STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RESETAR FARMS, Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	No 75-CE-171-M 3 ALRB No. 18

DECISION AND ORDER

This decision has been delegated to a three-member panel. Labor Code Section 1146.

On February 16, 1975, Administrative Law Officer David C. Nevins issued his decision in this case. The charging party filed timely exceptions.

Having reviewed the record, we adopt the law officer's findings, conclusions, and recommendations to the extent consistent with this opinion.

The administrative law officer's findings with respect to the allegations of a Section 1153(a)[1/] violation were based upon testimony of witnesses presented on behalf of both the General Counsel and the Respondent. That testimony clearly established that the Resetar employees were engaged in concerted

[1/] Section 1153(a) provides that it shall be an unfair labor practice for an agricultural employer to "'interfere with, restrain or" coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." Section 1152 provides in pertinent part that "Employees shall have the right to . . . engage in other concerted activities for the purpose of . . . mutual aid and protection . .. "

activity for their mutual aid and protection in protesting certain work instructions which the Respondent attempted to implement on October 7, 1975. The administrative law officer further concluded that such activity was protected by the Agricultural Labor Relations Act and that the discharges of seven employees in connection therewith interfered with, restrained and coerced Resetar employees in the exercise of their rights. The Respondent did not except to the administrative law officer's decision.

The Charging Party, however, excepts to the administrative law officer's failure to find that the discharges in question also violated Section 1153 (c) of the Act, which provides that an agricultural employer commits an unfair labor practice:

> By discrimination in regard to the hiring or tenure of employment . . . to . . . discourage membership in any labor organization.

The Charging Party argues that because some of the dischargees were known UFW activists, their firing had to be a 1153 (c) violation. Since the finding of this additional violation would not affect the remedy in this particular case, the issue is largely academic.

The administrative law officer credited Mr. Resetar with the genuine, though mistaken belief that these seven employees were alone responsible for the October 7 protest. The administrative law officer found that the discharges resulted from the protest alone." In the absence of any indication of union animus on the Respondent's part, and the lack of any connection between the concerted activity and the union campaign, we are reluctant to reverse the findings and conclusions of the administrative law

officer in the present case.[2/]

The Charging Party also excepts to the law officer's failure to recommend that Respondent be ordered to reimburse the Board and the UFW for litigation costs and attorney's fees. The law officer based his determination, in this respect, upon NLRB precedent.

The Charging Party has correctly noted that the remedy provisions of our Act are significantly different that those of the NLRA. Even a cursory comparison of Section 1160.3 of our Act and Section 10(c) of the NLRA reveals the far broader remedial powers bestowed on this Board. Undoubtedly, some of our remedies will be traditional, but others will not. Given the uniqueness of agricultural labor and the breadth of our law, we will not be regimented by NLRB precedent in fashioning effective remedies. Certain cases might warrant the awarding of litigation costs and attorney's fees. This is not such a case. We cannot conclude that the awarding of litigation costs and attorney's fees in this case will effectuate the purposes of the Act. The 1153 (a) violation we find here was isolated. We believe the remedies we have given are sufficient to correct the harms done, and an award of costs would serve no purpose. We modify the administrative law officer's recommended remedies in the following

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[2/]The administrative law officer found it significant that there was no union activity in the six days between the election held at the ranch and the incident which led to the discharges. We disagree. We doubt that an employer would forget, in one week's time, who among his workers were union activists. Nor do we adopt as legal analysis the law officer's rather cursory references to case law.

respects:

1. In accordance with our decision in Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977), we reject the administrative law officer's recommendation that the Notice to Workers be read, upon request, to new employees individually. Rather, we will require that the notice be read in English and in Spanish to assembled employees on company time and property at the commencement of the 1977 peak harvest season, by an Agricultural Labor Relations Board agent, and that the Board agent be accorded the opportunity to answer questions which employees might have regarding the notice and their rights under the Act. The regional director is to determine a reasonable rate of compensation to be payed by Respondent to its piece-rate employees to compensate for time lost at this reading. We will, additionally, require that the notice be mailed to all present employees, as well as to new employees and employees rehired, and that the notice be posted, at the commencement of the 1977 harvest season, for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

2. The regional director shall conduct an investigation to determine the amount of back pay, if any, due the discriminatees and shall calculate the interest thereon. If it appears that there exists a controversy between the Board and the Respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director shall issue a notice of hearing containing a brief statement of the matter

in controversy. The hearing shall be conducted pursuant to the provisions of Section 20370 of the Regulations, 8 Cal. Admin. Code, Section 20370. We additionally order that if the rate of pay of Respondent's employees increased at any time during the 1975 or 1976 seasons, the estimated losses incurred by the dischargees should be adjusted to include such wage increase or increases. Also, we correct an apparent clerical error in the first line of footnote 17, at page 16 of the administrative law officer's decision, in that the number of official employees to receive back pay is four such official employees, rather than three. In all other respects, the back pay is to be calculated in accordance with the administrative law officer's decision, including the provisions of the above-cited footnote.

Accordingly, IT IS HEREBY ORDERED that the Respondent, Resetar Farms, its officers, agents, successors, and assigns shall

1. Cease and desist from interfering with, restraining and coercing employees in the exercise of their right to self-organization, to engage in concerted activities for the purpose of mutual aid or protection, by way of discharge, refusal to rehire, or other discipline for engaging in such activities; and

2. take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Octavio Lara Ruiz, Victor Lara Ruiz, Manuel R. Lara, Jose M. Martinez, Pedro Fausto Rodriguez, Jose M. Munoz and Faustino Perez full reinstatement to their former positions, beginning with the date in the 1977 season when the crop activity in which they are qualified commences.

(b) Make the first four employees names in sub-paragraph 2(a) whole for any loss of earnings suffered by reason of their discharge of October 8, 1975, all in the manner described in the remedy section of the administrative law officer's decision, as modified.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Order.

(d)Mail the following Notice to Workers (to be printed in English and Spanish) in writing to all present employees, wherever geographically located, and to all new employees and employees rehired, and mail a copy of said notice to all of the employees listed on its master payroll for the payroll period or periods applicable to October 7 and October 8, 1975, and post such notice at the commencement of the 1977 harvest season for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

(e) Have the attached Notice to Workers read in English and Spanish to assembed employees on company time and property at the commencement of the 1977 harvest season, to all those then employed, by a Board agent accompanied by a company representative. Said Board agent is to be accorded the opportunity to answer questions which employees may have regarding

the notice and their rights under Section 1152 of the Act.

(f) Notify the regional director in the Salinas Regional Office within 20 days from receipt of a copy of this decision of the steps which Respondent has taken and will take to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

IT IS FURTHER ORDERED that the allegations contained in the complaint not specifically found herein as violations of the Act shall be, and hereby are, dismissed.

Dated: February 24, 1977

GERALD A. BROWN, Chairman

ROBERT B. KUTCHINSON, Member

RONALD L. RUIZ, Member

MEMBER JOHNSEN, Concurring:

I concur in the result, but I am deeply troubled by the majority's broad statement of policy with regard to the remedial aspect of this case.

The majority states that, "Even a cursory comparison of Section 1160.3 of our Act and Section 10(c) of the NLRA reveals far broader remedial powers bestowed on this Board." With all due respect to my colleagues, a cursory comparison actually shows that the two provisions are virtually identical.

The only substantive difference is contained in the following excerpts which constitute only a small portion of the two provisions:

> " . . . the board shall . . . order . . . such persons . . . to take affirmative action, including reinstatement of employees with or without back pay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part." Section 1160.3.
>
> " . . . the Board shall . . . order . . . such persons . . . to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . ." Section 10(c).
>
> [Principal differences denoted by underscoring.]

Thus, Section 1160.3 merely adds an example of the affirmative action that may be required. This added example pertains only to cases involving a refusal to bargain, and therefore is totally irrelevant to the case at hand. The clause allowing the Board "to provide such other relief as will effectuate the policies of this part" is no more than a restatement of the wording in 10(c) which allows the NLRB "to take such affirmative action . . . as will effectuate the policies of this Act . . . ."

I see nothing here to indicate that this Board has significantly greater latitude in fashioning remedies than the National Labor Relations Board.

Section 1148 of our Act states that, "The board shall follow applicable precedents of the National Labor Relations Act, as amended." This mandate applies no less to the determination of appropriate remedies than it does to other determinations made under the ALRA. Clearly, there are instances in which the peculiarities of agricultural labor make certain precedents of the NLRA inapplicable. However, we cannot reject NLRA remedial precedents in the wholesale manner suggested by the majority. Where, as here, there is no reason to believe NLRA precedent to be inapplicable, such precedent must be given due consideration.

Fortunately the majority's decision as to the appropriateness of awarding litigation costs and attorney's fees was in line with NLRA precedent. I hope that in the future the Board will not be too quick to adopt a remedy that does not comport with NLRA precedent.

Dated: February 24, 1977

Richard Johnsen, Jr., Member

NOTICE TO WORKERS

After a trial in which each side had a chance to present their side of the story, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers to act together to try to get a contract or to help one another as a group. The Board has told us to send out and post this notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To bargain as a group and to choose whom they want to speak for them.

4. To act together with other workers to try to get a contract or to help and protect one another, and

5. To decide not to do any of these things.

Because this is true, 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.

Especially:

WE WILL NOT fire you or lay you off because you act together to help and protect one another as *a* group.

WE WILL offer Octavio Lara Ruiz, Victor Lara Ruiz, Manuel R. Lara, Jose M. Martinez, Pedro Fausto Rodriguez, Jose M. Munoz, and Faustino Perez their old jobs back if they want them, beginning in this harvest and we will pay each of them any

money they lost because we discharged them.

We recognize that the Agricultural Labor Relations Act is the law in California. If you have any questions about your rights under the Act, you can ask an agent of the Board. The nearest Board office is at 21 West Laurel Dr., Suite M-65, Salinas, and its phone number is (408)449-7208.

Dated: _____

RESETAR FARMS

By: _____
(Representative (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. DO NOT REMOVE OR MUTILATE.

AVISO A LOS TRABAJADORES

Despues de un juicio donde cada parte tuvo una oportunidad de presentar su parte de los hechos el Consejo de Relaciones del Trabajo Agricola ha determinado que nosotros interferimos con los derechos de nuestros trabajadores de actuar juntos para tratar de conseguir un contract© o de ayudarse uno a otro como un grupo. El Consejo nos ha dicho que enviemos y coloquemos en sitio visible este aviso.

Nosotros haremos lo que el Consejo ha ordenado y tambien les decimos que el Acta de Relaciones del Trabajo Agricola es una ley que da a todos los trabajadores del campo estos derechos!

1. A organizarse por si mismos.

2. A formar, unirse, o ayudar a uniones.

3. A entrar en trato como un grupo y a escoger a las personas que ellos quieren que hablen por ellos.

4. A actuar juntos con otros trabajadores para tratar de conseguir un contrato o para ayudar y protegerse uno a otro y

5. A decidir no hacer ninguna de estas cosas.

Porque esto es verdad, nosotros prometemos que:

Nosotros no haremos nada en el futuro que les obligue a hacer, o les impediremos hacer, ninguna de las cosas mencionadas arriba.

Especialmente:

Nosotros no les despediremos o aboliremos su trabajo a causa de que ustedes actuen juntos para ayudar y protegerse uno al otro como un grupo.

Nosotros ofreceremos a Octavio Lara Ruiz, Victor Lara Ruiz, Manuel R. Lara, Jose M. Martinez, Pedro Fausto Rodriguez, Jose M. Munoz, and Faustino Perez sus trabajos anteriores si ellos losquieren, empezando en esta (proxima) cosecha y pagaremos a cada uno de ellos qualquier cantidad de dinero que ellos han perdido porque nosotros los despediraos.

Nosotros reconocemos que el Acta de Relaciones del Trabajo Agricola es la ley en California. Si ustedes tienen algunas preguntas acerca de sus derechos bajo el Acta, ustedes pueden prcguntar a un ager.te del Consejo. La oficina del Consejo mas cercana esta en el 21 West Laurel Drive, Suite M-65, Salinas y el numero de telefpno es: 408-449-7208.

Fecha:_____

RESETAR FARMS

por_____ _____
Representante Titulo

Esto es un aviso oficial del Consejo de Relaciones del Trabajo Agricola, una agencia del Estado de California. NO LO QUITE NI LO ROMPA.

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

RESETAR FARMS Respondent	)	
and	)	**Case** No. 75-CE-171-M
UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	)	

Ralph Perez, Frank Orozco and
C. Alison Colgan, for the General Counsel

Robert M. Hlnrichs
Abramson, Church & Stave, of
Salinas, California, for the Respondent

David Goode and Susan Berman of
Menlo Park, California, for the
Charging Party

DECISION

STATEMENT OF THE CASE

DAVID C. NEVINS, Administrative Law Officer: This case was heard before *me* on November 5 and *6,* 1975, in Salinas, California; all parties were represented. [1/] The complaint alleges that the Respondent, Resetar Farms, violated Sections 1153(a) and (c) of the Agricultural Labor Relations

[1/] All dates mentioned herein refer to 1975 unless otherwise specified.

Act (hereafter called the "Act"). The complaint is based on a charge filed by the United Farm Workers of America, AFL-CIO (hereafter the "Union") a copy of which was served on the Respondent en October 9.[2/] Briefs in support of their respective positions were filed after the hearing by the General Counsel and Respondent, and all parties (including the Union) submitted oral arguments at the close of the hearing.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

Respondent, Resetar Farms, is a partnership engaged in agriculture in Santa Cruz County, California, and was admitted to be by the Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

Further, it was stipulated by the parties that the Union is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices.

The complaint, dated October 22, alleges that the Respondent violated Sections 1153(a) and (c) of the Act by its refusal to rehire seven-named employees on October 8 because of their concerted activities in protesting their terms and conditions of employment and in order to discourage their self-organization rights.

Respondent denies that it refused to rehire the seven-named employees or otherwise violated the Act.

[2/] The Respondent argues that irregularities surrounding tKe Union's charge should bar this proceeding. However, the only "irregularity" which seems to exist is that the charge was mistakenly dated October 7 at first and was changed to read October 8. In any case, the charge was sufficient under the Act to initiate the Board's investigation, was duly served on the Respondent and resulted in a proper complaint issued by the General Counsel and likewise served on the Respondent.

Respondent essentially contends that the seven-named employees quit their employment on October 7 and were not rehired on October 8 because of their misconduct on the previous day.

III. The Facts.

A. Background:

Resetar Farms operates an apple orchard, growing different varieties of apples for harvesting and marketing. William Resetar, an admitted supervisor, is a partner in the operation and oversees the daily operations of the orchard. *He* is assisted in his operational duties by the orchard's foreman, Ramiro Orispe, who has the undisputed authority to hire and fire employees, as well as assign them their work, and whom I find to be a supervisor within the meaning of Section 1140.4 (j) of the Act.

The seven-named employees in the complaint are the following: Octavio Lara Ruiz, Victor Lara Ruiz, Manual R. Lara, Jose M. Martinez, Pedro Frausto Rodriguez, Jose M. Munoz and Faustino Perez. Of these seven, however, only the first four were formally recognized on the Respondent's payroll (and may be referred to herein as "official employees"). The other three were their helpers: Jose Munoz assisted Jose Martinez, Pedro Frausto helped Octavio Lara and Faustino Perez assisted Manual Lara. These so-called "helpers" (or "unofficial employees") assisted the official employees in picking apples and were paid from the income of their respective partners. The helpers were not listed on the Respondent's payroll. The practice of official employees having helpers who were not designated on its payroll was known to the Respondent and was a practice followed by other employees as well.[3/]

Shortly before the events which gave rise to this unfair labor practice proceeding, *a* representation election was conducted at the Respondent's orchard under the Act's auspices. That election, held on October 2, resulted in the Union receiving a majority of votes; some 22 voted in favor of the Union. But, as of the date of the hearing in this matter, the results of that election had not been certified.

Several of the employees named in the complaint were active in their support for the Union in and around the election. Thus, Jose Martinez, Octavio Lara and Jose Munoz passed out the Union's literature to fellow employees and were

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[3/]The seven-named employees were related to one another and may be described collectively herein as the "Lara Family," a name by which they were generally known at the orchard.

observed doing so by their foreman, Mr. Orispe. Also, Manual Lara and Victor Lara were election observers for the Union and were known to be by Mr. Resetar.

B. The Events Of October 7 And 8:

On October 7, a Tuesday, the Respondent intended to commence picking a variety of apples referred to as Delicious, after having picked the Newtown variety on preceding days. However, in a break with tradition, Mr. Resetar decided to use a method of selective picking never before used at the orchard. Rather than have employees pick all apples from each tree indiscriminately, which was the customary practice, they were to pick only the good color apples.. (i.e., the redder ones) and place them into one bin and then they were, to concentrate on the remaining apples of each tree (the greener ones), picking them and placing them into another bin. Mr. Resetar decided on the new, selective method of picking in order to segregate the redder apples which were more marketable at the time.[4/]

Mr. Resetar arrived at the orchard early on October 7, at about 6:30 a.m., and instructed his foreman to inform employees of the selective picking method to be used that day. Resetar then left the field. The employees began arriving for work that morning at about 7:00 a.m.; their arrival times varied because they were paid on a piece rate basis and had no exact starting time.

Picking was not immediately begun that day because the trees were too wet. Instead of beginning work the employees stood around talking and drinking beer. At some point around 8:30 a.m., Mr. Orispe informed the employees of the new, selective picking method they were to follow that day. Some 35 to 40 .employees were present when Orispe announced the instructions.

The employees were displeased with the new method of picking, believing it would slow their work and thereby

[4/] As noted, the method for picking chosen on October 7 was a completely new approach at the Respondent's orchard. The only comparable approach used in the past had bean to pick for color and *size* from one tree and then move on to another tree in similar fashion, leaving the undesirable apples on each tree unpicked. But, even that selective picking method had not been used at the Respondent's orchard for at least several years. Customarily, when apples were to be segregated by size or color, such segregation was accomplished after the picking was completed, by other employees.

decrease their income which was based on the number of apple bins each employee filled during the day. [5/] The selective picking method would have required workers to concentrate picking from the tree edges where the redder apples are, and then to' concentrate on the interior portions of trees where the greener apples are. The workers thought that by having to divide their picking in such a manner more effort would be required because the red and green apples were frequently found close together, although neither the employees nor Orispe and Resetar had much experience with the selective picking method chosen for the day.

After Orispe gave his instructions, a debate-between him and the workers ensued as to whether the workers would perform as instructed. During the course of that discussion, Orispe offered the employees a higher rate of pay for their bins; instead of receiving the normal $6.45 per bin for Delicious apples, Orispe offered them $7.05 per bin (a-rate which applied to the Newtown apples which were more difficult to pick).[6/] As another alternative to encourage the workers to follow his instructions, Orispe offered them the choice to work at an hourly rate of pay if they wished.

During Orispe's discussion with the workers, Mr. Resetar returned to the field and, although he did not personally enter into the discussion, he understood some Spanish (in which language the discussion took place) and Orispe informed him in English as to what was occurring. Despite the discussion and various-pay alternatives offered by Orispe, the employees could not agree on a pay method for the selective

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[5/] A substantial dispute exists between the parties as to which and how many of the employees protested the new picking method. Respondent contends that it was essentially the Lara Family, and in particular Jose Martinez, who rejected the work instructions. Witnesses appearing for the General Counsel testified that nearly every employee present protested the selective picking method. Discussion and resolution of this disputed testimony is reserved for a later portion of this Decision.

[6/] The piece work rates mentioned above were rates established in the contract between the Respondent and Teamster Farmworkers Union, Local 1973, of the Western Conference of Teamsters, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. That contract is referred to herein as the "Teamsters Contract." The Teamsters Contract was signed by the Respondent on July 9, 1974, and was to be effective until June 30, 1977.

picking or whether to follow the instructions. Most members of the Lara Family were standing together during the discussion, somewhat off from the other workers. They were opposed to the selective picking method and during the discussion Jose Martinez was overheard to say/ "Todo or nada."

Somewhere around 9:00 or 9:30 a.m., Foreman Orispe decided to leave the field. He was told by some of the employees (not the Lara Family) that nothing would happen as long as he remained and that if he left the workers could leave the orchard. (In order for work to proceed in the orchard, the foreman had to be present, for he was responsible for passing out the tags necessary to identify which worker picked which bins of apples.) Employees informed Orispe he should leave and that the workers would coma back the following day to pick apples. Mr. Resetar approved of the plan, and as Orispe left the orchard, he announced to the employees as a group that those who wanted to work should come back the next day.

After Orispe left the orchard, the employees also departed. No apple picking was performed on October 7. However, Orispe did not believe that any of the employees present that day had quit their employment. He left because there was no agreement with the workers as to whether the selective picking instructions would be followed or what method of payment for the picking would be used.

On the next day, Wednesday, Mr. Resetar rescinded the selective picking method which had been announced the previous day. Still in need of the redder apples, however, instructions were issued to employees that they were to concentrate on those trees which contained a higher percentage of red apples, picking all the apples on such trees and leaving the other greener trees for a later picking.

Most of the employees appeared for work at about 7:00 a.m. on October 8 and commenced picking the apples under the modified instructions. The seven members of the Lara Family appeared for work at about 8:00 a.m. When the Lara Family went to get their ladders and work instructions, they were stopped by Mr. Resetar. He told them that they had not wanted to work the previous day and wanted to that day, but due to their refusal to work the previous day they had quit. When members of the Lara Family protested that they had not quit, Mr. Resetar continued to refuse them permission to work.

As the Lara Family was prevented from working that morning, they asked for their paychecks. Mr. Resetar informed them he would have their paychecks later; he did not specify when. Later that day Mr. Resetar instructed that paychecks be

made up for the four members of the Lara Family who were designated on the payroll. However, it was not until approximately one week later that the employees went to pick up their paychecks.

After they were not permitted to work on October *8,* members of the Lara Family went to the Union and complained. A Union representative came to the field later to speak with Mr. Resetar, but the seven-named employees in the complaint were not put back to work. All other employees who had been at work the previous day, October 7, were allowed to return to work on October 8. It was acknowledged that the employees generally were pleased on October 3 that the selective picking instructions of the previous day had been rescinded. [7/]

CONCLUSIONS

I. Introduction.

Section 1152 of the Act provides, in part, "Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The General Counsel initially contends that Respondent interfered with and restrained the seven-named employees, in violation'' of Section 1153 (a) of the Act, by denying them re-employment on October 8 because of their "concerted activities" of the previous day—namely, their protest over the work instructions given that day. The General Counsel argues that the workers' protest on October 7 was activity protected by the Act and could result in no reprisal by the Respondent. In addition, General Counsel contends that the Respondent violated Section 1153(c) of the Act by discriminating against the seven-named employees by refusing them re-employment on October 8 due to their known support for the Union.

Contrary to the General Counsel, Respondent argues that the seven-named employees were not engaging in protected, concerted activity on October 7, but were guilty of insubordination and a refusal to work under proper work instructions. Respondent notes that none of the seven-named employees sought to grieve the disputed work instructions under the governing Teamsters Contract and by their actions—in effect—quit their employment on October 7. Respondent claims that the seven-named employees were the only workers refusing to work on

[7/] No new employees were hired as replacements for the Lara Family. Rather, Respondent used the existing complement of workers to complete the necessary picking until the end of the harvest season on November 2.

October 7 and were therefore not entitled to re-employment on October 8.

II. The Charge Under Section 1153(a).

The first question which must be confronted is whether the seven members of the Lara Family were engaging in activity on October 7 protected by virtue of Sections 1152 and 1153(a) of the Act. For, if they were engaging in activity protected by the Act, the Respondent—generally speaking— could not lawfully discharge them as a result of such activity, or refuse to re-employ them for such activity.[8/]

Protected, concerted activity on the part of employees is a concept extensively litigated under the Act's sister statute, the National Labor Relations Act, as amended ("N.L.R.A."}. Review of N.L.R.A. precedent establishes beyond serious doubt that the workers' protest of October 7 was activity held protected under identical provisions of the N.L.R.A. Thus, as noted by the National Labor Relations Board in Metal Plating Corp., 201 NLRB No. 28, 82 LRRM 1156, 1157 (1973):

> It is now established that a single, spontaneous work stoppage, absent unusual circumstances, is protected by Section 7, and discharging employees for engaging in such activity violates Section 8(a)(l).

In both that case, as well as N.L.R.B. v. Washington Aluminum Co., Inc., 370 U.S. 9, 50 LRRM 2235 (1962), which was cited by the National Labor Relations Board in Metal Plating, employees left their work to protest existing working conditions and their resulting discharges were held unlawful.

It has long been recognized under the N.L.R.A. that workers have the-protected right to protest their working conditions in concerted fashion, whether or not such protests result in brief work stoppages. See N.L.R.B.v. Western Meat

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[8/] Throughout this portion of the Decision, no effort is made to characterize what occurred on October 7 as if the Lara Family had quit their employment. Despite the Respondent's contention to the contrary, evidence does not support any conclusion that the seven-named employees quit their employment. Rather, they returned on October 8 expecting continued work with the Respondent. Furthermore, Foreman Orispe did not consider that they had quit the previous day, nor did the Lara Family. Quitting is normally a voluntary act on the part of an employee and nothing suggests that the seven Laras voluntarily severed their employment with the Respondent.

Packers, Inc., 368 F.2d 65, 63 LRRM 2367 (C.A. 10, 1966); N.L.R.B. v. Kennametal, Inc., 182 F.2d 817, 26 LRRM 2203 (C.A. 3, 1950); American Homes Systems, 200 NLRB No. 158, 82 LRRM 1183 (19721"! Indeed, in L. C. Cassidy & Sons, Inc., 206 NLR3 No. 52, 84 LRRM 1524 (1973), employees v/ho refused to perform work under an existing piece work rate and who sought to change their wages to hourly rates of pay were held to be engaged in protected, concerted activity.

Thus, in this case it must be concluded preliminarily that the workers engaged in activity protected by the Act on October 7. This is true whether that activity is characterized as a work stoppage, or a protest over the selective picking instructions which were issued, or a protest over the wages to be paid for selectively picking apples. It is clear that the workers were dissatisfied with the work instructions issued and sought to change them. The resulting discussion which took place'on October 7 was—-in essence—an effort to persuade the Respondent to rescind the instructions or an effort to negotiate a new wage structure for the selective picking.[9/] And, the fact that members of the Lara Family may have led the protest (or, indeed, were the only protestors) does not forfeit them their protected rights. See N.L.R.B. v. Elias Brothers Restaurants, Inc.,____ F.2d____, 86 LRRM 2651 (C.A. 6, 1974); Kennametal, supra, 26 LRRM 2203; Metal Plating, supra, 82 LRRM 1156.

In its post-hearing brief, Respondent emphasises that Mr. Resetar's motive in refusing to re-employ the seven workers was not due to any intent to interfere with his employees' protected rights. But, the Respondent's contention finds no support in the law. When it comes to employees' rights, an employer may not interfere regardless of motive.

[9/]Although the workers' October 7 protest did have overtones of a work stoppage, the evidence does not support a finding that they engaged in any lengthy stoppage or strike. Thus, the discussion between the workers and Orispe took place primarily before any work was to commence, due to the wet condition of the apple trees. Additionally, the workers did not refuse to follow any direct order by Orispe to begin their work and, indeed, Orispe voluntarily left the orchard knowing that his absence would preclude any work from taking place. Nor were the employees paid for October 7 inasmuch as no work was performed. Under such circumstances, it cannot be said that even if a work stoppage did occur on October 7 it fell outside the Act's protection. Shelly & Anderson Furniture CO. v. N.L.R.B., _____ F.2d _____, 86 LRRM 2619 (C.A. 3, 1974) .

As noted long ago under the identical portion of the N.L.R.A., "Section 8(a)(l) is violated if an employee is discharged for misconduct arising out of a protected activity despite the employer's good faith, when it is shown that the misconduct never occurred. * * * * A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." N.L.R.S. v. Burnup & Sims, Inc., 379 U.S. 21, 57 LRRM 2385, 2386 (1964).

However, activity protected by the Act could lose its protected status if it is otherwise unlawful or improper. One possible way of losing that protection under the N.L.R.A. has been where employees engage in a work stoppage violating a no-strike clause in their existing collective bargaining contract. Thus, although Respondent does not directly raise the issue, it seems appropriate to consider the question of whether the workers on October 7 lost their protection to engage in their protest by virtue of the no-strike clause in the Teamsters Contract.[10/]

Several factors support the view, however, that the Teamster Contract's no-strike provision has little bearing on the resolution of this case. For one thing, the evidence does not support a factual finding that a strike or work stoppage actually took place, due to Orispe's leaving the orchard. It was his departure, as much as any work refusal by employees, which led to the complete absence of work on October 7. Thus, it is difficult to say that a meaningful breach of the no-strike clause actually took place.

For another thing, employees of the Respondent knew virtually nothing about either the existence of the Teamsters Contract or its contents. It was never shown to them or explained to them. It is fair to conclude that since the Contract was entered into prior to the Act, and before any statutory bargaining rights were established, the Contract was not based on any knowledge or support emanating from the employees themselves. Thus, to bind the employees by the Contract's no-strike clause does not seem warranted. For example, it has been recognized under the N.L.R.A. that an underlying policy which allows an employee collective bargaining agent to give up a portion of employees' protected rights, such as the right to strike, stems from the majority support freely given by the employees to that bargaining agent. See Emporium Capwell Co.

[10/] The Teamsters Contract provided: "The Union [Teamsters) and the Company agree that there shall be no lockout, strikes, slowdowns, job or economic action, or other interference with the conduct of the Company's business during the life of this Agreement."

v. Western Addition Community Organization ____ U.S. ____, 88 ii'RRiM 2660 Q.975) .Here, there is no showing that the employees ever voiced support for the Teamsters Contract; therefore, little basis exists for binding then to its unknown provisions.[11/]

Finally, even if the employees (or the Lara Family) actually violated the contractual no-strike clause and thereby lost their protection to protest in the manner they did, it can only be concluded that Respondent condoned such a breach and thereby sacrificed its right to take reprisals against the protest. It has been held under the N.L.R.A. that when an employer condones unprotected activity, it cannot rest upon that activity's unprotected status in meting out discipline. However, the rule has been stated as follows:

> Where, as here, the strike misconduct is clearly shown, condonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred.[12/]

In this case, the Respondent demonstrated its condonation of the October 7 protest in two separate ways. First, at the conclusion of the group discussion on October 7, Mr. Orispe announced to the entire complement of workers that those who wanted to work should return the following day. Although the remark was somewhat ambiguous, it is apparent the 'foreman meant that all employees were welcome back the next day if they wished to return. No other conclusion is possible in view of Orispe's admission that he did not consider that any of the employees had quit their employment as a result of their October 7 protest, and his further admission that he did not know the basis for Mr. Resetar's refusal to allow the Lara Family to work on October 8.

[11/] It should be noted that the Act itself recognizes that contracts entered into prior to the Act become void and ineffective if employees choose another collective bargaining agent through the Act's election processes (Sections 1.5 and 1159). Accordingly, the Act also recognizes the significance of employee free choice in selecting a bargaining representative.

12/ N.L.R.3. v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 414, 35 LRRM 2320 (C.A. 5, 1955); N.L.R.3. v. Brake Parts Co., 447 F.2d 503, 77 LRRM 2695 (C.A. 7, 1971).

Second, no doubt can exist that many more workers than just the Lara Family participated in the protest against the selective picking method. The credible testimony of Jose Martinez, Octavio Lara and Manual Lara establishes that most, if not all, the approximately 40 employees present on October 7 opposed the work instructions given by Orispe. Even Angelo Reyes and Luis Gonzales, two employee-witnesses presented by the Respondent, acknowledged that "many" or at least one-half of the employees did not wish to work under the new work instructions.

Furthermore, even Mr. Orispe acknowledged that his discussion regarding his work instructions was held with the entire group of workers. Nor can it be accepted that the reason no work was performed on Tuesday vas simply because some seven out of over 35 employees did not like the work instructions. [13/] In this connection, Respondent rescinded its October 7 instructions the next day, even though the Laras were not permitted to work.

Accordingly, it must be concluded that on Tuesday a majority of workers present protested the new method of selective picking and resisted working under that method. It may have been that some of the Lara Family, in particular Jose Martinez, spearheaded the protest, but support was broad and deep for that protest among the workers.[14/]

[13/] Mr. Orispe's testimony, as well as Mr. Resetar's impressions, are not credited as to their claim that it was only the Lara Family who did not wish to work. It is inconceivable that had it only been the seven Laras refusing to work that Orispe would have tried to entice the entire complement of employees to work by offering higher wages. Nor is there any substantial evidence that other employees were afraid to work because of possible trouble with the Laras, for no testimony was put forth which established that any real or vocal threat to other workers was made by the Laras, as suggested by the Respondent. In fact, other employees who testified indicated no concern over what the Laras might do if the others chose to work under the disputed work instructions.

[14/] Respondent has dealt at length with the contention that the selective method of picking implemented on October 7 would not have led to any diminished earnings on the employees' part. But, the evidence shows that almost all those involved in the dispute, including Mr. Resetar and Mr. Orispe, understood that—at least—a significant chance existed that the new method would result in lower earnings. In fact, a premium piece rate was offered the employees and no one could say positively that even with that premium rate the employees would have earned comparable amounts to — [cont.]

However, despite the fact that many workers joined the protest on October *1,* only the seven Laras were refused re-employment on October 8. By condoning the protest action of the others through their re-employment the following day, the Respondent foreclosed itself from arguing that the Laras' activity was unprotected and therefore barred them from further employment. Retail, Wholesale & Department Store Union v. N'.L.R.B., 466 F.2d 380, 80 LRRM 3244, 3247-8 (C.A. D.C., 1972).Thus, even if the Laras[1] protest activity *was* unprotected, so too was the protest activity by the others, and both groups were entitled to reinstatement in similar fashion the following day.

One final argument should be considered. Respondent also contends that the seven-named employees lost their statutory protection because they were foreclosed from engaging in protest activity by the grievance provisions of the Teamsters Contract. Respondent, however, cites no applicable authority for the proposition that an existing grievance procedure forecloses employees from protected activity. Furthermore, in view of the comments earlier made with respect to the Teamsters Contract, it would be highly inappropriate to bind the Laras to its grievance procedures. In fact, Respondent—also permitted to grieve matters under the Teamsters Contract— likewise did not seek to adjust the dispute of October 7 either through its grievance procedures or by contacting the Teamsters Union. Accordingly, I cannot .find any sufficient basis in the record to- find that the employees were foreclosed from engaging in their protest actions on October 7 on the basis of the contractual grievance provisions.[15/]

[14/][continued]—-their past earnings. Thus, the workers' protest was real and emanated from their good faith belief that the new work instructions would cause them a loss in earnings.

[15/]It should be noted that Section 1160.9 of the Act provides th~at the unfair labor practice procedures set up by the Act and employed in this case "shall be the exclusive method of redressing unfair labor practices." Although it is true that the National Labor Relations Board has developed a policy to defer to arbitration where a complaint involves both an unfair labor practice allegation and contractual dispute (see Collyer Insulated Wire, 132 MLR3 837, 77 LRRM 1931), the Agricultural Labor "Relations Board has yet to develop such a policy. In view of the absence of any deferral policy by the Agricultural Labor Relations Board, it seems additionally inappropriate to hold that the employees had to take their protest of October 7 through the grievance procedure rather than by way of concerted activity protected by Section 1152. This is especially true since the Respondent itself insists - [cont.]

In sum, it is my conclusion that the Respondent violated Section 1153(a) of the Act by refusing to re-employ or—in effect--discharging the seven-named employees in the complaint on October 8. The protest engaged in by the seven workers was protected activity and the Respondent had no lawful basis on which to refuse to re-employ them for engaging in such protest.

III. The Charge Under Section 1153 (c).

As earlier noted, the General Counsel also contends that discharge of the seven Laras violated Section 1153(c). However, while the evidence could perhaps support an inference that the Respondent's motive in discharging the Laras was to rid itself of strong Union supporters, I do not believe there is sufficient evidence which mandates that inference.

In finding that the Respondent did not violate Section 1153(c), I take note of the following facts. For one thing, the five discharged employees who were active in the Union's behalf were only active around the time of the election, some five to six days prior to their loss of employment. There is no evidence that any of their support for the Union continued to manifest itself immediately preceding their discharge, or that either Mr. Resetar or Mr. Orispe were hostile to their pre-election Union activity.

For another thing, there is no showing that the Respondent had any significant animus toward the Union or its supporters. While it is undoubtedly true that the Respondent knew of some of the Laras' Union activity, since three of them had been seen by Orispe passing out Union literature and two of them had been Union observers at the election, the intention to discriminate against them because of such activities is not demonstrated by the record.

Nor can any anti-Union motive be inferred from the foreseeable results of Mr. Resetar's refusal to re-employ the seven Laras. See Radio Officers Union v. N.L.R.B., 347 U.S. 17, 33 LRRM 2417 (1954).That inference is unwarranted here because Mr. Resetar's sole motive for the "discharges," as demonstrated by the record, stemmed from his mistaken belief that the seven employees were single-handedly responsible for the protest on October 7. In addition, nothing in the record

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15/ [continued]—that under the Teamsters Contract employees had no right to protest the picking instructions by way of a grievance. Compare Bunker Hill Co., 208 NLRB Mo. 17, 85 LRRM 1264 (1973); Fenix s Sclsson, Inc., 207 NLRB No. 104, 85 LRRM 1380 (1973).

reflects that the protest had any overt connection to the Union or was considered as having such a connection by Mr. Resetar.

Accordingly, because there is insufficient evidence to support the belief that the seven-named employees were discharged in whole or in part for their activities in behalf of the Union, I find that Respondent did not violate Section 1153 (c).[16] See L. C. Cassidy 5 Sons, supra, 84 LRRM 1524. I recommend, therefore, that that portion of the complaint which alleges a violation of Section 1153(c) be dismissed.

THE REMEDY

Having found that Respondent violated Section 1153 (a) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that Respondent unlawfully refused to re-employ, or—in effect—unlawfully discharged, Octavio Lara Ruiz, Victor Lara Ruiz, Manuel R. Lara, Jose M. Martinez, Pedro Frausto Rodriguez, Jose M. Munoz and Faustino Perez, I recommend the following:

(1) Respondent make whole Octavio Lara, Victor Lara, Manuel Lara and Jose Martinez, employees who were officially designated on the Respondent's payroll, for any losses they incurred as a result of their loss of employment on October 8 by payment to them of a sum of money equal to the

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[16] There is some authority for holding that employees who engage in a protected work protest constitute themselves by such protest as a "labor organization" and if a discharge results from such protest it can be held to discourage membership in that labor organization within the meaning of Section 1153(c). See Kennametal, Inc., 26 LRRM 2203. However, I know of no such principle being voiced recently, and note that in traditional 1153(c) discharge cases (under 8 (a)(3) of the National Labor Relations Act), a violation does not normally occur unless the employer's actions constitute reprisal against activities in behalf of or support for a more recognizable labor organization. In other words, recent cases under the M.L.R.A. do not seem to hold that any one-time loose congregation of employees, identified together only in presenting a single work protest, establishes them as a labor organization within the meaning of Section 1153 (c).

wages they would have earned from October 8 to November 2 (the end of Respondent's season), less their net earnings during such period, together with interest thereon at the rate of seven percent (7%) per annum, and that loss of pay and interest be computed in accordance with the formula used by the National Labor Relations Board in F. W. Woolworth Co., 90 NLRB 289; and Isis Plumbing ana Heating Co., 133 NLRB 716. Their reimbursement should be based on the named employees' average daily earnings for the last five days each worked preceding the last day they worked, discounting any higher piece rate for those days.[17/]

(2) All seven-named employees be granted reinstatement by Respondent at the beginning of its next season, either in their own right or for the three helpers, if the practice continues, as helpers of employees officially designated on the Respondent's payroll.[18/]

(3) That the Respondent publish in the manner described below the attached notice.

General Counsel seeks several methods of publishing the attached notice which' have not been customarily employed by the National Labor Relations Board. The rationale for these special publishing methods is that agricultural employment is not only seasone;, but employees do not always return to the same employer so as to learn of the outcome of a proceeding like this one. Given the unusual nature of agricultural employment, it is my view that special steps have to be

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[17/]The back pay for those three official employees who were assisted by helpers shall be computed as to include the piece rate earnings generated by the three helpers who assisted them. However, the Board's Regional Office in Salinas should take the necessary steps to insure that the three helpers receive their proper share of the back pay earnings as computed.

[18/]Respondent argues that any remedy herein should not run to the three helpers who were not officially designated on the Respondent's payroll. However, to ignore those three employees would ignore the Act's mandate to provide relief which will effectuate the Act's policies. The three helpers, Pedro Frausto, Jose Munoz and Faustino Perez, were clearly "agricultural employees" as that term is used in Section 1140.4(b) of the Act, and therefore deserve the Act's protection and remedy for violation of their rights. Respondent has known of and accepted the practice of helpers working at its orchard without requiring them to be designated on its payroll and it cannot now ignore that long-standing practice when it comes to remedying its unfair labor practice as to such helpers.

taken to insure that employees are apprised of their rights. Accordingly, I recommend that the attached notice be translated in both English and Spanish, with the approval of an authorized representative of the Board, and that it be given by Respondent to each new employee hired from now to the end of the next harvest season. Respondent shall also advise each new employee that it is important that he or she understands its contents and to offer, if the employee so desires, to read the notice to the employee in either English or Spanish.

Further, I recommend that English and Spanish copies of the attached notice be mailed by the Respondent to each employee who worked at Respondent's orchard on October 7 , to the full extent that Respondent can- learn of such employees' current mailing addresses. Only by so mailing the notices to such employees at their current, or last-known, addresses is there reasonable hope that employees knowledgeable of the events which led to this unfair labor practice proceeding can learn of their rights and its outcome.

The General Counsel also requests that by way of remedy the Respondent reimburse both the Board and the Charging Party for the cost's of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs and more. The Board, of course, has not yet considered this form of remedial request and such costs have not been generally awarded by the National Labor Relations Board. Although the General Counsel cites Tiidee Products, Inc., 194 NLRB No. 198, 79 LRRM 1175, 196 NLEB No. 27, 79 LRRM 1692 (1972), enforced as modified, 502 F.2d 349, 86 LRRM 2093 (C.A. D.C., 1974), cert., denied, 421 U.S. 991, in support of its requested costs, review of the cited decisions shows that the National Labor Relations Board has awarded such costs only where a respondent has engaged in clearly frivolous litigation or where his unfair labor practice offenses were of a clearly aggravated and pervasive magnitude, involving flagrant repetition of conduct. It is obvious that Respondent here has engaged in no such flagrant conduct as was discussed in the Tiidee case.

It may be that the Board will not wish to follow the Tiidee rationale in determining whether such a strong showing is necessary to warrant imposition of costs against a respondent. However, I see no reason at this time to either depart from the rationale of Tiidee or to strike out on a new course of remedial orders without prior direction from the Board. Accordingly, I deem it inappropriate to follow the General Counsel's requested recommendation at this time.

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

ORDER

Respondent, its officers, agents and representatives shall:

(1) Cease and desist from interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities (except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 1153 (c) of the Act), by way of discharge, refusal to re-hire or other discipline for engaging in such activities; and

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Octavio Lara Ruiz, Victor Lara Ruiz, Manuel R. Lara, Jose M. Martinez, Pedro Frausto Rodriguez, Jose M. Munoz and Faustino Perez full reinstatement to their positions at the beginning of the next harvest season, and to make the first four-named employees whole for losses they may have suffered as a result of their loss of work on October 8, all in the manner described in the immediately preceding section.

(b) Preserve and make available to the Board or its agents, upon request, all payroll records, social security payment records, time cards, personnel-records and reports, or other records necessary to analyze the back pay due.

(c) Give to each employee hired from now to the end of next harvest season copies of the notice attached hereto and marked as "Appendix." Copies of this notice, in both English and Spanish, shall be approved by the Regional Director for the Salinas Regional Office, or other authorized representative of the Board. Respondent is also required to mail to all employees working on October 7, 1975, copies of the notice. The manner of publication of the attached notice is set forth in the foregoing section entitled "Remedy."

(d) Notify the Regional Director in the Salinas Regional Office within 20 days from receipt of a copy of this Decision of the steps Respondent has taken to comply therewith, and to continue to report periodically thereafter until full compliance is achieved.

Dated: February 16, 1976.

AGRICULTURAL LABOR
RELATIONS BOARD

David C. Nevins
Administrative Law Officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that Resetar Farms has violated the Agricultural Labor Relations Act, and has ordered Resetar Farms to notify all persons working for it on October 7, 1975, and all those coming to work for it from now through the next harvest season that the violation will be remedied and that employees' rights will be respected in the future. Therefore, each of you is advised:

(1) That on October 8, 1975, Resetar Farms unlawfully refused to re-employ, and—in effect—unlawfully discharged, Octavio Lara Ruiz, Victor Lara Ruiz, Mamie1 R. Lara, Jose M. Martinez, Pedro Frausto Rodriguez, Jose M. Munoz and Faustino Perez for engaging in a work protest protected by the Agricultural Labor Relations Act.

(2) We will grant reinstatement to the above-named seven employees at the beginning of next harvest season and give those of the seven-named employees who were on our pay-roll back pay for any losses they suffered between October 8 and the end of the harvest season they were working. The Agricultural Labor Relations Board will seek to have those of the seven-named employees, who were not then officially on our payroll, paid for their losses as well.

(3) We will not discharge, refuse to re-employ or otherwise discipline employees who exercise their right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing and who engage in other concerted activities for the purpose of collective bargaining or-other mutual aid or protection, or who refrain from such activities, which rights are more fully specified in the Agricultural Labor Relations Act.

Signed:
Resetar Farms

Dated: By _____
(Title)