Tapia and the others that Respondent was not going to hire any of them an so did not apply for work,

workers but that Well- Pict was hiring.[68] Margarito credibly testified he did net return sooner because Tapia had told him none of them would be hired. I infer that Tapia told him this after the mid-March conversation the group had with Letnus.

Abram Colimote was laid off in June. He testified he did not apply for work because his brother Iran told him in March that possibly they weren't going to get work because only a few would get work. I was not convinced that he actually intended to apply.

Other than Benigna Ramirez and Ramona Garcia, the only alleged discriminatee who did not testify about seeking work in 1997 is Jorge Martinez Lopez. The record does not establish that he sought work or that he was dissuaded from doing so because he was told Respondent would not hire the Union supporters.

General Counsel and the Union contend that Respondent changed its hiring procedure for unlawful reasons and illegally refused to rehire Union supporters as a group. In order to establish a prima facie case of unlawful discrimination, General Counsel must show protected concerted or union activity, employer

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[68]I do not credit Fernando's testimony that John Tsukiji told them they would not be hired because of their union activity since it is not corroborated by the other two workers.

knowledge of such activity, and a causal connection between the activity and the adverse action of the employer. Respondent must then show it would have taken the same action even absent the protected activity.

When the discriminatory conduct consists of a refusal to rehire, General Counsel generally must show that the discriminatee (s) applied for work at a time when work was available and that the employer had a policy of rehiring former workers. (Duke Wilson Company ("Wilson") (1936) 12 ALR3 No. 19; J. R. Norton ("Norton") (1982)- 8 ALRB No. 76.) However, in cases where the discrimination is against an identifiable group. General Cousel' s burden is met by showing a discriminatee is a member of the group, although each individual must have either applied for work or failed to do so based on a reasonable belief that application would be futile. (.Norton) Thus, where an employer makes known its discriminatory policy not'to rehire a particular group of people, it is not necessary for each member of the group to take the futile gesture of applying, if their failure to do so was because they knew of the policy and were dissuaded from applying because of it. ("Id.")

In order to establish group discrimination, it is not

necessary to show complete exclusion of the group from the workforce. Thus, the fact that some union supporters are hired does not insulate an employer from liability. ("Wilson"; "Norton"; Sahara Packing Co. ("Sahara") (1978) 4 ALRB No. 40.)

An employer is obligated to consider a request for employment in a lawful, nondiscriminatory manner. Whether it has done so does not depend on the availability of a job at the time the application is made. The law is violated when an employer fails to consider an application of employment for unlawful reasons, and the question of job availability is a matter for backpay. (Abatti Farms, Inc. and Abatti Produce, Inc. ("Abatti") (1979) 5 ALRB No, 34.)

The timing of the refusals to rehire also suggests an unlawful motive. This Board has recognized that in seasonal employment, the season following protected union or other concerted activity is often the first opportunity for an employer to retaliate for" such conduct without blatantly seeming to 'discriminate. ("Sahara")

Although I have found that Respondent would have reduced its acreage even absent the Union activity of its piece rate crew and do not rely on that as evidence that it

discriminated in rehiring the few workers needed, I find General Counsel has established that Respondent used the reduction in order to rid itself of virtually all of the Union supporters.

Respondent changed its hiring policy but did not tell the workers what it was. Not everyone was told they had to speak to Howard, and no one was told they would be hired in the order in which they applied. Clearly, this was critical information.

As discussed above, Respondent's reasons for the change are not convincing. I find it was made to make it more difficult for people to apply for work and to allow Howard Tsukiji to avoid hiring Union supporters.59 His treatment of Juan Garcia is especially revealing. Such changes are unlawful. (Norton)

Union supporters were also obviously discouraged by Lemus' remarks. Although Lemus told the group of workers they had to talk to Tsukiji, his comments put them on notice that they would not be hired and served to discourage their application for work. Respondent is responsible for those remarks because of Lemus' traditional role in appearing to hire many of the alleged discriminatees.

[69]Lemus was at the ranch every day while in the pre-harvest period Howard Tsukiji was there only occasionally--sometimes not for a day or two at a time. The fact that some workers were able to locate him does not change this fact.

Thus, the workers reasonably concluded Respondent was bent on not hiring them and application was futile. Therefore, it is not necessary for there to have been vacancies at the time individuals applied for work. (Norton.)

Based on the foregoing, I find that Respondent's change in hiring practices and refusal to hire Union supporters as an identifiable group violates section 1153 (c) and (a) of the Act. The only alleged discriminatees not encompassed in this finding are Abram Colimote and Jorge Martinez Lopez because I do not find the evidence supports a finding that they either applied for work or failed to do so because they were dissuaded from doing so because they reasonably believed it would be futile. All of the others either applied for work or reasonably believed it would be futile.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board ("ALRB") hereby order that Respondent TSUKIJI FARMS, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

    a. Threatening employees with loss of employment

because of their involvement in protacted concerted and union activities or support thereof;

b. Changing its hiring practices because of its employees' involvement in protected concerted and union activities or support thereof;

c. Refusing to rehire or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or' she has engaged in concerted activity or union activity protected by Section 1152 of the Act;

d. In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their 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 Cayetano Avalos, Iran Colimote, Rosendo Colimote, Francisco Garcia, Juan Garcia, Merced Garcia, Ramona Garcia, Francisco Lopez, Jesus Lopez Avalos, Jesus Lopez Rincon, Jose Lopez Rincon, Margarito Lopez, Octavio Lopez, Rodolfo Lopez, Jose A. Martinez, Arturo Ramirez, Benigna Ramirez, Bernardo Sandoval, Gabriel Tapia immediate and full reinstatement to their former positions of employment, or if their former positions no

longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

b. Make whole Cayetano Avalos, Iran Colimote, Rosando Colimote, Francisco Garcia, Juan Garcia, Merced Garcia, Ramona Garcia, Francisco Lopez, Jesus Lopez Avalos, Jesus Lopez Rincon, Jose Lopez Rincon, Margarito Lopez, Octavio Lopez, Rodolfo Lopez, Jose A. Martinez, Arturo Ramirez, Benigna Ramirez, Bernardo Sandoval, Gabriel Tapia for all wage losses or other economic losses they have suffered as a result of their unlawful discharges or refusals to rehire. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonuses given since the unlawful refusals to rehJLre. The award •shall also include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No, 5.;

c. Preserve and upon request make available to the Board or its agents for examination and copying all records relevant to a determination of the backpay amounts due those employees named in Paragraphs 2 (a) and (b) above, under the terms of the remedial order as determined by the Regional Director;

d. Sign the attached Notice to Employees embodying the

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

e. Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season;

f. Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from [date of unfair labor practice] to [one year later.]

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

h. Provide a copy of the signed notice to each. agricultural employee hired to work for Respondent during the twelve months period following the issuance of a final order;

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

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

DATED: December 31, 1997

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint which, alleged that we, Tsukiji Farms, had violated the law. After a hearing all which all parties had an opportunity to present evidence , the Board found that we violated the law by threatening and refusing to rehire the piece rate crew .

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

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

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

Because you have these rights, we promise that:
WE WILL HOT do anything in the future that forces you to do or stops you from doing any of the things listed above.
WE WILL HOT refuse to hire, threaten, or otherwise discriminate against any agricultural employee because he or she has acted together with other employees to protest the terms and conditions of employment.
WE WILL offer the employees who were unlawfully refused rehire in 1997 immediate reinstatement to their former positions, and we will reimburse them
with interest for any loss in pay or other economic losses they suffered because we refused to rehire them.

DATED: Tsukiji Farms

By:

Representative
Title

If you have a question about your rights as farm workers or about this notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at. 112 Boronda Road, Salinas California. The telephone number is (408)443-3161.
This is an official notice of, the Agricultural Labor Relations Board, an agency of the Stats of California.

DO NOT REMOVE OR MUTILATE.