STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROS., INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	No. 75-CE-21-S 3 ALRB No. 78

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel .

On March 22, 1977, Administrative Law Officer Robert LeProhn issued the attached Decision in the above-entitled proceeding. He found that Respondent had engaged in certain unfair labor practices. Respondent and the Charging Party filed timely exceptions.

Upon review of the entire record, we adopt the Administrative Law Officer's findings, conclusions, and recommendations as modified herein.

Two of Respondent's exceptions challenge, on constitutional grounds, the Board's authority to exercise its jurisdiction in this matter. We decline to consider such issues where, as here, they are raised for the first time in the form of exceptions. The issues should have been raised at the hearing for consideration by the Administrative Law Officer.

A further procedural exception is based on the denial of Respondent's request to take oral depositions. We find the complaint to be sufficiently clear to put Respondent on notice as to what witnesses and evidence would be necessary to present its defense. Information sought by Respondent as to back pay issues was not essential prior to a determination that the dischargees were entitled to back pay. The exception is dismissed.

Respondent asserts that the Administrative Law Officer misconstrued certain testimony given by Vicente Hernandez at trial, [1/] and therefore the finding that Vicente Hernandez was unlawfully discharged is premised upon an improper foundation. Respondent's contention is without merit. An examination of Vicente's testimony, including the cross-examination by Respondent's counsel, reveals that Vicente did in fact testify that his brother, David Hernandez, relayed a message from supervisor Gilmore to Vicente that he (Vicente Hernandez) had been fired. Although Vicente's testimony on direct examination was susceptible to Respondent's interpretation, Vicente's testimony on cross-examination clearly supports the Administrative Law Officer's conclusion. It is also evident from counsel's questioning on cross-examination that he, too, interpreted Vicente's testimony in the same manner as Administrative Law Officer LeProhn. This exception is, therefore, dismissed.

We modify the law officer's recommended order to provide for computation of back pay and interest for Vicente Hernandez in accordance with the formula used in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

[1/] The testimony allegedly misconstrued is found on page 82, lines 19-25 of the transcript, volume dated Tuesday, January 11, 1977.

It is our opinion that the posting, reading and mailing of the attached notice to workers in the manner set forth below is sufficient to notify Respondent's employees of Respondent's unlawful conduct and the procedures taken to remedy such conduct. Accordingly, we eliminate from this order the requirement of distribution by hand of the attached notice to workers.

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the Respondent, Arnaudo Bros., Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO by unlawful interrogation, by creating the impression of surveillance, by threatening reprisals for supporting the UFW, or by discharging, changing working conditions, or in any other manner discriminating against individuals in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153 (c) of the Act.

b. In any other manner interfering with, restraining, or coercing employees in the exercise of 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 rights may be affected by an agreement requiring membership in a labor organization as a

condition of continued employment as authorized in Section 1153(c) of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policy of the Act.

a. Offer Vicente Hernandez immediate and full reinstatement to his former or a substantially equivalent job without prejudice to his seniority or other rights and privileges and make him whole for any losses he may have suffered as a result of his termination in accordance with the formula used in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

b. Make the tomato sorters in the crew of Javier Hernandez during the work week ending October 1, 1975 whole for any losses suffered as a result of Respondent's change in working conditions by payment to each the sum equaling two and one-half hours' pay at the sorter's" wage rate in October 1975, together with interest thereon at the rate of 7% per annum.

c. Make Salvador Hernandez whole for any losses he may have suffered as a result of Respondent's failure to transfer him to the position of harvest machine operator by payment to him of a sum of money equal to the difference between what he actually earned from the commencement of the harvest season until his termination and the amount he would have earned as a harvest machine operator during that period of employment together with interest thereon at the rate of 7% per annum.

d. Preserve and make available to the ALRB or its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to ascertain the back pay due.

e. Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this order, to all persons employed during the 1975 tomato harvest season at their last known addresses on file with Respondent or at any more current address furnished Respondent by the General Counsel or Charging Party.

f. Post copies of the attached notice at times and places to be determined by the regional director. Copies of the notice shall be furnished by the regional director in appropriate languages. The Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

g. A representative of the Respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall -be at such times and places as are specified 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 employees may have concerning the notice or their rights under the Act. The regional director shall determine a reasonable rate of compensation to be paid by the Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question and answer period.

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

i. Copies of the notice attached hereto shall be furnished Respondent for distribution by the regional director for the Sacramento Regional Office.

It is further ordered that the allegations of the amended complaint as set forth in paragraphs 7(a), 7(b), 7(c), 7(e), 7(j) and 7(k) of the amended complaint are dismissed.

Dated: October 12, 1977

RICHARD JOHNSEN, JR., Member

RONALD L. RUIZ, Member HERBERT

A. PERRY, Member

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROS., INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 75-CE-21-S

Appearances are as follows:

Tosh Yamamoto, Esq. and Betty S. 0. Buccat, Esq. of Sacramento, California for the General Counsel

Dante John Nomellini, Esq. of Lodi, California for Respondent

Linton Joaquin, Esq., Kurt Ullman, Esq. and Reuben Serna of Salinas, California for the Charging Party

DECISION

STATEMENT OF THE CASE

ROBERT LEPROHN, Administrative Law Officer: This case was heard before me in Tracy, California on January 10 through i 14 and on January 17, 1977. The First Amended Complaint issued j January 13, 1976. The First Amended Complaint alleges violations j of Section 1153 (a) and 1153 (c) of the Agricultural Labor Relations; Act, herein called the Act, by Arnaudo Bros., Inc. At the j commencement of the hearing all parties stipulated that the First j Amended Complaint be amended to state the correct name of respondent as Arnaudo Bros., a partnership, doing business as ABA Farms and/or B & B Ranch. The First Amended Complaint is based upon charges and amended charges filed October 7 and November 24, 1975. The charges, the amended charges and the First Amended Complaint were each duly served upon respondent.

All parties were given full opportunity to participate in the hearing, and after the close of the hearing, each party filed a brief in support of its respective position.

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

FINDINGS OF FACT

I. Jurisdiction

Arnaudo Bros., hereinafter called respondent, is a partnership which operates, among other farm properties, ABA Farms and B & B Ranch. Respondent is engaged in agriculture in San Joaquin County, California and is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

The United Farm Workers of America, AFL-CIO, is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment work conditions of work for agricultural employees. I find the United Farm Workers of America (UFW) to be a labor organization as defined in Section 1140.4(f) of the Act. See Valley Farms and Rose J Farms (1976) 2 ALRB No. 41.

II. The Alleged Unfair Labor Practices

The first amended complaint alleges that respondent violated Section 1153(c) of the Act in the following respect: The discriminatory discharge of Jose Hernandez Lucatero, Vicente Hernandez and Salvador Hernandez; and the discriminatory constructive discharge of David Hernandez and Javier Hernandez. [1/] Upon completion of the General Counsel's case in chief, his counsel moved to amend the complaint by deleting therefrom allegations that Andres Mendina Lucatero and Efran Quinones had been discriminatorily discharged in violation of Section 1153(c). This motion was granted.

The complaint alleges the following violations of Section 1153(a): threats of loss of employment; interrogation of an employee regarding his union membership, activities and sympathies; changes in working conditions; creating the impression of surveillance of the workers union activities; and engaging in a pattern and practice of harassment.

1/ During the course of the hearing the First Amended Complaint was amended to read Jose Hernandez Lucatero at all places therein where it initially read Jose Hernandez.

The violations of Section 1153(c) are also alleged to violate Section 1153(a) . The alleged changes in working conditions are pleaded as violations of Section 1153(c) as well as violations of 1153(a) .

Respondent denies it violated the Act and denies that it committed any of the acts alleged. In addition respondent pleaded an affirmative defense, alleging that the Agricultural Labor Relations Board could not hear the matter because Board members Joseph Ortega, Roger M. Mahoney and Leroy Chatfield have been active supporters of the UFW and have a conflict of interest preventing them from rendering fair and impartial decisions. No j evidence was offered in support of the allegations of the affirmative defense. For this reason and because the defense is moot since hone of the named individuals is currently a Board member, the affirmative defense is hereby stricken from respondent's answer to the first amended complaint.

III. The Farm Operation

B & B and ABA are contiguous proprieties upon on which respondent grows tomatoes, sugar beets and alfalfa, and has a herd of cows.

In 1975 respondent had between 350 and 400 acres of tomatoes. The tomato crop is machine harvested for delivery to canneries. A harvesting crew consists of a harvest machine operator, tomato sorters and tractor drivers who pull the bins into which the tomatoes are deposited after sorting. Each year the harvest starts with a single machine peopled by a crew of respondent's employees. The ranch has two tomato harvesters. 2/ When additional harvesters are needed to meet cannery demands or the threat of bad weather, such harvesters are brought in from other Arnaudo properties or are obtained from contractors. In either case a full crew comes with the harvester, and no B & B employees are utilized on the additional equipment. In 1975 the tomato harvest began sometime between September 10 and September 15 and was completed on October 18, 1975.

Glen Gilmore has been foreman for Arnaudo Bros. on the B & B and ABA Ranches for about 8 years. The parties have stipulated that Gilmore is a supervisor within the meaning of Section 1140.4(j) of the Act. The five alleged discriminatees have been directly responsible to Gilmore during the period he has worked

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2/ The Arnaudo Bros, properties involved in these proceedings were alternatively referred to as the "Hill Ranch, Rancho Sierra" and B & B. This property is located some six or seven miles from other uninvolved Arnaudo properties.

for Arnaudo Bros. Gilmore does not speak Spanish. He gives his orders in English, and the orders are relayed by an employee who speaks Spanish. Spanish is the primary language of the majority of the 50 employees supervised by Gilmore. David, Javier and Salvador Hernandez have all relayed messages for Gilmore.

IV. The Terminations

A. The Discharge of Jose Hernandez Lucatero

Jose Lucatero first worked for respondent as a tomato sorter during the 1966 tomato harvest season. He returned to work in April, 1967 as an irrigator, working as a sorter during the 1967 tomato harvest. From 1968 through 1975 Jose Lucatero returned to work each year in April as an irrigator, and he customarily worked until sometime in October. Except for working one week as a tomato sorter in 1974, Lucatero did not help in harvesting the tomato crop during these years.

On October 4th Gilmore told Jose that October 5th would be his last day of work.3/ Jose asked for and was given extra men to help him gather the irrigation pipes for delivery to the ranch's shop. Since the tomato harvest was not completed, Jose asked Gilmore for work as a sorter. Gilmore told him there was no more work available for him. It was the general practice to have workers sort tomatoes if they had nothing else to do. No evidence was offered with respect to whether irrigation was completed at the time of Jose's termination; however, the completion of irrigation may be inferred from Jose's testimony regarding the gathering of the irrigation pipes. Subsequent to Jose's termination on October 8 , 1975, additional tomato harvesters were utilized on the ranch; however, these machines were not manned by respondent's employees. 4/

Prior to the election Jose did nothing to manifest the fact he was either a union member or a union supporter. He participated in no union campaign. Commencing with election day Jose wore a UFW button while at work. This was the extent of his union activity. Notwithstanding Jose's lack of overt union activity prior to the election, Arnaudo manifested a belief that he supported the UFW during a conversation which occurred in the last part of September by referring to Jose as a "Chavista", a term customarily used, to describe supporters of Caesar. Chavez or the UFW.

3/Unless otherwise noted all dates refer to 1975.

4/ Jose testified that October 5 was his last day at work; however, the company's time records show he worked until October 8, 1975, which was the end of the pay period. I find October 8 to be his last day of work.

B. The Discharge of Salvador Hernandez

Salvador Hernandez has been employed by respondent since 1964. During the first two years of his employment he worked about 8 months a year as an irrigator. In 1966 and 1967 in addition to irrigating he sorted tomatoes during the harvest season. Starting in 1968 the scope of his duties was broadened to include driving a tractor, a caterpillar and a harvest machine.5/

Between 1968 and 1974 Salvador customarily returned to work in mid-March each year to drive tractor. He would switch to irrigating in April and work as an irrigator until the start of the tomato harvest, at which time he was switched to driving a harvester. After the harvest, Salvador would spend approximately a month driving a cat in the discing and plowing of the recently harvested tomato fields. In 1974 Salvador did not work after the close of the harvest season because he had to enroll his small son in school and had to make sure his son safely got his school transportation. In 1975 Salvador returned to work in March driving tractor and/or a cat and once again when the irrigation commenced, he irrigated. However, he was not transferred to a harvester when the 1975 harvest commenced in September; he continued to irrigate until he accidently shot himself in the leg in early October. Salvador did not return to work until he was called back on October 14 to drive harvester and to sort the tomatoes. He worked until the end of the harvest. During the second week of September 1975 Gilmore told Salvador he was dissatisfied with his work, that more work needed to be done and that Arnaudo had given orders to fire the irrigators if they made mistakes. Gilmore told Salvador he had to drive the workers working under him more, or he would be fired. On the same day Gilmore reduced the irrigation crew by 2 employees.

Salvador was terminated on October 18 by Glen Gilmore who told him that only two members of the Hernandez family were needed to work after the harvest, the rest of the family would be fired. Gilmore told Salvador that David and Javier Hernandez were the 2 who were to be retained.

Salvador's union activity consisted of signing an authorization card, attending union meetings in Tracy, wearing a UFW button at work on and after election day and voting in the election.

5/ The term tractor refers to a wheeled vehicle. The term caterpillar or cats refers to tread type vehicles which are at same points in the record called "crawlers".

C. The Discharge of Vicente Hernandez

Vicente first worked for respondent as a sorter during the harvest of 1967. He returned during the 1968 season, remaining after the end of the harvest to do' field clean up work. In 1969 he worked during the harvest and also did some irrigating

In 1970 through 1972 Vicente returned to work in April or May each year as an irrigator. When irrigation was completed, he worked as a sorter. He was laid off each year at the end of the harvest.

In 1973 he returned to work to irrigate; but he worked during the harvest as a tractor driver rather than as a sorter, and after the harvest, he was assigned to taking care of and feeding the cows. He worked through the entire winter of 1973-74.

In 1974 Vicente drove tractor and learned how to drive a caterpillar and a tomato harvester. He also cut alfalfa. He did not work as a sorter during the tomato season; he operated the harvester for two weeks and also cut alfalfa during this period. He took an emergency leave in November and December 1974 and returned to work in January 1975.

During the rainy period in early 1975 Vicente fed cattle and repaired fences. When the rain stopped, he cultivated, and when this work was finished, he cut and baled alfalfa and operated a back hoe. During the 1975 harvest Vicente worked *as a* sorter rather than as a harvest machine driver or tractor driver He was working as a sorter at the time of his termination.

On October 19 David Hernandez told Vicente that Gilmore told him he had no more work for Vicente, that Vicente was fired. The next day Vicente followed Gilmore to the ranch and asked him, "what work am I going to do?", Gilmore said there was no more work for him and told him to go. Gilmore, without contradiction, testified he asked Vicente, on October 18, to stay to clean up the harvest machines, and that he received no response. Vicente did not work on October 19.

Vicente was the most active UFW supporter among the alleged discriminatees. He attended the UFW convention in Fresno over the weekend of Aguust 16, missing four days work; he signed an authorization card and solicited cards from other workers; he was a UFW observer at the representation election on September 30, 1975; he attended all union meetings; he was present during the ballot count; and after the election he wore a UFW button at work.

Two or three days after he returned from the UFW convention in August, Arnaudo asked him where he'd been. Vicente responded Tijuana; Arnaudo said this was not true, that Vicente had been to the UFW convention in Fresno. Respondent was aware

that Vicente was a union observer at the representation election. 6/

D. The Constructive Discharge of David Hernandez

David Hernandez was first employed by respondent in 1966. He worked for about three months in 1966 and 1967 as a tomato sorter and with a short hoe. In 1968 and 1969 he worked as a tractor driver, starting work each year in February and March, and he worked until the rains came or until November.

David became a year round worker in January 1970. He worked repairing old houses on respondent's ranch until plowing season, when he drove tractor. When winter came, he finished repairing and rebuilding the Arnaudo company houses. Once plowing started in 1971, David worked as a tractor driver.

In 1972 David again worked doing the plowing. During the harvest he drove forklift, and when the harvest was finished, he plowed the tomato fields.

David worked as a mechanic during the 1973 harvest. After the harvest, he plowed the tomato fields, drove a back hoe and tended the cows.

David's work in 1974 was about the same as in previous years. He cultivated, baled hay, drove tractor and helped the foreman with mechanical work. He and another person both did mechanical work until the latter quit in 1974. Thereafter David worked in the shop by himself until the end of November.

The evidence is in conlict regarding the work performed by David during 1975. Ross testified he had seen David driving tractor in connection with hay baling and cultivating. David testified he did not drive tractor in 1975.

On October 18, 1975, Gilmore told David and Javier that the tomato harvest was finished, and he wanted them to clean the machines the next day and then after that there would be some tractor work. They told Gilmore they would stay and help.7/ The next afternoon David told Gilmore that he had changed his mind and that he was going to leave. Gilmore said he needed him to help clean the machines and to do tractor work. Both David and Javier, who were present, said they were going to leave; neither offered Gilmore any explanation for his action.

6/ Since the conversation between Arnaudo and Vicente occurred prior the effective date of the Act, it does not provide a basis for a conclusion that respondent committed any unfair labor practice.

7/ The witnesses were sequestered. Javier Hernandez did not testify concerning this conversation.

On the afternoon of October 19, David had a conversation in the presence of Bob Ross and Javier Hernandez.8/ Ross and Arnaudo were seated in the latter's pickup during the course of the conversation. David asked Arnaudo why his brothers were being fired. Arnaudo said he didn't need them anymore. He said he needed two workers from the Hernandez family to drive tractors. David told Arnaudo that if the rules of previous years were followed, he would have to stop work because Arnaudo wanted to use him as a tractor driver, and he was not a tractor driver. No mention was made regarding any need for a mechanic. Arnaudo did not tell David he was discharged; he offered him work as a tractor driver, and David said he could not accept such work.9/ David told Arnaudo to give the work to Vicente; Arnaudo said he did not want to do this, giving as his reason that Vicente had not done this kind of work and that he had already left. David told Arnaudo that he and Javier were not going to stay to finish the discing if Arnaudo wasn't going to follow the rules of previous years. 10/

Arnaudo told David he was leaving because he got involved with the union. Arnaudo had observed David wearing a UFW button while at work, and he had, on at least one occasion prior to the representation election, told David he was aware of his attendence at the union meetings.

E. The Constructive Discharge of Javier Hernandez

Javier first worked for respondent in 1968 cleaning and thinning the tomato fields. He sorted tomatoes during the harvest and was laid off when the season was over. This work pattern was repeated in 1969.

In 1970 Javier drove tractor during the harvest rather than working as a sorter. He was laid off at the end of the harvest. In 1971, 72, and 73 he worked as an irrigator from April until the start of the harvest. During the harvest he

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8/ Bob Ross was, at all times material, a field representative for a company supplying materials to respondent.

9/ Bob Ross who was present during the course of the conversation testified he heard David say on several occasions, in English, that they were going to quit.'

10/ The findings with respect to this conversation are" a composite of the testimony of David and Javier Hernandez, Steve Arnaudo and Bob Ross.

drove tractor, and when the harvest was over, he stayed on until sometime in November plowing the tomato fields.

Javier returned to work in March 1974 to drive a caterpillar during the beet harvest. While cleaning the beet harvesters after the harvest, he injured himself and was off work for approximately four months, returning at the end of June or first part of July to drive tractor. He drove a harvester during the tomato harvest and again stayed on after the harvest to drive a back hoe. In 1975 Javier drove harvesters during both the beet and tomato harvest.

Javier hurt his back on October 1974 when a machine he was driving hit a "big hole". He hurt his back again a few days later when he slipped while putting water in one of the cats. In September 1975 he hurt his back again while repairing the bands on a tomato machine. No work time was lost from any of these injuries.

The relevant events of Javier's last day at work, October 19, have been recited above. His UFW activity consisted of signing an authorization card, wearing a UFW button, being a UFW observer at the election and signing the tally of ballots following the election.

V. The 1153(a) Violations

A. Threats of Loss of Future Employment

7(d) of the complaint alleges that during the period between September 4 and September 10, 1975, Arnaudo threatened Javier Hernandez with loss of future employment because he signed a UFW authorization card.

During the first week of September, Arnaudo told Javier that if the union entered the ranch, he would plant alfalfa where he formerly planted tomatoes and that he would get another company to come in and do the work, which would mean the end of work for Javier. Arnaudo said that if Chavez does not enter the ranch, there will be work for all of you as in previous years. Arnaudo stated he knew the Hernandezes attended union meetings, and he said, they should watch carefully what they did.

Salvador Hernandez

7(g) of the complaint alleges that during the period of between September 10 and 17, 1975, Arnaudo threatened Salvador Hernandez with loss of future employment if he signed an authorization card.

During the last part of September 1975, Arnaudo had a conversation with Salvador Hernandez and Jose Lucatero in the course of which Arnaudo said that if they signed papers with the union, he would plant grass the next year, and this would be the last year they worked for him.

Arnaudo asked Salvador what he knew about Chavez and the union. Salvador said he was aware of the union because some women had been by the fields. Arnaudo told Salvador to pay no attention to them because they were people who did not want to work, and who just wanted to make a ruckus. He said it was not to their advantage to get involved, that all Chavez had to offer was insurance which could be obtained without a union at a cost of $8.00 to 15.00 per month. At the close of this conversation Arnaudo asked how long the irrigating would last, Salvador said it would be finished in 2 or 3 days. Arnaudo said it was possible they would not be needed for tomatoes.

David Hernandez

The complaint, at paragraph 7(i), alleges that on or about September 27 Arnaudo threatened David Hernandez with loss of future employment because David intended to vote in the pending representation election. Arnaudo also threatened loss of employment if the union won the election.

Two or three days before the representation election, Arnaudo spoke to David while in the tomato fields and said that the Hernandezes were more Chavista than anyone else on the ranch. He said they should not vote for the union; David said they were going to vote for the union since they had already, signed cards. Arnaudo said that signing cards made no difference, they shouldn't vote for the union. David told Arnaudo that he was not going to convince him not to vote for the union; he was going to vote for the union, anyway. Arnaudo said he would not plant tomatoes, and. he would give all the work required on the alfalfa to another person. He said he had a right to keep who he wanted, and he was going to fire everybody in the Hernandez family.

Vicente Hernandez

Paragraph 7 (m) of the complaint alleges that on or about September 22, 1975, Arnaudo threatened Vicente Hernandez with loss; of future employment because of his support of the UFW.

Two or three weeks before the representation election, Vicente had a conversation regarding the union with Arnaudo during which Arnaudo told him he didn't need a union. Arnaudo said that he helped Vicente and his family by planting beets and tomatoes, and if the Hernandezes went crazy and signed the cards, he wouldn't plant tomatoes and beets next year but would plant barley instead. Then, he would not need the Hernandezes and would have to fire them.

B. Interrogation of Employees

Paragraph 7(e) of the complaint alleges that Glen Gilmore, during the period between September 4 and September 10, interrogated Javier Hernandez regarding his union sympathies.

Sometime between September 5 and September 12, Gilmore asked Javier what he thought about the union. Javier replied that in his opinion Chavez was good for the farm workers. Gilmore asked him what was good about the union. Javier said that the union was good because it had good insurance. Javier said that when one was in the union, the boss could not lay a worker off merely because he wanted to; he had to have a serious reason to let him go. Gilmore asked Javier whether he knew that he had to pay dues to the union, and that he could only work 8 hours, a day with the union, while at Arnaudo's he could work 13 hours a day.

At paragraph 7(j) the complaint alleges that on or about September 29, 1975, Glen Gilmore interrogated David Hernandez regarding his union activities. Since no evidence was offered tending to prove this allegation, *I* shall recommend dismissal of paragraph 7(j) of the amended complaint.

C. Failure to Pay Employees for Their Lunch Periods

Paragraph 7(f) of the amended complaint alleges that since September 30 respondent has changed the conditions of employment for certain employees by no longer paying them for their lunch periods. This allegation relates to the sorters working on Javier's harvester.

During 1974 and 1975 Javier kept a daily record of the hours worked by sorters and others in his harvesting crew. His testimony is contradictory regarding whether or not this record keeping was part of his job. He kept such records in both 1974 and 1975, and testified he gave them to Gilmore on a weekly basis. Gilmore denies ever having seen the records. It was his testimony that he kept his own records on a daily basis, and that such records provided the basis for paying the employees. Martha Hernandez, who worked as a sorter during both in 1974 and 1975 harvests/testified that Javier kept her hours in 1975, and that Gilmore had never asked her about either daily or weekly hours work.

The 1975 employer payroll records show the following: for the pay period ending October 1, the time worked by each sorter on Javier's machine is recorded as one half hour per day less j than the time recorded for the sorters by Javier. The time recorded for tractor drivers working with Javier's harvester is identical in both records. With respect to Javier, the Gilmore records credit him with two more hours work that week than do his own records. It is only during this pay period that the employer records credit sorters with one half hour per day less than Javier's records.

Javier testified he wrote the letters UFW on the corner of the October 1 time record which he gave to Gilmore. The letters had been written on the sheet by Javier in response to a question from his mother at a time when he was working on

the records. He turned the time sheets in without erasing the letters. Gilmore later told him that he had taken away the lunch period of the workers because UFW letters were on the time sheet

Gilmore denies ever having seen Javier's time sheets. He admits consulting him from time to time regarding hours worked by people on his harvester.

D. Creating the Imperession of Engaging in Surveillance

Paragraph 7 (h) of the amended complaint alleges that Arnaudo created the impression of engaging in surveillance of employees' union, activities during the period between September 10 and September 17, 1975.

During a conversation with David Hernandez in the middle of September, Arnaudo stated that he knew that David was going to union meetings. In a subsequent conversation 2 or 3 days before the election, Arnaudo told David that the Hernandez family was more Chavista than anyone else on the ranch.

About three weeks prior to the election Arnaudo came by a field where Vicente was irrigating and said to him, "How's my little Chavista? I hear you guys are getting crazy". Arnaudo then went on to state they didn't need a union, and he would plant barley next year if the union got in.

On another occasion Arnaudo called Jose a Chavista, and when Jose denied the fact, went on to say that yes he was a Chavista.

During the first week of September Arnaudo referred to Javier as a Chavista. Javier denied there was any Chavista present. Arnaudo said, "Oh yes, this old man knows all. I know the Hernandez family attends union meetings. I want to note very well what you are going to do".

E. Harassment of Javier, Vicente and David Hernandez

The amended complaint (paragraph 7 (k)) alleges that respondent engaged in a pattern and practice of harassing Javier, Vicente and David Hernandez from August 28 until October 19, 1975. The General Counsel's brief sets forth seven happenings which he contends constitute the harassment alleged.

(a) Gilmore asked Vicente Hernandez to go home after working only a half day.

The record does not support such a finding. As noted below Vicente's work schedule remained substantially unchanged throughout a relevant period, and I so find.

(b) Gilmore shouted orders to his employees.

The General Counsel did not articulate the specific portions of the testimony he regards as supporting this contention. Upon reviewing my notes of the testimony, I make the following findings: after the election Gilmore gave orders in an angry manner, shouted at the workers and intensified his supervision over them.

(c) Gilmore "constantly" wore a pistol.

The testimony regarding the consistency with which Gilmore wore a pistol is in conflict. David Hernandez testified that Gilmore customarily did not wear a gun during September and October. 11/ Javier Hernandez testified he saw Gilmore wear a gun during August, September and October 1975, and from September on he wore the gun constantly.,

Gilmore concedes he wore a pistol at various times in 1974 and 1975; he denies ever wearing it for so long a period as a week. He wore the gun, as well as carried a shotgun in his pickup, to deal with wild dogs which roamed the ranch's pasture-land. David also carried a gun in his pickup to deal with the dogs.

(d) Gilmore told Salvador and Jose to work night and day irrigating, and that they would be paid only thirteen hours per day.

The facts relating to this allegation are set forth below in connection with the allegation that the work conditions of Salvador were changed. 12/ There is no evidence cited by the General Counsel to support a finding that' Gilmore's conduct toward Salvador and Jose constituted a pattern and practice of harassing Javier, Vicente or David Hernandez. I make no such finding. 13/

(e) Javier was given a smaller crew of sorters as compared to previous years. His crew worked on "a lot more green tomato fields than before."

11/ David testified he had a conversation with Gilmore in September at which time Gilmore was wearing a gun, but that he did not thereafter customarily wear a gun.

12/ The complaint contains no allegation that the work conditions of Jose were changed, although Jose and Salvador both performed the same work.

13/ Although the amended complaint does not allege harassment of Salvador or Jose, a finding of such harassment would support a conclusion that respondent violated Section 1153 (a).

Javier testified he had only fourteen sorters on his harvester in 1975. His own records discredit this testimony. The respondent's payroll records which I credit show Javier with eighteen sorters each week of the 1975 harvest. There are no j company records in evidence from which the number of sorters on I Javier's harvester in 1974 can be accurately ascertained. I do not credit Javier's testimony that he had twenty or more sorters I on his machine in 1974. I find he was not given a smaller crew in 1975 than he had in 1974.

Javier's harvester was. used to "open fields" in 1975, that is, it was used to harvest the first 15 or 20 rows in a field in order to see whether the field was ready for harvesting. His harvester was used because the tractors assigned to it were four-wheel tractors which don't run on the tomato banks. Tractors assigned to other harvesters had only three wheels, thus the front wheel would trample the tomatoes.

Nothing in the record indicates that Javier's work was more onerous because he was opening fields. He was required to go slower so that the sorters could keep up with the additional debris encountered and with a greater number of green tomatoes to be sorted out. Both the sorters and Javier were hourly rated employees and received the same hourly rates irrespective of the field in which the harvester was operating.

Javier apparently never complained about having to "open fields". The machine he drove in 1975 was the same harvester he had driven two previous years, and his assignment in 1975 did not differ from his 1974 assignment.14/

(f) The sorters on Javier's machine were not paid for a one half lunch break.

The General Counsel fails to explain how this fact amounts to a pattern of harassment of Javier Hernandez, especially in view of the fact Javier did not lose his lunch period pay.

(g) Gilmore gave David orders to relay to the workers and would countermand these orders by dealing directly with the workers and giving them different orders.

David Hernandez testified to this effect.

F. Change in the Terms and Conditions of Employment of Vincente Hernandez and Salvador Hernandez

Salvador Hernandez

Prior to September 17 the irrigation crew consisted of

14/ Javier testified that in 1974, unlike 1975, he was never moved from one field to another when he was harvesting in order tq open a new field. I do not credit this testimony.

six workers, including Salvador; on September 17 the crew was reduced to two, Salvador and Jose. This was the day that tomato harvest began, and at this time the ranch had only two or three heads of water running and only two irrigators were needed.

Salvador worked fourteen hours a day before the work force reduction, thereafter he generally worked eighteen hours per day. The additional hours were required because the irrigation ditches and pipes had to be checked at night. 15/ Unlike 1974 he was not, at the start of the tomato harvest, transferred to operate a tomato harvester.

From October 1 until October 14 Salvador was off work as the result of a self-inflicted gunshot wound. He returned to work and worked the balance of the harvest season. He testified he worked as a sorter during this period. This testimony is not controverted; however, he was paid at $3.75 per hour, a dollar an hour more than sorters and a dollar an hour more than he received as an irrigator.

Employer records show Salvador's 1974 period of employment to commence on March 17 and end on October 5, his 1975 period of employment commenced on March 13 and ended October 18. He worked. 2,575 hours in 1974 and 2,562 hours in 1975

Vicente Hernandez

Vicente attended the UFW convention in Fresno in August, 1975. He was off work for four days, August 15 through August 18, for this purpose. Although Vicente told Arnaudo and Gilmore that he had gone to Tijuana during the time he was off, they were aware that he had attended the UFW convention. Prior to the convention, Vicente customarily worked 12 hours a day cutting and baling alfalfa. His rate was $2.50 per hour. After his return from the convention until the week ending October 8, Vicente's hours were substantially what they were prior to August 17. On or about September 11, Vicente along with other employees, received a twenty-five cent per hour increase.

15/Salvador testified he was required to work 24 hours for 18 hours pay, and that he worked 24 hours a day for a period of two weeks. I do not credit this testimony, nor do I credit Salvador's testimony to the effect that an increase in daily hours from 13 to 18 occurred on September 25. The employer records are to the contrary, and no evidence was presented challenging the accuracy of those records.

During the weekend ending October 8, 1975 Vicente, for reasons not brought out at the hearing, worked 17 hours less than his co-worker in alfalfa cutting and baling. 16/ Vicente was off work two days on which his co-worker (Rosas) worked 13 hours per day, and Vicente worked eight, hours on a day Rosas was off.

From the payroll records, it appears that Vicente was moved from alfalfa harvesting to tomato harvesting during the last pay period of the harvest season. He worked sorting tomatoes rather than driving a tractor as he had done in the harvest of the two preceding years. As a sorter he worked fewer hours than did the tractor drivers. This was true of all sorters. From the time the harvest commenced until Vicente was transferred to sorting, he worked 213 hours as opposed to 229 hours for one of the tractor drivers. The hourly rate was the same on each job.

ANALYSES AND CONCLUSIONS

The General Counsel's contentions are divided into three basic parts: (1) allegations relating to employer conduct independent of any employee terminations, i.e., independent Section 1153(a) conduct; (2) a series of terminations which are alleged to violate Sections 1153(a) and/or 1153(c); and (3) allegations regarding the failure of respondent to rehire certain individuals are alleged as violations of 1153 (c).

(1) The Independent 1153(a) Violations

Section 1153(a) of the Act makes it an' unfair labor practice for an employer to interfer with, restrain or coerce an employee in the exercise of rights guaranteed the employee under Section 1152 of the Act. This section is substantially identical to Section 8(a)(1) of the National Labor Relations Act. Since ALRA Section 1148 mandates following applicable decisions under the National Labor Relations Act, such decisions are appropriately examined to ascertain whether Respondent has violated Section 1153(a).

(a) Impression of Surveillance

Employer speech or conduct calculated to impress an employee with the idea that the employer has kept a close enough watch to enable him to know about union meetings or union activities of his employees violates the National Labor Relations Act. Coca-Cola Bottling Co. (1974) 210 NLRB 706; Berton-Krishner, Inc. (1974) 209 NLRB 1081; Walnut Creek Hospital (1974) 203 NLRB 656; Murcole, Inc. (1973) 204 NLRB 228, 234; NLRB v River Togs, Inc. (2nd Cir. 1967), 382 F2d 198 Section 1148 of the Act tells us that such speech or conduct by an agricultural employer violates Section 1153(a).

16/Contrary to Vicente's testimony the payroll records do not reveal a pattern of sending him home after six hours work per day. I do not credit his testimony that he was so sent home.

On several occasions prior to the representation election on September 30, 1975, Steve Arnaudo made comments to workers about their union activities as well as the activities of others, for example he told David Hernandez he knew David was going to union meetings, and on another occasion he told Javier Hernandez he knew the entire Hernandez family attended union meetings. 17/ The Arnaudo statements would reasonbly be expected to create in the mind of the worker the conclusion that his participation in UFW activities was known to Arnaudo and that Arnaudo's knowledge of such affairs was obtained from surveillance At the time Arnaudo spoke to David and to Javier, the union activities of neither were so overt as to be matters of public knowledge; thus, in the mind of each it was unlikely that Arnaudo could have learned of the activitiy mentioned except through surveillance. 18/ Arnaudo's statements to David and Javier created the impression of surveillance, thereby interfering with and restraining the exercise of rights guaranteed in Section 1152 in violation of Section 1153(a).

(b) Interrogation of Employees

Interrogation of employees by an employer regarding their union sympathies or affiliation is violative of NLRA Section 8(a)(l) because of the natural tendency of such questioning to instill in the minds of those questioned fear of discrimination on the basis of the information the employer has obtained. NLRB v West Coast Casket Co. (9th Cir. 1953) 205 F2d. Questioning employees regarding their union sympathies) is not regarded as an expression of views or opinion under Section 8(c) of the NLRA because the purpose of the inquiry is not to express views but to ascertain the views of the person questioned. Struksnes Construction Co. (1965) 165 NLRB 1062. Such interrogation, is proscribed under the NLRA even when directed to selected or individual employees in the absence of any legitimate reason for the questioning and in the absence of any assurances against reprisals. Holiday Inn of Chicago-South (1974) 209 NLRB 11; Engineered Steel Products, Inc. (1971) 188 NLRB 298; Colonial Haven Nursing Home, Inc. (1975) 218 NLRB No. 37; La-Z-Boy South, Inc., supra.; Struksnes Construction Co., (1967) 165 NLRB 1062; Blue Flash Express, Inc. (1954) 109 NLRB 591.

17/ Arnaudo testified he had many conversations with his employees about the UFW and that he could not remember the content of the conversation. He admitted to frequent use of the term "Chavista" in talking to his employees. I credit the testimony of David and Javier with respect to the recited statements.

18/Cf. La-Z-Boy South, Inc. (1974) 212 NLRB 295

Both Gilmore and Arnaudo interrogated employees about the UFW and their UFW sympathies. Arnaudo 's interrogations were frequently juxtaposed to threats to plant alfalfa and thereby eliminate jobs if the union came in. 19/ The interrogation by Arnaudo is not denied. He had many conversations with his employees about the union, but he could not recall the substance of any particular conversation. Gilmore interrogated Javier Hernandez on one occasion regarding his union sympathies. The interrogation of Arnaudo and Gilmore were not accompanied by any assurance against reprisal; rather, on many occasions the interrogations were accompanied by the threat of job elimination. The cited interrogations violated Section 1153 (a) of the Act.

(c) Threats of Reprisals

Statements by supervisors or agents of an employer to the effect that the employer will go out of business or move his business to another area in the event of a union victory at the polls violate Section 8 (a) (1) of the National Labor Relations Act. (NLRB v River Togs, Inc. (2nd Cir 1967)382 F.2d 198; NLRB v Marsh Supermarkets, Inc. (7th Cir 1963) 327 F.2d 109, cert. denied (1964) 377 US 944; NLRB v Winn-Dixies Stores, Inc. (6th cir 1965) 341 F.2d 750, cert. denied (1965) 382 US 836.) Similarly, statements by supervisors or agents that an employee will be discharged if he signs an authorization card or votes for the union are violations of Section 8 (a) (1). Carbide Tools, Inc. (1973) 205 NLRB 318; Maple City Stamping Co. (1972) 200 NLRB No. 108.

Section 8(c) of the NLRA and Section 1155 of the ALRA permit an employer to communicate his views of unionism to his employees so long as the communication contains "no threat of reprisal or force, or promise of benefit". NLRB v Gissel Packing Co. (1969) 395 US 575, 618-619. However, Mr. Arnaudo's repeated statements about planting alfalfa rather than tomatoes, thereby eliminating the need for a sizeable work force, coupled with his statement that he would contract out the alfalfa cutting work we're patent threats to the workers; they would have no work if the union prevailed. He stated he would make the threatened moves in response to a union victory. NLRB v Winn-Dixies Stores, Inc., supra. Furthening Arnaudo's statements to Javier and Salvador Hernandez to the effect that there would be no future employment for them because they signed union authorization cards, were threats of reprisals for having exercised S 1152 rights. Coca-Cola Bottling Co. (1974) 210 NLRB 706; De Loreau Cadillac, Inc. (1975) 213 NLRB No. 208; NLRB v S.E. Nicols-Dover, Inc. (3rd Cir, 1969) 414 F2d 561, cert. denied (1970) 400 US 831; NLRB v Marsh Supermarkets, Inc., supra. The learning and the authority of the cases cited above establishes this conduct as clear violations of Section 1153(a) as alleged in paragraphs 7(d), 7(g), 7(i) and 7(m) of the amended complaint.

19/The complaint does not allege interrogation by Arnaudo; however, the record supports a finding of such conduct. The absence in the complaint of a specific allegation of interrogation by Arnaudo does not preclude a finding that such interrogation violated the ALRA. See Rochester Cadet Cleaners, Inc.(1973)205 NLRB 773.

(d) Change of Working Conditions

(e) (i) Vicente and Salvadore

The General Counsel contends the Respondent violated Sections 1153 (a) and (c) of the Act by changing the terms and conditions of employment of Vicente Hernandez and Salvador Hernandez. The alleged change in work conditions of Vicente is an hours reduction because he attended the UFW convention held in August, 1975. Vicente testified that after returning: from the convention, Respondent began sending him home after working six hours a day, thereby substantially reducing his income Respondent's payroll records contradict this testimony. Records show Vicente working substantially the same number of hours per day during September, 1975 as he worked in early August of that year. No evidence other than Vicente 's testimony was offered by the General Counsel. I conclude the General Counsel failed to prove this allegation; therefore, I shall recommend dismissal of the allegation of paragraph 7 (e) of the amended complaint so far as they relate to Vicente Hernandez.

The testimony and Respondent's records show that Salvador was customarily transferred from irrigating to harvest machine operating at the outset of the tomato harvest. This transfer was not effected in 1975. No testimony was presented to explain the difference in treatment of Salvador at the start of the 1975 harvest. The hourly rate for an operator was $3.75 per hour, a dollar an hour more than Salvador received as an irrigator Placing these facts in the context of clear employer knowledge of Salvador's affinity with the UFW 'and threats of reprisals for such affinity, I find Respondent's unexplained failure to follow its practice of assigning Salvador a harvesting machine to violate both SS 1153 (a) and 1153 (c) of the Act as alleged in paragraph 7 (e) of the amended complaint. Davis Food City (1972) 198 NLRB 94; Dodson/GA Foodliner (1971) 194 NLRB 192.

(ii) Sorters Work Week Reduction

The General Counsel claims Respondent violated 1153 (a) and 1153 (c) of the Act by reducing the workweek of tomato sorters on Javier Hernandez 's harvester by one-half hour per day; this reduction being manifested by the disparity between Gilmore's time records and those maintained by Javier Hernandez for his sorter. During the pay period ending October 1, 1975, the Gilmore records credit sorters with ½ hour per day less than Javier's records. The disparity exists only during the cited pay period j and only for the sorters on the crew. It does not include Javier or the crew's tractor drivers.

Respondent's supervisor, Gilmore, denies the significance of the difference in the records by asserting he had never seen Javier 's records, and by asserting that he made a daily check on the hours worked by the sorters. Martha Hernandez, a sorter on Javier 's machine, testified that during the 1975 harvest Gilmore had never questioned her regarding her hours. Other than the cited difference, the Javier time records are substantially identical to Respondent's payroll records.

I do not credit Gilmore's statement that he never saw the Javier time sheets. The substantial identity of the two records with respect to sorters coupled with the Martha Hernandez testimony supports a conclusion that Javier 's time records were used to provide the Respondent with the hours worked by the sorters in Javier 's crew. While it follows that each sorter's time was reduced as asserted, it does not inevitably follow that the reduction violated either 1153 (a) or 1153 (c) .

To prove a violation of 1153 (c) the General Counsel must establish a primafacie showing that Respondent took away the ½ hour lunch period with the object of discouraging membership in the UFW and that the reduction in hours was discriminatory. Radio Officers' Union v NLRB (1954) 347 US 17, 33 CRRM 2417.

The reduction was effected for the pay period ending the day after the representation election. It was effected in a crew led by an overt UFW supporter and in a crew consisting primarily of members of the Hernandez family, a family previously recognized by Respondent as more Chavista than any other group of its employees. A natural consequence of the hours reduction, applied as it was to the period immediately preceding the election and manifesting itself in the first paycheck received after the election, was to discourage membership in the UFW. Thus, I conclude the General Counsel established a primafacie case; the Respondent violated 1153 (c) as alleged.

The employer defends against this allegation by saying the reduction did not occur. No explanation for the reduction was offered. Having concluded, contrary to the Respondent's assertion, such a reduction did occur. I conclude that Respondent violated 1153 (c) as alleged. 20/

The unilateral and unexplained elimination of the past lunch periods also violated Sections 1153(a) of the Act. Davis Wholesale Co., (1967) 165 NLRB 271; Buddy Schoellkopf Products, Inc. TT96'7) 164 NLRB 182; Carbide Tools, Inc. (1973) 205 NLRB 318; Maple City Stamping Co. (1972) 200 NLRB No. 108. ALRA Sections 1148 warrants application of these NLRB precedents to the present case.

20/ Respondent's counsel correctly points out that Javier's hours; for the week in question were increased by two hours as compared with his time record. Since Javier was a more open and active supporter of the UFW than any of his crew members, counsel argues that the failure to "punish" him support the conclusion that the hours reduction had no discriminatory motive. The failure to "punish" Javier is also susceptible of the inference that his open and "notorious" support of the UFW protected him from such punishment. An hours reduction applied solely to him would more likely be regarded as having an illicit motive.

(e) Harrassment

The General Counsel cites seven happenings alleged to amount to a pattern and practice of harrassing Javier, Vicente, and David Hernandez. No argument is made that the harrassment provide an independent ground for finding a violation of Section 1153(a); nor is a harrassment violation set forth as an issue in the case by the General Counsel. For the most part, the incidents contended to be covered by this paragraph of the amended complaint are covered by other allegations and have been considered elsewhere in this opinion.

As set forth above, I find that Gilmore gave orders in an angry manner and shouted at employees, that Gilmore wore a j pistol from time to time and that he countermanded orders given to I David to relay to the workers and dealt directly with the workers. Contrary to the contentions of the General Counsel, I do not find the conduct to be an independent violation of Section 1153(a) with i respect to David, Vicente or Javier Hernandez as alleged at i paragraph 7(k); therefore, I recommend that the allegations of paragraph 7(k) of the complaint be dismissed.

(f) The Terminations

(i) Jose Lucatero

Commencing with 1968, Jose Lucatero was employed each year by Respondent-as an irrigator, customarily working until: sometime in October. But for one week in 1974, he did not work in the tomato harvest. In 1975 he was terminated with the completion of irrigation. He requested, but was not given work in the harvest. Although he engaged in no overt union activity, the Respondent manifested an awareness Jose supported the UFW.

The record contains no evidence to suggest that Lucatero's termination occurred for any reason other than the completion of irrigation of the Respondent's properties. The date of the termination is consistent with his own testimony regarding when he normally finished work. His total 1975 hours worked was consistent with total hours worked prior years.

The General Counsel has failed to establish a primafacie showing that the termination of Jose Lucatero violated the Act; therefore, I shall recommend dismissal of the allegations of paragraph 7(a) of the amended complaint.

(ii) Vicente Hernandez

Prior to the 1973 harvest, Vicente was laid off each year at the end of the harvest. After the harvest in 1973 Vicente was retained through the winter of 73-74 to tend Respondent's cows. From his commencement of work in April, 1973

Vicente was a year-round employee until his termination in October, 1975.21/

The events surrounding his termination are as follows: he was working as a sorter when the harvest ended; the the day the harvest ended Gilmore asked him to stay and help clean the harvesters, Vicente left without responding; the next day (October 19) he did not work; at the close of the day his brother David told him Gilmore said he was fired; on the twentieth, Vicente testified he asked Gilmore what work he was to do and Gilmore told him there was no work for him.22/ On October 19, David suggested to Arnaudo that Vicente be kept on; Arnaudo declined to do this giving as his reasons that Vicente had left and that he had not previously done this kind of work. There was apparently no discussion about keeping him or anyone else on tending cows.

In seeking to establish a discharge violation of Section 1153(c) the burden is upon the General Counsel to establish a primafacie case. Once that burden is met, the Respondent must produce a valid explanation for the discharge since the "real" reason for the termination is within its exclusive knowledge.

Vicente was a year-round employee and was the employee most active in support of the UFW, both before and after the election; and the employer was unquestionably aware of his activities. There is no evidence his customary winter time work of tending cows was unavailable. I credit David's testimony to the effect that Gilmore said Vicente was fired. This evidence establishes a primafacie violation of the Act. The burden thus shifted to Respondent to explain the termination to give us the "real" reason it happened. Montgomery Ward & Co. v NLRB (7th Cir. 1939)107 F2d 555, 560; NLRB v Miller Redwood Co. (9th Cir. 1969) 407 F2d 1366, 1369.

21/ See Respondent Exhibit No. 8. The exhibit corroborates Vicente's testimony that he was off during November and December, 1974. His testimony that this was an emergency leave is uncon-tradicted.

22/ Gilmore denies seeing Vicente on October 20. I credit Vicente's testimony on this point. Respondent in it's brief does not deny the Gilmore statement to David Hernandez on the 19th Vicente's testimony regarding Gilmore's statements made during a conversation on the 20th is consistent with what Gilmore said on the 19th.

The Respondent's explanation is that Vicente quit on October 18. This response is inconsistent with Gilmore's statement that there was no work for Vicente made to David on the 19th, as well as being inconsistent with Vicente's inquiry about work on October 20. This response is also inconsistent with one of Arnaudo's reasons for not assigning him post harvest work, i.e. inexperience. Arnaudo's alternative reason, that Vicente had left was not true, and therefore casts doubt upon the bona fides of the disharge. Finally, the employer offers no explanation for not offering Vicente his winter work of the past two years, cow tending.

As urged by the General Counsel, I conclude that Respondent violated Sections 1153(a) and 1153(c) of the Act by discharging Vicente Hernandez on October 19, 1975.

(iii) Salvador Hernandez

Salvador Hernandez was terminated at the end of the 1973 harvest season. He testified that each year from 1968 through 1973 he worked approximately one month after the end of the harvest. He testified he did not work after the harvest ended in 1974 because he had to enroll his small son in school. The General Counsel does not articulate a theory with respect to why this termination violated either 1153(a) or 1153(c); presumably, in light of Salvador's testimony, his contention rests upon an unexplained disparity of treatment in terms of Salvador's 1975 period of employment vis a vis his period of employment in prior years. This contention is not supported by the evidence. Salvador's testimony regarding the period of time he worked each year is controverted by a summary of the pertinent employer record which show Salvador's last day of employment from 1971 through 1975 to be sometime in October, the month in which the tomato harvest is finished. Therefore, I do not credit Salvador's testimony that he customarily worked a month beyond the end of the harvest, and I find his 1975 termination to be consistent with his termination in prior years.

Thus, contrary to the assertion of the General Counsel, I find the termination of Salvador Hernandez did not violate Sections 1153(a) and 1153(c) of the Act. Therefore, I shall recommend dismissal of paragraph 7(b) of the amended complaint with respect to Salvador Hernandez.

(iv) David Hernandez

David Hernandez quit his job at Arnaudo's. The General Counsel argues that his termination was a constructive discharge, and therefore violative of Sections 1153(a) and (c).

On October 18 both David and Javier agreed in response to a request by Gilmore to continue working. Gilmore wanted them to clean the harvest machines and then to do some tractor work. The next afternoon each told Gilmore he had changed his mind and was leaving. No explanation was offered. On the 19th, David had a conversation with Arnaudo in which he said he couldn't stay because Arnaudo was not following the rules of

previous years. David said he wasn't a tractor driver, and if tractor drivers were needed, he could not accept this work. There is no evidence regarding the need, if any, for someone to perfor "mechanical" work after the harvest. Nor did the General Counsel offer any evidence regarding what David meant by his reference to the rules of previous years. Thus, David's allusion to such rules has no probative value and can be given no weight in assessing the nature of his termination.

The General Counsel must prove his case by affirmative evidence and reasonable inferences drawn from such evidence He has failed to do so. The Respondent does not have the burden of disproving a violation of rules which haven't been proved. Hawkins v NLRB (7th Cir. 1966) 358 F2d 281, 283-284; Maple City Stamping Co., supra at p. 753.

Additional factors to be considered in evaluating the nature of David's termination are the following: he had previously performed tractor work, there is no evidence tractor work was more onerous than the work he had been doing, tractor work was needed, there is no evidence his pay would have been reduced when performing tractor work and his initial acceptance of such work and Arnaudo's reliance on that acceptance. It is apparent David felt it was improper for him to stay; however, the presence of such a feeling does not* translate into wrongful conduct by Respondent.

Turning to NLRB decisions 'for guidance I find the Board has treated terminations as constructive discharges rather than quits in the presence of the following factors: reduction in classification which occurred in the context of surveillance of the employee's work, keeping tabs on his work rule violators, and violation of the employer's past practice by denying a request to trade shifts. NLRB v Lipman Brothers (1st Cir. 1966) 355 Fs 15 Dodson/GA Foodliner, supra. Ostensible quits motivated by discriminatory even to work which is not more disagreeable or onerous have also been treated by the NLRB as constructive discharges. NLRB v Mays, Inc. (2 Cir 1966) F2d. NLRB v Monroe Auto Equipment Co. (1966) 159 NLRB 613. However, in the present case the General Counsel has not presented proof of a discriminatory motive in the offer to David Hernandez of available work of the kind previously performed by him, particularly in the absence of affirmative evidence there was further need for a mechanic. It is apparent that Arnaudo would have kept David on had he been prepared to work as. a tractor driver. David declined and opted to leave. See Eabarn Trucking Service (1966) 157 NLRB 1370. I find that Respondent did not terminate David Hernandez; therefore I shall recommend that the allegations of paragraph 7(c) of the amended complaint as they relate to David Hernandez be dismissed.

(V) Javier Hernandez

Javier's employment ended on October 19th. Like David, he quit. The General Counsel contends his termination was a constructive discharge as opposed to a "quit". Javier was offered tractor driving, a job which he had previously performed. He testified he declined to accept the work because of back problems. Javier was present during the final conversation between David and Arnaudo, and it appears David was speaking for both of them. Javier did not offer to try the work to see whether he could do it. He had been driving tomato machines during the harvest, but this work hadn't bothered his back.

The General Counsel cites Fuqua Homes Missouri, Inc., (1973) 201 NLRB 130 to support his contention that Javier was constructively discharged. The case is distinguishable. In Fuqua, the discriminatee quit after being transferred to more onerous work. No justification was found for the transfer in the face of his known fear of heights and the fact he weighed one hundred pounds more than other workers. The day before he left work, the discriminatee fell through the roof of a trailer under construction. 23/ The Trial Examiner found the transfer was motivated by a desire to make the discriminatee's working conditions so onerous that he would quit; thus, concluding there was a constructive discharge.

In the present case, no transfer is involved with respect to Javier. There was no more work as a harvester operator. Javier was offered work driving tractors. When this offer was initially made, Javier as well as David accepted. No mention was made at that point of Javier's back infirmity. A fact which casts doubt upon his subsequent use of his back as an explanation for refusing work. It is also to be noted that after returning to work following his injury in March 1974, he did tractor and back hoe work during and after the 1974 harvest season. 24/ Although there was a "back" incident in 1975, Javier lost no time from work. On October 18 when Gilmore offered Javier a post harvest job driving tractors, I find he had no reason to know he was offering something Javier could not do, and, as noted above, it did not initially occur to Javier he couldn't do the work for he accepted the offer. Thus, even in the context of independent Section 1153 (a) conduct by Respondent, I find the termination of

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23/The employer was engaged in the manufacture and distribution of mobile homes.

24/Javier was apparently off from early March to early June 1974.

Javier Hernandez to be a quit rather than a constructive discharge. Therefore I shall recommend the dismissal of the allegations of paragraph 7(c) of the amended complaint so far as they relate to Javier Hernandez. 25/

25/ The absense of any medical evidence regarding the nature and extent of Javier's back condition clouds his credibility with respect to his reason for not accepting tractor work.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153(a) and Section 1153 (c) 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 found that Respondent unlawfully discharged Vicente Hernandez, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former or to a substantially equivalent job. I shall further recommend that Respondent make whole Vicente Hernandez for any losses he may have incurred as the result of its unlawful discriminatory action against him by payment to him of a sum of money equal to the wages he would have earned from the date of his discharge to the date he is reinstated or offered reinstatement less his net earnings, together with interest thereon at the rate of 7% per inem. I shall recommend that the 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 and Heating Co., 138 NLRB 716.

Having found that Respondent unlawfully discriminated , against the tomato sorters in the crew of Javier Hernandez during! the work week ending October 1, 1975, I shall recommend that Respondent make said tomato sorters whole by payment to each the sum equaling *2%* hours pay at the sorters wage rate in October 1975, together with interest thereon at the rate of 7% per inem.

Having found that Respondent unlawfully discriminated against Salvador Hernandez by failing to transfer him to the position of harvest machine operator at the outset of the 1975 tomato harvest, I shall recommend that Salvador Hernandez be made whole for the loss of wages suffered from Respondent's discriminatory act by payment to him of a sum of money equal to the difference between what he actually earned from the commencement of the harvest season until his termination and the amount he would have earned as a harvest machine operator during that period of employment together with interest thereon at the rate of 7% per inem.

In order to more fully remedy the Respondent's unlawful conduct, I shall recommend that Respondent make known to its current employees, to all persons employed during the 1975 harvest, and to all persons who are hired during the 1977 tomato harvest that it has been found in violation of the Agricultural Labor Relations Act, that it has been ordered to make certain of its employees whole for wage losses resulting from its unlawful acts, and that it has been ordered to cease violating the Act and not to engage in future violations.

To this end I shall recommend:

(1) That Respondent be ordered to mail a copy of the attached Notice to Employees to all persons employed during the 1975 tomato harvest season at their last known addresses on file with Respondent or at any more current address furnished Respondent by the General Counsel or Charging Party;

(2) That Respondent be ordered to distribute a copy of the Notice to each of its current employees;

(3) That Respondent be ordered to post the Notice during the period commencing August 1, 1977, and continuing until the end of the 1977 tomato harvest at not less than 3 sites on its Hill Ranch at which workers may reasonably be expected to become aware of the Notice;

(4) That Respondent be ordered to distribute a copy of the Notice to each person hired during the 1977 harvest season, and

(5) That the Notice be read in Spanish to the workers by Respondent at the commencement of 1977 tomato harvest.

I shall further recommend that the Notice be distributed and posted both in English and in Spanish.

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

ORDER

Respondent, its officers, agents, supervisors, and representatives shall:

(1) Cease and desist from:

(a) Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO by unlawful interrogation, by creating the impression of surveillance , by threatening reprisals for supporting the UFW, or by discharging, changing working conditions, or in any other manner discriminating against individuals in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(b) in any other manner interfering with, restraining, or coercing employees in the exercise of self-organization, to form, join or assist labor organizations, to bargain collectively through representative 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 continued employment as authorized in Section 1153 (c) of the Act.

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

(a) Offer Vicente Hernandez immediate and full reinstatement to his former or a substantially equivalent job without prejudice to his seniority or other rights and priveleges and make him whole for any losses he may have suffered as a result of his termination in the manner described above in the section entitled "The Remedy".

(b) Make the tomato sorters in the crew of Javier Hernandez during the work week ending October 1, 1975 whole for any losses suffered as a result of Respondent's change in working; conditions in the manner described above in the section entitled "The Remedy".

(c) Make Salvador Hernandez whole for any losses he may have suffered as a result of Respondent's failure to transfer him to the position of harvest machine operator in the manner described above in the section entitled "The Remedy".

(d) Preserve and make available to the ALRE or its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to ascertain the back pay due.

(e) Mail to each employee employed during the 1975 tomato harvest a copy of the Notice attached hereto and marked "Appendix" in the manner described above in the section "The Remedy".

(f) Give to each of its current employees a copy of the notice attached hereto and marked "Appendix".

(g) Give to each employee hired during the 1977 tomato harvest season a copy of the notice attached hereto and marked "Appendix".

(h) Post the notice attached hereto and marked "Appendix" during a period commencing August 1, 1977, and continuing until the end of the 1977 tomato harvest in the manner described in the section entitled "The Remedy".

(i) At the commencement of the 1977 tomato harvest season read in Spanish to all harvest employees assembled the notice attached hereto and marked "Appendix".

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

(k) Copies of the notice attached hereto shall be furnished Respondent for distribution by the Regional Director for the Sacramento Regional Office.

It is further recommended that the allegations of the amended complaint as set forth in paragraphs 7(a), 7(b), 7(c), 7(e), 7(j) and 7(k) of the amended complaint.

Dated: March *22,* 1977

AGRICULTURAL LABOR RELATIONS BOARD

By

Robert LeProhn
Administrative Law Officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing, during which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has ordered us to notify all persons currently employed by us, all persons employed during the 1975 tomato harvest by us and all persons employed during the 1977 tomato harvest season that we will remedy those violations, and that we will respect the rights of all our employees in the future. Therefore, we are now telling each of you:

(1) We will reinstate Vicente Hernandez to his former job and give him back pay for any losses that he had while he was off work.

(2) We will give back pay to the tomato sorters in the crew of Javier Hernandez during the week of October 1, 1975 for losses suffered because they were not paid for their lunch period.

(3) We will give Salvador Hernandez back pay for any losses incurred because he was not transferred to the position of tomato harvest machine operator at the commencement of the 1975 tomato harvest.

(4) We will not question of our employees regarding their support of the United Farm Workers of America; we will not threaten our employees with reprisals for supporting the United Farm Workers of America and we will not create the impression that we are engaging in surveillance of our employees with respect to their support of the United Farm Workers of America.

(5) Each of our employees is free to support, become or remain a member of the United Farm Workers of America, or any other union. OUr employees may wear union buttons, pass out and sign union authorization cards or engage in other organizational efforts including passing out literature or talking to their fellow employees about any union of their choice provided this is not done at times or in a manner which interferes with the employee doing the job for which he has been hired. We will not discharge, lay off, change the working conditions of or in any other manner interfere with the right of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

Signed:

ARNAUDO BROS.

by_____
(Title)

Dated