STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ADAM DAIRY dba RANCHO DOS RIOS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 76-CE-15-M 76-CE-36-M 4 ALRB No. 24

DECISION AND ORDER

On May 3, 1977, Administrative Law Officer (ALO) Morton P. Cohen issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent and Charging Party each filed exceptions.[1/] The exceptions of both General Counsel and Charging Party were concerned solely with the remedial portion of the Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided

[1/]General Counsel moved to dismiss Respondent's exceptions for failure to comply with Section 20282 (a) of the Board's regulations. This motion is denied. Respondent submitted 64 exceptions which refer to particular statements, findings, or conclusions in the ALO's Decision. In some cases the grounds for the exception are not clearly stated, and references to support in the record are not sufficiently specific to be helpful in locating evidence relevant to Respondent's arguments. From a strictly technical point of view, some of these exceptions are adequate and some are not. We have reviewed the record in this case in light of all these exceptions rather than partially dismissing them on technical grounds.

to affirm the rulings, findings, and conclusions of the ALO except as modified herein.

The violations found in this case are illegal discharges for union support or activity in violation of Labor Code Section 1153(a) and (c), and illegal refusal to bargain in violation of Labor Code Section 1153 (a) and (e). Extensive and generally conflicting testimony was taken from the principal participants in the events surrounding the discharges and the course of bargaining. The resolution of conflicts in this evidence frequently turns on credibility-and is at the heart of the ALO's findings of liability in this case. Many of Respondent's exceptions challenge findings of fact which turn on credibility resolutions. In determining whether to reverse a trial examiner's findings on credibility, we, like the National Labor Relations Board, consider the entire record, and believe great weight should be accorded the ALO's assessment of credibility based on his observations of the demeanor of witnesses. El Paso Natural Gas Company, 193 NLRB 333, 78 LRRM 1250 (1971); Standard Dry Wall Products, Inc., 91 NLRB 544, 26 LRRM 1531 (1950); Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977); affirmed Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board, 144 Cal. Rptr. 149, 160 (1978). We have carefully examined the record in this case and find that the ALO's credibility findings are supported by the record as a whole.

Concerning the four discharges, the General Counsel presented a prima facie case that each was motivated by the

employee's union support or activity, based on Respondent's knowledge thereof, its marked anti-union animus, and the circumstances surrounding the discharges. Each employee had worked for Respondent for many years and the Respondent's justifications for the discharges were shifting and inconsistent. In light of the ALO's assessments of credibility, Respondent's admission of untruths and Respondent's admitted fear and distrust of the UFW, we conclude that these justifications were pretexts for the discharges of union supporters.

This Board has not previously considered charges of violations of Section 1153 (e) of the Act, which states that it shall be an unfair labor practice for an agricultural employer to "refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5...of this part." However, the issues raised in this case have been frequently considered by the National Labor Relations Board with respect to the analogous Section 8 (a) (5) of the national labor law. The ALO appropriately applied NLRB precedent to the facts in the context of this case, and we adopt his findings of fact and conclusions of law that Respondent violated Labor Code Section 1153 (a) and (e) by its failure to provide information requested by the UFW for the purposes of bargaining, numerous unilateral changes including the discharges discussed above, the change in pay rate and method of payment for irrigators, subsequent wage increases, the granting of housing allowances to the employees hired to replace its discharged milkers, failure to provide

a meaningful counter-proposal, and refusal to bargain in good faith as discussed by the ALO.

The Remedy

I. The "Make Whole" Remedy for Refusal to Bargain

We are called upon in the present case to construe for the first time that portion of Section 1160.3 of the Act commonly referred to as the "make whole" remedy for an employer's refusal to bargain. The pertinent statutory language states that "[where an unfair labor practice has been found] ...the Board...shall issue...an order requiring such person... to take affirmative actions, including...making employees whole/ when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, ...”

By this provision this Board has been granted a power which the NLRB determined in a 3-2 decision it did not possess. [See Ex-Cell-O Corporation, 185 NLRB 107, 74 LRRM 1740 (1970), rev'd. and remanded, sub nom. Auto Workers v. NLRB, 449 F. 2d 1046, 76 LRRM 2753 (D. C. Cir. 1971.) Both the majority and the dissent in Ex-Cell-O agreed, however, that more adequate remedies were needed under the NLRB in cases of employer refusals to bargain. As former NLRB chairman McCulloch observed during the 1976 oversight committee hearings:

> Every Board Member in Ex-Cell-O conceded the inadequacy of the Board's 8(a)(5) remedies. The losses to employees, especially in first bargaining situations, who are deprived for 1, 2 or sometimes many more years

> of their right to be represented are palpable. The weakening of their bargaining agent's status is admitted. The savings to respondent employers from delaying the onset of bargaining for these long periods can be enormous. Until this basic profit from unfair practices is removed, the incentive to mock the statute's promises with lengthy delays is apparently compelling.

Much scholarly comment both before and after the Ex-Cell-O decision has argued forcefully to the same end.[2/]

There can also be no serious doubt that this history and these concerns were within the contemplation of the drafters of the ALRA, and that this portion of Section 1160.3 was expressly designed in the hope that the course of agricultural labor relations in California would not suffer from a similar lack of authority in this Board.

In her appearance before the Senate Industrial Relations Committee considering the proposed ALRA on May 21, 1975, the then Secretary of the Agriculture and Services Agency Rose Elizabeth Bird, stated in response to a question about the make-whole provision:

> [T]his language was just placed in because there has been a good deal of discussion with the National Labor Relations Act that it ought to be amended to allow the "make whole" remedy, and this is something that the people who have looked at this Act carefully believe is a progressive step and should be taken. And we decided since we were starting anew here in California, that we would take that progressive step. (Hearing on SB 1, 3d Ex. Sess., Senate Ind. Rel. Comm., at 64-65.)

[2/]Symposium on NLRB Remedies, 14 Wayne L. Rev. 1039 (1968); Note, "NLRB Power to Award Damages in Unfair Labor Practice Cases," 84 Harv. L. Rev. 1670 (1971); Note, "NLRB Attorney's Fees Awards: An Inadequate Remedy for Refusal to Bargain," 63 Geo. L. J. 955 (1975).

While we have specific authorization for such a remedy, we must consider the scope of its application. Two questions arise directly from the statutory language authorizing the remedy: namely, when is the remedy appropriately applied, and what is included in the term "pay" as it appears in the statute?

The statute directs that the Board may order a make-whole remedy when it "deems such relief appropriate". We have elsewhere concluded that the remedy should be applied in any case in which employees suffer a loss of pay as a result of an employer's refusal to bargain. See Perry Farms, 4 ALRB No. 25. decided today.

We consider "pay" as it appears in the statute to refer not only to the wages paid directly to the employee, but also all other benefits, capable of a monetary calculation, which flow to the employee by virtue of the employment relation. In Ware v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 24 Cal, App. 3d 35 (1972), the Court of Appeal found that the scope of the term "wages", appearing in Labor Code Section 200, encompasses all the benefits to which the employee is entitled as a part of his or her compensation, including, for example, bonuses, payments to health and welfare funds, payment of insurance premiums by the employer, employer payments to un-employment insurance funds, and pension plan benefits. Similarly, the National Labor Relations Board, pursuant to its authority to order "back pay" for employees unlawfully discharged or laid off [Section 10 (c), NLRA, 29 USC Section

160 (c)] has ordered the payment of vacation benefits [Richard W. Kaase Co., 162 NLRB 122, 64 LRRM 1181 (1967)], bonuses [United Shoe Machinery Corp., 96 NLRB 1309, 29 LRRM 1024 (1951], pension coverage [Richard W. Kaase Co., supra], and health and medical coverage [Knickerbocker Plastics Co., 104 NLRB 514, 32 LRRM 1123 (1953)], in addition to basic wages.

We conclude that the term "pay" in Labor Code Section 1160.3 has the same broad content as the term "wages", as applied by California Courts or "back pay" as construed by the NLRB. The record in this case shows that the UFW has standard contractual clauses providing for health and medical coverage through the Robert F. Kennedy Health Plan, pension benefits through the Juan de la Cruz Pension Plan, and social educational services through the Martin Luther King Fund, as well as clauses providing, where appropriate, for such benefits as overtime pay, shift premiums, paid vacations and holidays, and compensation during travel time and standby time. All such items are encompassed by the term "pay" and it is therefore within our power to order that employees be compensated for their loss.

In fashioning an appropriate implementation of the make whole remedy, we bear in mind certain well-established principles concerning the role of the bargaining obligation and the scope of our remedial powers under this Act. It is the theme of the Act, adopted from the national law on which it is modeled, that peace may be substituted for disruption and strife in California's fields if justice is assured to farmworkers, and the processes of collective bargaining are

available to resolve differences between labor and management over terms and conditions of employment.[3/] To this end, the Act specifies the rights of farmworkers to bargain collectively with their employers through a representative selected by majority vote. Labor Code Section 1152. An obligation to engage in the bargaining process in good faith is imposed upon employers and certified labor organizations. Labor Code Sections 1153 (e) and 1154(c). Violation of this duty deprives individual farmworkers of their rights and frustrates the statutory aim of achieving stable labor-management relationships in California agriculture through the use of this process.[4/] Hence the often repeated conclusion of the NLRB and the federal courts that a refusal to bargain in good faith is a violation which strikes at the heart of the Act.

This Board has broad discretion to devise remedies, provided only that those remedies serve the purposes of the Act. NLRB v. Seven-Up Bottling Co., 344 US 344, 31 LRRM 2237 (1958).

[3/]Section 1 of the Preamble to the ALRA states that "In enacting this legislation the people of the State of California seek to insure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." See also Labor Code Section 1140.2.

[4/]While the statutory scheme does not require that parties agree to a contract or to any particular terms of a contract, it can be shown that good faith bargaining normally results in contracts. Studies have shown that good faith bargaining undertaken without delay results in contracts in a majority of cases following elections by the NLRB. See studies by Professor Phillip Ross cited in Ex-Cell-O, supra, at footnotes 47 and 48; a 1975 study of the results of 1970 NLRB election victories by the Industrial Union Department of the AFL-CIO found that 64.45 percent of the units won in that year were brought and remain under contract, and another 13.2 percent were brought under contract for awhile, but are no longer under contract.

Thus, the dissenters in Ex-Cell-O advocated a reimbursement order for violations of Section 8 (a) (5) of the NLRA so that "employees would be compensated for the injury suffered as a result of their employer's unlawful refusal to bargain, and the employer would thereby be prohibited from enjoying the fruits of its forbidden conduct to the end, as embodied in the Act, that collective bargaining be encouraged and the rights of injured employees be protected". The concurrent purposes of compensating employees and encouraging the practice of collective bargaining form the framework for application of the make whole-remedy. Thus, we seek initially to make employees whole for a deprivation of their statutory rights, and in so doing we must assess the actual monetary value of their loss with reasonable accuracy. In making that assessment, however, we must also strive to encourage the process of collective bargaining, since it is clear that employees may lose far more than wages when there is no contract as a result of a refusal to bargain. Non-monetary improvements in working conditions such as grievance procedures, seniority systems, and provisions for health and safety on the job are not restored to employees by an award of wages, no matter how broadly defined. These benefits must be obtained, if at all, through bargaining; hence our concern that our authority to compensate for loss of wages should be applied so as to spur the resumption of bargaining and that it not become a new means to delay the bargaining process through lengthy compliance proceedings.

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We note further that the Board's remedial powers were created not to redress private causes of action, but to .implement public policy embodied in the Act. NLRB v. Seven-Up Bottling Co., supra; F. W. Woolworth Company v._ NLRB, 121 F. 2d 658, 8 LRRM 515 (1941). It does not serve the purposes of the Act for the state, in seeking to remedy unfair labor practices which undermine collective bargaining, to so intertwine itself in the details of bargaining that the dictates of the state are substituted for agreement of the parties. It has been the thesis of this law since the enactment of the Wagner Act in 1935 that the practice of collective bargaining should take place free of state interference with the interplay of economic forces and the substance of agreements reached between the parties:

> The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 1 LRRM 703 (1937).
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> The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, hopefully, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. H. K. Porter Co. v. NLRB, 397 US 99, 71 LRRM 2561 (1970).

In 1947, the Taft-Hartley amendments to the NLRA added Section 8(d) defining the duty to bargain in good faith

and containing the proviso that the duty did not "compel either party to agree to a proposal or require the making of a concession". In H. K. Porter; supra, the U. S. Supreme Court interpreted this proviso as a limit on the Board's remedial powers, holding that it precluded the Board from ordering the parties to agree to a particular contract item.

Section 1155.2(a) of the ALRA contains language identical to Section 8(d). Under the ALRA, however, that language must be weighed in the remedial context against the explicit authority found in Labor Code Section 1160.3 to assess a make-whole remedy in refusal to bargain cases. The granting of make-whole authority makes it clear that we are not to read Section 1155.2(a) in such a way that it permits employers who refuse to bargain in good faith to shield themselves from any effective remedy, while retaining economic benefits unlawfully obtained at the expense of their employees. Instead, we read these provisions, taken together, to authorize the Board to assess a make-whole remedy for periods in which an employer refuses to bargain in good faith and to order good faith bargaining in the future, without imposing a requirement that the parties reach a contract and without dictating any terms of a contract. We also read these two sections as a directive to fashion a make-whole remedy which is minimally intrusive into the bargaining process and which encourages the resumption of that process. "It is the business of the Board to give coordinated effect to the policies of the Act." NLRB v. Seven-Up Bottling Co., supra, emphasis added.

We have before us a number of suggestions for the calculation of this award, both in this case and in others now pending. Also, a wide range of relevant data on which such an award might reasonably be based is described in the dissenting opinion in Ex-Cell-O, supra. We are concerned, however, that the very wealth of available data will give rise to extensive and detailed offers and counter-offers of proof, and will result in protracted litigation at the compliance stages. Such litigation has itself been one of the principal means of legitimizing an otherwise illegal delay in fulfilling the bargaining obligation, and we wish to avoid creating additional opportunities for such delay to the fullest extent possible. It is entirely appropriate and consistent with the purposes of this section to balance the need for reasonable certainty in the amount of damages with the need to minimize delays in bargaining which result directly from use of the Board's processes.

General Counsel and Charging Party in this case jointly presented evidence which would give us a basis for establishing a procedure for calculating wages and fringe benefits in post-decision compliance proceedings in each case. This evidence establishes a high probability that employees could expect a UFW contract with their employer to contain each of these elements, and further sets forth the contractual formula with respect to each one. In addition, General Counsel and Charging Party submitted an article describing methods devised by the Federal Bureau of Labor Statistics,

for the costing out of collective bargaining agreements. It is clearly the case that we could calculate a make-whole award by establishing the elements of a hypothetical contract which employees could reasonably have expected to achieve, and thereafter cost out each element of that contract for a particular employer. While this approach might be warranted in particular cases, we think as a general matter that it requires far too much time to be spent in gathering information and making calculations and contains too much potential for dispute over detailed components of the award.

The General Counsel in this case has further followed the Ex-Cell-O dissenters in assuming that the formula for a make-whole award in any particular case would be determined in post-hearing compliance stages. In the course of this process the General Counsel would have the burden of establishing elements of the award, and Respondent would have the opportunity to rebut his proof. This approach would almost surely entail a second full-scale hearing in each case, particularly in the initial period of experience with this remedy. At such a hearing, or for that matter in any negotiations to settle the award, the parties and the Board would undertake a detailed inquiry into areas at the heart of the collective bargaining process.

By contrast, legislation now pending before Congress to add the make-whole remedy to the National Labor Relations Act approaches the calculation of the amount of the award far more narrowly than was envisioned in Ex-Cell-O in 1970. HR 8410

provides that the award

> Shall be measured by the difference between (1). the wages and other benefits received by such employees during the period of delay, and (ii) the wages and fringe benefits such employees were receiving at the time of the unfair labor practice multiplied by the percentage change in wages and other benefits stated in the Bureau of Labor Statistics, Average Wage and Benefit Settlements, Quarterly Report of Major Collective Bargaining Settlements for the quarter in which the delay began. If the Secretary of Labor certifies to the Board that the Bureau has, subsequent to the effective date of the Labor Reform Act of 1977, instituted regular issuance of a statistical compilation of bargaining settlements which the Secretary determines would better effectuate the purposes of this subsection than the compilation specified herein, the Board shall, in administering this subsection use the compilation certified by the Secretary.[5/]

This formula achieves a reasonable estimate of the actual loss to employees while avoiding the necessity for arguing the relevance of a range of data in each case in a post-hearing setting. We note also that it altogether by-passes litigation of the issue of whether or not a particular employer would have reached contract or agreed to a particular provision. In view of the fact that this issue is created by Respondent's conduct in refusing to bargain, this approach is entirely

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[5/]The House Report on the H.R. 8410 further described the measure of the award as follows:

> The measure of such damages is an objective one. It consists of the difference between the wages and other benefits received by the employees during the period of delay and the wages and other benefits they were receiving at the time of the unfair labor practice multiplied by a factor which represents the change in such wages and benefits elsewhere in the same industry as determined by the Bureau of Labor Statistics. H.R. Rep. No. 95-637, 95th Gong., 1st Sess. (1977); see also S. Rep. No. 95-628, 95th Gong., 2nd Sess, (1978) on the Labor Law Reform Act of 1978 (S. 2467) at pp. 13-18.

consistent with the purposes of the Act. cf. Fibreboard Paper Products Corp., 180 NLRB 142, 72 LRRM 1617 (1969), enf'd sub nom Steelworkers v. NLRB, 436 F 2d 908, 75 LRRM 2609 (DC Cir. 1970). Respondent in Fibreboard Paper Products Corp., 138 NLRB 550, 51 LRRM 1101 (1962), violated Section 8(a)(5) by failing to bargain about its decision to contract out its maintenance operations. During proceedings to determine the amount of backpay owed to the employees terminated as a result of its decision, Respondent contested the formula selected by the Board with the argument that it could not be assumed, and in fact was unlikely, that Respondent would have agreed to that formula if it had bargained. The Board's decision stated:

> In the words of the Supreme Court, "it is not possible to say whether a satisfactory solution could [have been] reached...." Indeed, as the Respondent contends, the Union might not have been able to persuade the Respondent not to contract-out or retain the "Pabco formula". On the other hand, it is by no means clear that the parties could not have reached an agreement in 1959 which would not have eliminated the "Pabco formula". The fact that the Respondent did not give the Union an opportunity to attempt to reach such an agreement was found violative of the Act. Thus, any uncertainty with respect to what wage rates the backpay claimants would have received except for termination was created by the Respondent, which bears the risk of that uncertainty. Fibreboard Paper Products Corp., supra, 180 NLRB at 144.

We do not have statistics on wages or collective bargaining settlements in agricultural labor comparable to the BLS data used in the proposed NLRB formula and could not therefore adopt such a precise formula at this early stage. However, we do think it appropriate to try to reduce the number of elements which are subject to dispute in each case, and to

simplify the calculation of the amount of the award to each employee.

In addition to these practical advantages, we think this approach is preferable in terms of its impact on the bargaining process. We prefer to leave to the parties the tasks of costing out and weighing one particular provision against another. We think that an award based on a more general estimate of the cost of a contract allows more room for this negotiation process to be worked out in the manner most appropriate in each case, because it does not inject the Board into the process of assessing alternatives. Furthermore/ since such an award is based to an extent upon generally applicable data drawn from employers who bargained in good faith, it will reflect the settlements they have reached. This will tend to eliminate any competitive advantage obtained by an employer who bargains in bad faith over employers who pay higher labor costs because they complied with the law, thereby further reducing "the incentive to mock the statute's promises...."

We therefore shall proceed on the basis of these principles to calculate the amount of the make-whole award as follows:

A. The Duration of the Make-Whole Period

The appropriate period for the application of the make-whole remedy is from the date of the first refusal to bargain until Respondent begins to bargain in good faith and thereafter bargains to contract or impasse. Application of the remedy during this period directly deprives Respondent of

the immediate economic benefits to be gained by continuing its misconduct, and serves to forestall those effects of delay so destructive to the union's ability to bargain. Again as noted in footnote 51 of Ex-Cell-O, supra,

> It is argued that the remedy contemplated should not be computed from the beginning of the Employer's refusal to bargain since collective-bargaining contracts are usually not agreed upon immediately upon the inception of a duty to bargain. However, an order that liability shall cease when the Respondent commences to bargain, not when an agreement is achieved, negates any such argument for a delayed date of liability. For, the period between commencement of bargaining and agreement would be provided for at .the end of the liability period rather than at the beginning. In addition to providing beginning and ending dates more precise and less conjectural, a computation on such a basis has the added advantage of permitting the employer to accept its basic responsibility to bargain and thereby toll the accrual of reimbursable losses and leave it free actually to bargain without added pressure to reach a contract in order thereby to minimize its monetary liability, thus fostering collective bargaining without compelling agreement.

The General Counsel has argued for a procedure which would involve payment of make-whole sums into an escrow account on a regular basis until contract or impasse is reached. At that point, any amounts paid into the account during periods of good faith bargaining would be refunded to the employer and the rest of the funds distributed to the employees. General Counsel argues that the need to make such continuing payments even during periods of good faith bargaining will act as a necessary spur to the bargaining process. At this point we see no need for a procedure which would have a substantial continuing impact on the ongoing bargaining process. Not until we have monitored the impact of this remedy can we draw any

conclusion regarding its effectiveness. Changes may be appropriate at some future time. For the present, then, we leave the details of manner and timing of payment of Respondent's liability to compliance procedures supervised by the Regional Director, in the same manner as in back-pay proceedings.

B. Calculation of Basic Wage Rate

As noted above, we have no source of data on wages and fringe benefits paid to California farmworkers under union contract which is comparable to the data specified in H.R. 8410. Nor is it likely that such data will be available from any official source in the immediate future. However, the data submitted in this case provide a reasonable basis for calculation of a basic wage rate which employees could expect to receive under UFW contract.

Of the total number of 57 UFW contracts in effect as of the time of this hearing, there are 37 which were negotiated pursuant to ALRA certifications and concerning which we have relatively complete data. These contracts cover a wide range of crops, and vary considerably in size of work force. With respect to basic wage rates, a consistent pattern emerges irrespective of these variations in the type of agricultural enterprises. In 30 of 37 contracts the general field and harvest labor wage rate was $3.10 per hour during the first year of contract and $3.225 during the second year. The average of all 37 contracts was $3.13 during the first year and $3.26 the second year. During the third year, 32 out of 35 contracts specified a rate of $3.35 per hour with an average for all 35

of $3.38, while two contracts contained no provision for a third year. Thus, it is clear from these data that the most predictable result of the UFW's bargaining efforts during this period was the establishment of a nearly uniform basic wage rate statewide, irrespective of the pre-contract wage rates at particular employers.[6/]

We also note that these 37 contracts were concluded within a time frame which is relevant to our determination of a make-whole award. All 37 were concluded within 12 months of the UFW's certification with respect to each employer and 36 of the 37 contracts were concluded during the 12 month period following the UFW's certification on December 5, 1975, as bargaining agent for respondent herein. Based on this evidence it is reasonable to assume for purposes of calculating the make-whole amount that Respondent's conduct deprived employees of the benefits of a similar contract concluded during a similar period. The presumption embodied in the statute that the year following certification both will and should be the period of most fruitful bargaining lends further support to our reference to contracts concluded during this period. Labor Code 1156.6, Ray Brooks v. NLRB, 348 U.S. 98, 35 LRRM 2158 (1954); Mar-Jac

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[6/]The evidence shows an average increase over pre-contract wage rates of 11.73 percent for these 37 contracts. However, where the employer was already paying a pre-contract wage in the vicinity of $3.10 per hour, the negotiated increase was markedly less than this average; where the employer's pre-contract wage was substantially below $3.10, it rose by a percentage greatly in excess of the average. To adopt an average percentage in the face of this evidence would be inequitable.

Poultry Company, Inc., 136 NLRB 785, 49 LRRM 1854 (1962); see also Kaplan's Fruit and Produce Co., 3 ALRB No. 28. Particularly in a first bargaining situation where Respondent's refusal to bargain in good faith spans this protected period of the certification year, it is appropriate to look to contracts concluded during this period as a measure of employee loss.

We conclude that the average negotiated wage rate under these first contracts is a reasonable measure of the compensation which employees could have expected to gain in the form of straight-time hourly wages as a result of the UFW' s efforts on their part during the period measured by the Respondent's refusal to bargain. Accordingly, we shall order that Respondent make its employees whole for the net difference between its basic wage rate and the average negotiated wage of $3.13 per hour reflected for this period. We note, however, that this reflects the lowest wage rate negotiated in UFW contracts. The UPW produced testimony that similarly uniform patterns appear with respect to more specialized and highly paid job classifications, such as "mechanics". In addition, this figure of $3.13 per hour does not reflect the

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generally higher average hourly earnings obtainable by the more skilled employees working under a piece-rate system.[7/]

We could presumably obtain data concerning more highly paid job classifications and subject it to the same analysis described above. However, in order to apply this data in the calculation of an award, we would have to classify the employees in each case according to categories set forth in a hypothetical UFW contract. Respondent's wage structure herein currently reflects differentials among some of its employees, which were apparently not established according to any systematic criteria. Its employees could reasonably have expected that some of these differentials would be eliminated, and new ones created pursuant to a contract as a result of systems for determining seniority and job classifications. Notwithstanding the clear impact of such changes on the income of particular employees, we do not consider these potential contract items to be "pay" within the meaning of Section 1160.3. Any attempt to project the application of such systems

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[7/]The Board has conducted its own examination of 19 UFW contracts currently on file with the Department of Industrial Relations. Those 19 overlap somewhat with the 37 under consideration here. Examination of those contracts reveals that piece-rates commonly appear in UFW contracts and are embodied in supplemental agreements to those contracts, and that the contracts prescribe higher wage rates for a wide variety of specialized jobs, such as mechanics, irrigators, loaders and others. It is not possible simply by examining these contracts to estimate average hourly earnings under the piece-rates. Statistics published in Farm Labor and Wage Rates by the California Crop and Livestock Reporting Service(U.S. Dept. of Agriculture and Calif. Dept. of Food and Agriculture) indicate that piece-rates produce higher hourly earnings than straight hourly rates.

to particular employers takes us rather far afield from our basic task here which is to compensate employees for loss of pay. Rather than engaging in such speculation, we shall order that the award be calculated in such a way as to assure that employees currently earning higher rates will be made whole to the same extent as other employees. This shall be accomplished by assuming that the average negotiated wage of $3.13 per hour is equivalent to Respondent's lowest basic wage rate. Each employee who received during the make-whole period a differential above the Respondent's base wage shall be credited with a proportional increment above the make-whole base rate. For example, the make-whole rate for an individual earning 10 percent above the employer's basic prevailing wage shall be $3.13 per hour, plus 10 percent, or a total make-whole wage rate of $3.44 per hour. The value of fringe benefits will, of course, have to be added to this figure to achieve the full make-whole hourly rate. In future cases, if we found a close correspondence between a respondent's job classifications and those specified in UFW contracts, or if wage data constituting averages from all wage categories become available to us, we might take another approach.

Before proceeding to consider the calculation of fringe benefits, we note several considerations related to the applicability of this wage data to this Respondent's operations. Respondent operates a dairy, and none of the 37 contracts discussed herein is a dairy contract. Respondent specifically excepted to the ALO's finding that dairy agricultural work is similar to other agricultural work for purposes of the make-

whole remedy on the grounds that he had earlier found the milkers to be "skilled" workers when considering their discharges. We do not think these two findings are inconsistent. The ALO characterized the milkers as skilled in the context of evaluating Respondent's proffered justifications for their discharges. Testimony showed that Respondent's non-supervisory workforce consisted of two milkers, a relief milker, and from 12-14 other employees who performed a variety of general agricultural tasks. Chuck Adam, a partner in Adam Dairy and generally involved in its operations on a daily basis, testified that[1] the work on the ranch, including milking, was "all fairly skilled". He testified that he could demonstrate the jobs of tractor driving or pipe-moving in about 15 minutes, but that it would take a new employee "about a month" before he would get to be good at it. To replace its discharged milkers, Respondent hired one employee with previous experience as a milker, and a second with none, with the intent that the first would train the second. The experienced employee was not working as a milker at the time he was hired. This testimony is consistent with that of UFW witness Gilbert Padilla, who testified without contradiction that dairy workers come from the same general labor pool and receive similar pay to other agricultural workers. We therefore conclude that this record adequately supports the application of the general field and harvest labor wage rate in UFW contracts to Respondent's operations for remedial purposes. Moreover, under the method we have adopted for taking account of wage differentials, the only

ones required in Respondent's operations will be those previously instituted by Respondent itself.

C. Calculation of Fringe Benefits

As indicated above, we construe the term "pay" broadly to include all benefits, capable of a monetary calculation, which accrue to the employee as an element of his or her total compensation. In the preceding section we set forth the foundation for our calculation of the basic wage to be awarded herein. We must now turn to an analysis of the fringe benefit aspect of employee compensation.

We begin first with the concept that fringe benefits are an element of the total compensation paid by the employer to the employee. In some instances this compensation is diverted to deposit in funds which provide benefit to the employee through an administered plan. In other forms it is paid directly to the employee; for example, overtime, vacation pay, holiday pay, standby pay, etc. Irrespective of the form which the benefit takes, however, it is ultimately calculable in terms of a dollars per hour figure. Because these various benefits are employee compensation, and hence pay within our broad definition, it is our intent to order that their value be paid directly to the workers involved as an aspect of the gross make-whole award. This, of course, means that we will not order that any of these sums be paid directly to the various benefit plans which the evidence indicates the UFW negotiates, on a virtually uniform basis, in its contracts. At the present time a direct payment to the individual contains a promise of

ease of administration and Board control not matched by this other approach.[8/] Moreover, as we currently view the problem, it avoids any necessity for Board evaluation of the merits of any particular fund as a depository for employee monies. That is ultimately a matter for negotiation by the parties.

There remains the problem of deriving the amount of the award. Our goal has been to devise a method which will avoid lengthy post-decisional proceedings, will provide an effective redress for employee losses and will promote the course of good faith negotiations between the parties in the future. In part I-A, above, we have looked to the record evidence and determined that the effect of the UFW's bargaining power in the first-time contracts in the relevant period was the achievement of a fairly uniform basic field and harvest wage rate, statewide, irrespective of crop, of $3.13 per hour. This same evidence discloses that the typical contract negotiated by the UFW is a fully developed type, modeled closely upon those in effect in the industrial sector. It contains a variety of benefit provisions beyond the basic wage structure, including, for example, overtime and night shift differentials, vacation and holiday pays, standby time, travel time, paid bereavement, and jury duty leave.

[8/] In the realm of the distribution of compensatory monetary awards, the NLRB has traditionally been granted wide discretion to fashion solutions tailored to the particular case. See, e.g. Phelps Dodge Corp. v. NLRB, 313 US 177, 8 LRRM 439, fn. 7 and accompanying text (1941); F. W. Woolworth v. NLRB, 121 F 2d 658, 8 LRRM 515 (2d Cir. 1941); NLRB v. Seven-Up Bottling Company, supra.

There are several methods by which we might proceed to derive a fringe benefit figure. One would be to apply the typical UFW contract, provision by provision, to the Respondent's operation. To do so would require a massive review of the nature of the farming operation and a determination whether, for example, standby and travel pay would apply. We would also have to determine the applicability of night shift differentials. The structure of the vacation pay provision is such that we would have to analyze each employee's work history to determine the extent of the vacation entitlement on a case-by-case basis. In some instances this approach might require the Board to choose between one of several variations in the provision in order to apply it to the Respondent. In our view, such a process would be unwieldy, time-consuming, and not conducive to fostering a future course of good faith bargaining between the parties. We are also mindful of our obligation to refrain from writing an agreement for the parties.

In order to avoid these problems, we have sought a more generalized approach to this question. Among other sources, we have taken notice of the publications of the U.S. Department of Labor, Bureau of Labor Statistics (BLS), for an approach to the issue which would meet our needs. In a 1977 publication entitled Employee Compensation in the Private Nonfarm Economy, 1974 (BLS Bulletin 1963), the Bureau tabulated data regarding the results of its national surveys of the composition of employee compensation during the period 1966 to 1974. The data shows clearly that during this period of time fringe

benefits markedly increased their role in the total compensation paid the employee. Bulletin 1963, supra, Chart 2, p. 6. See also Table 38. When the compensation paid to non-office employees in union and non-union establishments is compared, a sharper pattern of diversion of compensation into fringe benefits is revealed. Table 20. In 1974, pay for straight time worked constituted, for all industries, 76.3 percent of total compensation received. Fringe benefits therefore represented the remainder of such compensation. The 1974 figures concerning the non-manufacturing sector show straight time pay representing a slightly higher percentage of total compensation. The fringe benefits in that segment of the economy therefore represent a smaller percentage of the total compensation.

From this data we have identified these principles. In the eight year period 1966-1974 the clear trend was for fringe benefits to represent an increasingly larger percentage of the total compensation paid to employees. On the average, over the entire period, fringes increased their proportion of total compensation at a rate of slightly more than 1/2 percent per year. In the non-manufacturing sector, pay for straight time worked has historically represented a higher proportion of the total compensation paid employees than in the manufacturing sector. Finally, one measurable consequence of a collective bargaining contract has been the receipt of a greater proportion of total compensation in the form of fringe benefits.

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As the result of our consideration of the evidence before us, our notice of the BLS data and in order to promote the objectives described above, we have determined to premise the make-whole award for fringe benefits on the following basis. Accepting the figure of $3.13 per hour as the basic straight-time make-whole wage (see part I-B above), we assign to it a value of 78 percent of the total compensation package.[9/] The minimum total make-whole wage per employee per hour, shall therefore be $4.01. This sum is derived in the following manner:

$3.13 = .78X (where X equals the total compensation).

$$\$3.13 = \frac{X}{.78}$$

X = $4.01

In the year 1976, then, each employee shall receive the net difference per hour between this figure and the actual total hourly value of all monetary benefits actually received from the company. This latter figure shall be composed of the

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[9/] We take this figure from the 1974, non-manufacturing straight time pay category of the BLS study, Table 38. The non-manufacturing category is most readily compared to the agricultural industry. It is relatively lower paying, and tends by and large to be characterized by labor-intensive, rather than capital-intensive operations.

Although the overall trend would indicate that in the year 1976 this figure would be approximately 1 percent lower (77%), we have not adopted that figure. This is largely because we recognize that in the agricultural industry vacation and paid holiday benefits are less than those prevailing in the non-farm economy, hence they represent a smaller percentage of the fringe benefit compensation.

total net pay received by each employee during the make-whole period plus any sums paid by the employer for the benefit of employees calculated on an hourly basis. For example, the Respondent shall be credited for its share of contributions to funds to which it directly contributes for the employees' account.

We recognize fully that in deriving this fringe benefit figure we are venturing into a. somewhat novel remedial area. Because of the Respondent's misconduct in unlawfully refusing to bargain in good faith with the certified representative of its employees, we are required to consider imprecise data. Moreover, our inability to effect the perfect remedial order does not negative our obligation to enter an order which nonetheless effectuates the purposes and policies of the Act. As the Court said in a related context (back pay calculation for discharged employees):

> ...Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasonable conclusion. (Citations omitted.)
>
> F. W. Woolworth Co. v. NLRB, 121 F. 2d 658, 8 LRRM 515 (2nd Cir.1941); cited with approval in Bigelow v. RKO Radio Pictures, 327 US 251, 265 (1945).

II. Additional remedies for refusal to bargain in good faith.

The make-whole remedy for refusal to bargain takes its place among a variety of remedies which have been tailored to fit particular variations of this violation. We modify the ALO's order to include the following provisions which are appropriate to the facts of this case.

A. Unilateral changes.

Respondent in this case unilaterally changed its method of paying for pipe-moving and other general labor from an hourly rate to a combination of hourly and piece rates. While the ALO found, and we agree, that the offer to Luis Chavez of a job consisting entirely of pipe-moving on a piece-rate basis constituted a reduction in his wages, we do not think it is clear on this record that the change to a combination of hourly and piece rates for pipe moving and other work operated to the detriment of Respondent's other employees. If the employees were adversely affected by the change, it would be appropriate to order that it be rescinded. Accordingly, we shall order that the changes be rescinded, if the union, as the exclusive representative of the affected employees, so desires; and in addition, that Respondent make available to the union, upon request, all records necessary and relevant to assess the alternatives available to the employees. Unoco, Apparel, Inc., 215 NLRB 89, 88 LRRM 1238 (1974); IDaho Fresh-Pak-Inc., 215 NLRB 676, 88 LRRM 1207 (1974). If the employees desire revocation of the changes, Respondent shall make them whole for any losses which resulted from such changes.

B. Extension of certification year.

The NLRB routinely extends certification where there has been a refusal to bargain during the certification year; see for example Big Three Industries, Inc., 227 NLRB No. 243 (1977), Whitney Stores, 185 NLRB 625, 75 LRRM 1464 (1970); Hartford Fire Insurance Co., 191 NLRB 563, 77 LRRM 1581 (1971).

We think this practice is equally appropriate under the circumstances of our cases. See Kaplan's Fruit and Produce Co., 3 ALRB No. 28 (1977). Accordingly, in view of Respondent's refusal to bargain during the initial certification year, and in order to insure that these employees will be accorded the services of their selected bargaining representative for the period provided by law, we shall extend the union's initial certification for one year from the date on which Respondent commences bargaining in good faith with the union.

C. Refusal to provide information.

Since Respondent in this case refused to provide information which was relevant and necessary to the union to carry out its duties as bargaining agent for its employees, we shall specifically order that it do so.

III. Award of costs and attorney's fees.

The ALO ordered Respondent to pay attorney's fees to the Charging Party in connection with its conditional bargaining defense on the basis that that .defense was frivolous. He defined a frivolous defense as one which "obviously lacks merit, is not debatable, and not one which falls simply upon the Administrative Law Judge's resolutions of conflicting testimony." In its conditional bargaining defense, Respondent's theory was that the UFW negotiator, Peter Cohen, insisted on reinstatement of the four discriminatees before the union would engage in further negotiations. Respondent's witnesses testified that Cohen said exactly that in the meeting on May 18, 1976, and in alleged telephone conversations thereafter, while Cohen testified

to the effect that he insisted only that their status be discussed in the course of bargaining. Respondent's version poses something more than a frivolous defense. While the record clearly supports the ALO's resolution of this conflicting testimony in favor of Cohen, his resolution is central to Respondent's defense. Accordingly, we reverse the ALO's award of attorney's fees to the Charging Party.[10/]

ORDER

Respondent Adam Dairy (Rancho Dos Rios), its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the UFW, or any other labor organization, by discharging, laying off, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153 (c) of the Act.

(b) Refusing to bargain collectively in good faith with the UFW as the exclusive representative of its agricultural employees as required by Labor Code Sections 1153(e) and 1155.2(a), and in particular: (1) refusing to meet at reasonable times and confer in good faith and submit meaningful bargaining proposals with respect to wages, hours and other

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[10/]The General Counsel excepted to the ALO's failure to award attorney's fees to it. Since we do not characterize Respondent's defenses as frivolous or debatable, such an award is not warranted in this case. Western Conference of Teamsters, et al., 3 ALRB No. 57 (1977).

terms and conditions of employment; (2) refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining; and (3) making unilateral changes in terms and conditions of employment of its employees without notice to and bargaining with the UFW.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by section 1152.

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

(a) Offer to Luis Chavez, Ramiro Cardenas, Ruben Quintero and Jesus Magana, immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their termination pursuant to the formula used in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

(b) Upon request, bargain collectively with the UFW as the exclusive representative of its agricultural employees, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Furnish to the UFW the information requested by it relevant to the preparation for and conduct of collective bargaining.

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(d) Upon request, furnish the UPW with all records necessary and relevant to its determination of whether to request restoration of the method and rates of pay in effect prior to Respondent's unilateral changes in method and rates of pay for pipe-moving work.

(e) Revoke the unilateral changes in method and rates of pay for pipe-moving work, and restore those rates of pay in effect prior to these changes, and make employees whole for any losses they may have suffered by reason of the unlawful .changes, if the UFW, as the exclusive representative of Respondent's employees, so requests.

(f) Make whole those employees employed by Respondent in the appropriate bargaining unit at any time between the date of Respondent's first refusal to bargain at about January 19, 1976,[11/] to the date on which Respondent commences collective bargaining in good faith and thereafter bargains to contract or impasse, for any losses they may have suffered as a result of the aforesaid refusal to bargain in good faith, as those losses have been defined in Part I of this decision.

(g) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due employees under the terms of this Order.

[11/]This was the date of the first phone conversation between Chavez and Adam Dairy following his return from vacation, in which Respondent did not permit Chavez to resume his work as usual.

(h) Execute the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter, reproduce sufficient copies in each language for the purposes set forth hereafter.

(i) Post copies of the attached notice for 90 consecutive days at places to be determined by the Regional Director. Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

(j) Mail copies of the attached notice in appropriate languages, within 30 days from receipt of this Order, to all employees employed between January 15, 1976, and the date on which Respondent commences to bargain in good faith and thereafter bargains to contract or impasse.

(k) A representative of Respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of 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 Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

(l) Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps

have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ordered that the certification of the United Farmworkers of America, AFL-CIO, as the exclusive bargaining representative for Respondent's agricultural employees be extended for a period of one year from the date on which Respondent commences to bargain in good faith with said union.

It is further ORDERED that all allegations contained in the complaint and not found herein are dismissed.

Dated: April 26, 1978

GERALD A. BROWN, Chairman

HERBERT A. PERRY, Member

RONALD L. RUIZ, Member

APPENDIX I

Following is a list of the 37 contracts relied upon herein for the calculation of the average negotiated wage rate in UFW contracts and as otherwise representative of the type of contract achieved by UFW bargaining during the relevant period for determination of this make-whole award. Data concerning the type of crop and approximate size of labor force for each farm is contained in UFW Exhibit 23. Data concerning pre-contract and post-contract wages is contained in UFW Exhibit 24. Certification dates and contract dates are in UFW Exhibit 26. Information comparing economic provisions of the contracts is in UFW Exhibit 25 and in the testimony of Dr. Michael Yates on March 15, 1977, in Volume No. 14 of the hearing transcript in this case.

1. ADMIRAL PACKING
2. AKITOMO NURSERY
3. AKUNE NURSERY
4. MICHAEL BUTLER
5. CROSETTI ORCHARDS
6. J. J. CROSETTI
7. DRM GROVE LABOR
8. E & A CORPORATION
9. R. T. ENGLUND
10. GRIMMER ORCHARDS
11. HARDEN FARMS
12. H & M FARMS
13. ELWIN MANN
14. MITCHELL MADESKO
15. CARL J. MAGGIO
16. MEYERS TOMATOES
17. MOLERA AGR. GROUP
18. MONTPELIER ORCH.
19. MR. ARTICHOKE
20. BLAS PISTA
21. RILCO
22. BRUCE RIDER
23. SALINAS MRK. COOP.
24. SANTA CLARA NURS.
25. ANTHONY SCURICH
26. STEVEN SCURICH
27. DAVID STOLICH
28. TANAKA BROTHERS
29. RAY TRAVERS
30. UNITED CELERY
31. VALLEY VINEYARDS
32. VALLEY HARVEST
33. VEG-PAK INC.
34. WEST COAST FARMS
35. WEST FOODS
36. M. ZUPAN & SONS
37. WATANABE RANCH

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, 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 our employees that we will respect their rights under the Act in the future. Therefore we are now telling each of you:

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 choose whom they want to speak for them;
(4) To act together with other workers to try to get a contract or to help or protect one another;
(5) To decide not to do any of these things.

Because this is true we promise that:

(1) We will offer Luis Chavez, Ramiro Cardenas, Ruben Quintero, and Jesus Magana full reinstatement to their former jobs or to equivalent jobs, and pay them back pay for any losses they had while they were off work.

(2) We will revoke our changes in method and rates of paying employees for pipe-moving work if the UFW, as your bargaining representative, requests us to do so, and will make each of you whole for any losses of pay which resulted from this change.

(3) We will bargain collectively with the UFW as exclusive representative of our employees concerning rates of pay, wages, hours, and other terms and conditions of employment, and sign a contract if we reach agreement.

(4) We will make those of you who were employed during the appropriate period whole for any losses of pay which resulted from our refusal to bargain in good faith with the UFW.

(5) All our employees are free to support, become or remain members of the UFW, or of any other union. We will not discharge, lay off, or in any other manner interfere with the rights of our employees to engage in these activities and other activities which are guaranteed them by the Agricultural Labor Relations Act. Because the UFW was selected by a majority vote of our employees as their exclusive representative for purposes of collective bargaining, we have an obligation to meet with the UFW at reasonable times and bargain in good faith about wages, hours, working conditions and other terms and conditions of employment. Therefore, we will not make changes in terms and conditions of employment until we have first notified and bargained with the UFW, and we will not refuse to meet and bargain with them in good faith as required by the Agricultural Labor Relations Act.

Dated: ADAM DAIRY, dba
RANCHO DOS RIOS

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.

MEMBER McCARTHY, Concurring:

I concur in the result of the majority opinion insofar as it deems make-whole relief a proper remedy under the facts and circumstances of this case. However, for the reasons stated in my concurring opinion in Perry Farms, Inc. 4 ALRB No. 25 (1978) decided today, I cannot agree with my colleagues' view that every case of refusal to bargain warrants application of the make-whole remedy.

Dated: April 26, 1978

JOHN P. McCARTHY, Member

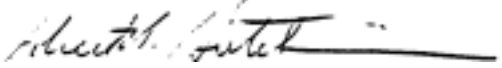
MEMBER HUTCHINSON, dissenting in part:

I concur in all respects with the majority opinion except for its reversal of the ALO's award of attorney's fees and litigation costs to the Charging Party.

While the ALO may have mischaracterized one of Respondent's defenses, the record as a whole justifies his recommended order.

In my view a litigation posture which utilizes spurious justifications, pretexts, and untruthful testimony to explain away flagrant violations of the law can logically be labelled as "frivilous." Respondent wins no redemption, in this case, by the fact that one, or a few, of its defense positions raised debatable issues.

DATED: April 26, 1978



ROBERT B. HUTCHINSON, Member

CASE SUMMARY

Adam Dairy, dba
Rancho Dos Rios

4 ALRB No. 24
Case No. 76-CE-15-M
76-CE-36-M

ALO DECISION

On May 3, 1977, ALO Cohen issued his decision finding that Respondent violated Section 1153 (c) and (a) of the Act by discriminatorily discharging four employees and Section 1153 (e) and (a) by refusing to bargain in good faith with the United Farmworkers of America, AFL-CIO. He recommended that Respondent be ordered to reinstate the dischargees with backpay, to make its employees whole for its refusal to bargain in good faith, and to pay attorney's fees to the Charging Party.

A. The discharges

The ALO found that Respondent constructively discharged Luis Chavez when it failed to return him to his usual work after his annual month-long vacation, and instead offered him work which Respondent knew would be injurious to his arthritic hands and which would not pay as well. Chavez had worked for Respondent since 1959, and had previously received a change in work, and later on a raise, so that he could stay with Respondent. The ALO rejected Respondent's defenses that Chavez was a part-time irrigation supervisor not protected by the Act, and that he was replaced on his old job due to problems with his work.

Ruben Quintero, Ramiro Cardenas, and Jesus Magana had worked as milkers for Respondent for several years. Respondent offered several defenses for their discharges. As to Quintero and Magana, both illegal aliens, Respondent claimed to have recently become aware of a law subjecting employers to fines for employing illegal aliens, and contended that this fear precipitated its removal of all three from their previous milking duties on April 13, 1976, although Respondent knew Cardenas to be a legal alien. Quintero and Magana were discharged when they could not produce proper papers within about one week's time. Cardenas was discharged on May 14, 1976, after he returned late from vacation, due to his wife's illness, and then failed to inform his supervisor that he had to be absent from work for one day. In addition, Respondent produced evidence that it had problems with the bacteria count in its milk, and argued that it had replaced its milkers to deal with this problem.

The ALO found that Respondent strongly disliked and feared the UFW, and that it was aware of the pro-UFW sentiments of these four employees. He further found factual

weaknesses and inconsistencies in each of Respondent's defenses and in all of them taken together, including Respondent's admitted untruths in connection with its illegal alien defense. Finally, he found Respondent's, witnesses to be not credible in numerous instances.

B. Refusal to bargain in good faith

The UFW was certified as representative of Respondent's employees on December 5, 1975. On January 12, 1976, the UFW sent Respondent a written request for information, and on February 12 and 17 requested the same by phone. Meetings between representatives of respondent and the UFW were held on March 11 and May 18, 1976. The UFW supplied Respondent with a copy of its non-economic proposals prior to the first meeting. Respondent's representative supplied the UFW with two partial counterproposals containing inconsistent provisions during April 1976. No further meetings were held although the UFW continued to contact Respondent's representative to request them. During the period from about January through October 1976, Respondent made numerous changes in its employment practices without notifying or consulting with the UFW. These included: changes in work involved in the discharges discussed above, change in rate and method of paying for pipe-moving work, subsequent raises in summer and fall of 1976, and housing allowances to the replacements for its discharged milkers.

The ALO found that Respondent refused to bargain in good faith in violation of Section 1153(e) and (a) of the Act by instituting the above unilateral changes, by failing to provide relevant information requested by the UFW, failing to submit a meaningful counter-proposal, and by failing to cooperate in arranging further meetings after May 18, 1976. The ALO rejected Respondent's defense that it refused to meet after that date because the UFW improperly conditioned further bargaining on reinstatement of the four discharged employees, based on his resolutions of credibility and the parties' courses of conduct.

BOARD DECISION

The Board affirmed the ALO's findings of fact and conclusions of law. Although this Board had not previously considered violations of Section 1153 (e), it concluded that the ALO appropriately applied NLRB precedent under Section 8(a)(5) of the LMRA in the context of this case.

The Board's decision is concerned primarily with remedies for refusal to bargain in good faith. Under Section 1160.3, this Board has been granted the authority, not specifically granted to the NLRB, to make employees whole for loss of pay resulting from the employer's refusal to bargain in good faith. Compare Section 10 (c) of the LMRA

and see Ex-Cell-O Corporation, 185 NLRB 107, 74 LRRM 1740 (1970). The Board first noted that this grant of authority is intended to avoid the much-discussed inadequacy of refusal-to-bargain remedies under the national labor law. It then proceeded in this case and in the concurrent case of Perry Farms, 4 ALRB No. 25, to establish the following principles concerning the make-whole remedy:

1. The remedy is appropriately applied whenever employees suffer a loss of pay, as a result of an employer's unlawful refusal to bargain. See Perry Farms,4 ALRB No. 25.

2. The term "pay" is broadly construed to include all benefits capable of a monetary calculation which flow to the employee by virtue of the employment relationship. This includes pay for straight-time worked, premium pay (overtime, shift premiums, etc.) and fringe benefits (medical and pension plans, etc.) This interpretation is based on analogous NLRB practice in backpay cases and on California law as stated in Ware v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 24 Cal. App. 3d 35 (1972).

3. Under applicable NLRB precedent, the Board has broad discretion to fashion remedies, provided those remedies serve the purposes of the Act. NLRB v. Seven-Up Bottling CO., 344 US 344, 31 LRRM 2237 (1958).

4. The concurrent purposes of the make-whole remedy are to compensate employees for their loss resulting from the employer's refusal to bargain and to encourage the practice of collective bargaining by removing the profit in refusing to bargain in good faith. Ex-Cell-O, supra.

5. Since many of the potential benefits of collective bargaining are non-monetary (for example, seniority systems and grievance procedures) the Board will strive both to estimate loss of pay with reasonable accuracy and to encourage resumption of the bargaining process. In this connection, administration of the make-whole remedy should not itself become a new means of delaying bargaining.

6. Historically it has been the thesis of this law that the practice of collective bargaining should take place free of state interference with the interplay of economic forces and the substance of agreements reached between the parties. The make-whole remedy should be administered so as to be minimally intrusive into the bargaining process.

7. Section 1155.2 (a), which states that a party is not compelled to agree to a particular provision or to sign a contract, and Section 1160.3, which authorizes the make-whole remedy, taken together authorize the Board to assess a make-whole remedy for periods in which an employer refuses to bargain in good faith and to order good faith bargaining in the future, without imposing a requirement that the parties reach a contract and without dictating any terms of a contract.

The Board considered proposals from the parties concerning ways of assessing a make-whole award, and also took note of the formula proposed in the Labor Law Reform Bill now pending in Congress. The Board then determined to calculate the make-whole award by using an appropriate group of UPW contracts to determine the average negotiated wage rate for the relevant period, and to determine the value of fringe benefits from data collected by the federal Bureau of Labor Statistics. Although it recognized that the B.L.S. data was derived from non-farm industries, the Board concluded that it appeared to be a reasonable estimate. In a similar context the U.S. Supreme Court stated that

> ...Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasonable conclusion. (Citations omitted.) Bigelow v. RKO Radio Pictures, 327 US 251, 265 (1945).

The Board determined that the make-whole period should run from the date of Respondent's first refusal to bargain until it commences to bargain in good faith, which deprives Respondent of the economic benefits to be gained by continuing to refuse to bargain, but permits Respondent to toll its liability by ceasing its unlawful conduct.

In addition to the make-whole award, the Board found that the following additional remedies for refusal to bargain were appropriate in this case:

- -rescission of unilateral changes if the UFW so requests on behalf of Respondent's employees;
- -extension of certification for one year from the date on which Respondent commences to bargain in good faith;
- -a specific order that Respondent supply relevant information to the UFW in addition to a general order that it bargain in good faith with the UFW.

Chairman Brown and Members Perry and Ruiz. reversed the ALO's award to the UFW of attorneys fees in connection with Respondent's conditional bargaining defense, on the grounds that the defense was not frivolous. Member Hutchinson, dissenting in part, would sustain the award of attorneys fees as warranted by other aspects of Respondent's litigation posture. Member McCarthy, in a concurring opinion, agreed that application of the make-whole remedy is appropriate in this case, but stated that the Board should apply the make-whole remedy on a case-by-case basis, as discussed in his concurring opinion in Perry Farms, supra.

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THIS CASE SUMMARY IS FURNISHED FOR INFORMATION ONLY AND IS NOT AN OFFICIAL STATEMENT OF THE CASE, OR OF THE ALRB.

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STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ADAM DAIRY (RANCHO DOS RIOS), Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	CASE NOS. - 76-CE-15-M 76-CE-36-M

RUTH FRIEDMAN, ESQ. of Salinas, California,
for the General Counsel

NOEL SHIPMAN, Esq. of Los Angeles, California,
for the Respondent

W. DANIEL BOONE, Esq. of Salinas, California,
for the Intervenor-Charging Party

DECISION

MORTON P. COHEN, Administrative Law Officer

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I

STATEMENT OF THE CASE

These consolidated cases were heard before me in Santa Maria, California commencing on February 15, 1977 and concluding on March 16 1977. The complaint in the matter was issued on December 17, 1976, based, on charges filed June 14, 1976 (76-CE-15-M) and September 2, 1976 (76-CE-36-M) by the UNITED FARM WORKERS OF AMERICA, AFL-CEO, (hereafter U.F.W.). Copies of the charges and subsequent complaint were duly served on respondent. The original charges alleged violation of Section 1153 (a), (b), and (c) of the Agricultural Labor Relations Act (hereafter A.L.R.A.), as to Case No. 76-CE-15-M, and of Section 1153 (a) and (e) of the A.L.R.A. as to Case No. 76-CE-36-M, and the resultant complaint charged violations of Section 1153 (a), (c) and (e) of the A.L.R.A. as to both cases. An Order consolidating the two cases issued December 17, 1976 pursuant to Section 20244 of the Regulations of the Agricultural Labor Relations Board (hereafter Regulations). On January 3, 1977, issue was joined by the answer of respondent, duly served, admitting some and denying other allegations of the complaint. At the hearing, the U.F.W. moved to intervene for all purposes and such motion was granted.

All parties were given full opportunity to participate in the hearing on the merits, and to present witnesses, documentary evidence and argument." After the close of the hearing, a very lengthy joint brief was filed by the General Counsel and the U.F.W., and a lengthy brief was filed by the respondent. Thereafter, both sides submitted reply memoranda of their own volition, to their opponent's brief. All such documents were received and considered.

On March 15, 1977 an oral stipulation was entered into by all the par-

ties amending the complaint to conform to the evidence adduced, at the hearing. Such stipulation was approved and the amendment ordered by the Administrative Law Officer.

Upon the entire record herein, including testimony, admissions stipulations, and exhibits, upon my observation of the demeanor and credibility of each of the witnesses, and upon consideration of the briefs submitted by all parties, I make the following findings of fact and conclusions of law and determination of relief.

II.

FINDINGS OF FACT

A. Jurisdiction

ADAM DAIRY, doing business as RANCHO DOS RIOS, is operated as a partnership in Santa Maria, California. Its partners are James Eldon Jim) Adam and his children Charles (Chuck) Adam, Cindy Adam and Steve Adam. ADAM DAIRY is an agriculture employer within the meaning of Section 1140.4(c) of the A.L.R.A., and is engaged in the dairy industry. The employees of ADAM DAIRY are agriculture employees within the meaning of Section 1140.4(b) of the A.L.R.A. The U.F.W. is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the A.L.R.A.

B. Allegations of Unfair Labor Practices

The complaint alleges that respondent violated Section 1153(a) of the A.L.R.A. in that respondent did, and continues to, interfere with, restrain and coerce the employees in the exercise of rights guaranteed in Section 1152 of the A.L.R.A. through discharges of employees Ramiro Cardenas, Ruben Quintero and Jesus Magana based

on their support of the U.F.W.; through a refusal to return Luis Chavez to his usual employment after an authorized leave of absence, due to his support of the U.F.W.; and through a refusal to bargain in good faith with the U.F.W., previously duly certified on December 5, 1975 as representatives of respondent's employees (Complaint, paragraphs 6-9) The complaint further alleges violation of Section 1153(c) of the A.L.R.A. based on the foregoing discharges and the refusal to permit a return to usual employment, (Complaint, paragraph 10) Finally, the complaint alleges violation of Section 1153(e) of the A.L.R.A. in that respondent did and continues to refuse to bargain in good faith with the U.F.W. by: causing discriminatory lay-offs, changing job classifications and pay rates unilaterally without consultation, failing to provide re quested relevant data, unreasonably delaying the scheduling of meetings and refusing to negotiate in good faith. (Complaint, paragraphs 11-12)

In the answer, respondent denied the allegations of violation of Section 1153(a), (c) and (e) of the A.L.R.A.

C. Respondent's Dairy Operations

ADAM DAIRY*, which is also known as RANCHO DOS RIOS DAIRY, is a partnership located in Santa Barbara County. The partnership performs a number of agricultural functions including selling milk raising and selling cattle, and growing corn, sugar beets, alfalfa and oats. To perform the various agricultural functions, the partnership maintains several different locations within Santa Barbara County and within or contiguous to the Santa Maria area, one of which

*Although the complaint and answer are entitled "ADAMS DAIRY", Mr. Jim Adam indicated that the correct spelling is "ADAM DAIRY".

is the dairy where the milking is performed. The partnership "owns approximately 350 dairy cows which number varies based on the number of maturing heifers and the number of cows which have gone dry The partnership produces and sells from 82,000 to 122,000 pounds of milk weekly, which amount varies based on feed, weather and the. productivity of the cows themselves, and sells its milk to Knudsen Corporation, a Los Angeles based operation.

ADAM DAIRY employs, in its actual milking operation, two milkers and a relief milker, whose milking responsibilities include preparing cows for milking and the actual milking performed through the use of mechanical milking apparatus. There is, additionally, a herdsman who is the supervisor of the milking as well as all other processes affecting the dairy operation. Further, Chuck Adam and, in the past, Jim Adam, perform substantial supervisory roles over all the dairy operations.

ADAM DAIRY owns and operates 200 acres of alfalfa, 60 acres of sugar beets and 40 acres of oats, all of which require irrigation at some time during the year depending on. the amount of rainfall and cold weather. If there is little rainfall, but the temperature remains cold during the day, no irrigation is possible as the alfalfa will freeze. During the peak irrigation months, respondent will employ about five irrigators whose job is to disconnect, carry and reconnect irrigation pipe. The resultant feed for the cows includes green oats, also called green chop, hay oats and straw oats. The feed is better generally in spring, summer and fall. A grain supplement is also fed to the cows, but such supplement is a store-bought commodity.

In all, ADAM DAIRY employs between twelve and eighteen people,

whose jobs, hours and actual employment change on a seasonal need basis, the high being during the spring, summer and fall and the low being during the winter. The categories of employment include irrigation, fence repairer, tractor driver, field worker and weeder green chopper and hauler, and finally the herdsman-supervisor. Employees perform a number of these chores interchangably, with the exception of certain skills categories, and the supervisorial category. Thus, the herdsman is in a category unto himself as supervisor and the milkers and relief milker are in a category by themselves as skilled workers. At the other end of the skill spectrum are the irrigators who spend about eighty percent (80%) of their time moving pipe and whose job is the least skilled of the work performed for respondent.

D. Luis Chavez

Chavez is presently forty-two (42) years old, of Mexican extraction, married and the father of four children. He first became employed by respondent in 1959 and was thereafter a milker for seven or eight years. At the end of this period he was obliged to transfer to other work due to a physical condition resulting in swolen and arthritic hands[3] worsened by contact with water and cattle medicine, both of which are commonly used in milking. Thereafter, Chavez worked for respondent until the end of 1975 as a tractor and truck driver hauling hay, bales and green chop as feed for the cows. Additional duties included assisting in the moving of irrigation pipe on a sporadic, once a month, basis during that time of year when irrigation occurred. Addition al duties also included, during that time of year when irrigation occurred, instructing new employees in moving and installing irri-

gation pipe, which instructions takes about fifteen minutes per employee to accomplish, and to instruct them as to what areas required irrigation so as to insure that such areas be irrigated. Thereafter, irrigators do most work on their own and require little supervision except regarding dry spots pointed out to them by 4 Jim Adam or by Chuck Adam after Jim became ill in 1975.[4] Chavez never fired or recommended the firing of any person, nor did he know that he could do so[5]. All hiring, firing and similar tasks were performed either by Jim or Chuck Adam (or by the herdsman, Salvadore Barragon) to whom the workers reported for responsibilities and grievances. In July of 1975, Chavez received an increase in pay from $2.70 to $3.00 per hour.[6] At that time, and during the remainder of the summer of 1975, U.F.W. recognitional activities were occurring concerning the respondent and the elections, which elections were to be held in the fall of 1975. Chavez participated in such activities including obtaining signature, cards for the U.F.W. .On one occasion, Chuck Adam saw the respondent's truck, normally driven by Chavez, parked in front of U.F.W. offices and presumed Chavez was inside, although in fact Chavez had stopped to go to a nearby drug store. After the filing of the U.F.W. recognition petition, Jim Adam had approached Chavez and told him to tell the other workers "I don't want the U.F.W. I will sell the cows."[7] Adam was fully aware that Chavez was a "Chavista", that is in sympathy of the U.F.W.

In July of 1975, Chavez informed respondent, through Jim Adam, that Chavez would be taking a vacation during the winter of that year. Chavez had taken vacations either every year or every other year for the past sixteen years. Indeed, most of respondent's em-

ployees took such unpaid vacations during the winter and, as Jim Adam testified, "It was like ducks going South." Vacations are" taken during the winter since there is less work to be done.. Af-" ter November of 1975, none "of the persons employed during the Previous summer remained as irrigators on respondent's payroll, all had had Spanish surnames, and of their replacements in the spring of 1976, none had Spanish surnames.

During the sixteen years prior to 1975, when Chavez took a vacation he returned to perform the same work he had when he left. As was said by Chuck Adam, "when he left as a milker, he returned as a milker and when he left as a chopper he came back as a chopper." Further, Chavez normally took a month's vacation. Whenever Chavez went on a vacation, he would train a replacement to handle his duties in his absence. In October 1975, Gilberto Cepeda was trained to be Chavez's replacement but Cepeda received a back injury and was unable to perform the strenuous hauling work which Chavez did. Instead, Chavez was told that Glen Overholzer, an eighteen year old hired just before Cepeda left, would perform Chavez's duties while Chavez was on vacation.

In December of 1975, Chavez again informed Jim Adam of his vacation plans which were to commence on December 18 for one month.[9] Just before leaving, Chavez said good-bye to Jim. Adam who said "We'll see you in a month." This was the last work performed by Chavez for respondent. At all times, the work performed by Chavez for respondent during his sixteen year tenure was good, com petent work, as was indicated by Jim and Chuck Adam in a sworn statement to an A.L.R.B. investigator.[10]

Upon his return in January of 1976, Chavez contacted Jim

Adam and informed him of the fact that Chavez had returned from vacation and was prepared to start working again. Instead, he was told by Jim Adam that he should wait a few more days until other work could be found for Overholzer. Jim Adam said he would call Chavez but did not do so. In February of 1976, Chavez called Adam again but was again told there was no work for him.[11] After more than a month, Chavez called again and was then told he could return to work as a full-time irrigator rather than at his previous work Since Adam could not get rid of Overholzer. Chavez reminded Adam that full-time irrigator work would cause him harm because of the Wetness and his diseased hands. Adam said that was the only work Available and Overholzer would not be transferred. Chavez then said he would accept the work because he had no choice, whereupon 12 Jim Adam stated that the pay would be six cents (6c) per pipe.[12]

The pipes are three inches by thirty feet (3" x 30') and are Generally carried about forty to forty-five feet (40-45') when each is moved by an irrigator. Prior to 1976, none of respondent's Workers including irrigators were paid on a piece-work basis. After January of 1976, all newly hired irrigators were paid on a Piece-work basis. After receiving the offer of six cents (6c) per pipe, Chavez indicated to Jim Adam that he would make less money then he had made previously and would be unable to support his Family. He was advised that was all he would be paid and that students would work for a wage of six cents (6c) per pipe. Chavez did not take the job.

Previously, at $3.00 per hour, Chavez would be able to earn $30.00 for a ten hour day. In order to earn $30.00 per day at six cents (6c) per pipe, Chavez would have to move 500 pipe in ten

hours, or slightly less than one pipe per minute. Such pipe have to be moved through differing conditions of terrain, wetness and grass heights. While it is possible to move 450 pipe in ten hours in good conditions, in difficult conditions only about 300 pipe Could be moved, and the average is somewhere between these two Figures.[13]

In 1976, a number of new irrigators were hired by respondent, Including Bruce Tolbert, Curt Skowe, Ken Tolbert, Bob Kotecki and Eddie George, all of whom were between the ages of seventeen and Twenty-one and none of whom were Mexican. All were paid six cents (6c) per pipe at the outset but in October of 1976 four of the five Asked for higher wages and, because six cents (6c) per pipe was Felt to be insufficient by respondent, the rates were increased to Eight cents (8c) per pipe.[14] Additionally, each of the five spent About twenty percent (20%) of the day on chores other than pipe Moving for which four were paid at a rate of $2.50 per hour, and The fifth at $3.00 per hour.

E. Ruben Quintero and Jesus Magana

Ruben Quintero is a forty- five (45) year old Mexican man who Had worked for respondent from 1970 until April of 1976, was con- Sidered to be a good worker by respondent,[15] and had been given a Substantial raise in June of 1975. Quintero, although married to An American citizen for several years, is not himself a citizen Of this country. Quintero, since he is married to an American cit- Izen, was never threatened with, and is not likely to be subject To, deportation. Evidence was presented by experts on this sub- Ject, which evidence was quite credible. As of April 13, 1976, Quintero was a skilled milker for respondent, having been such for

the previous four years, and was also a "Chavista", a fact known to respondent since Quintero had been a representative for the employees of the U.F.W. as late as March of 1976.[16]

Jesus Magana is a thirty-three (33) year old Mexican man, married with two children, one of whom was born on November 25, 1973 While Magana and his family resided in quarters on respondent's Property. Magana commenced work with respondent in 1971 and, as of April 13, 1976, when his employment was terminated, worked as a relief milker receiving the same pay as that of Quintero and Cardenas, the two milkers, that of $750.00 per month, but performing field chores when not relieving the milkers, Magana is not a citizen of the United States but, in November of 1976 , received the Necessary documentation from the Immigration and Naturalization Service to permit him to work in the United States. As with Quin-Tero, Magana is not, and was not on April 13 , 1976, a likely sub-Ject for deportation, the reason for Magana being that he has a Child born in the United States. This fact was attested to by ex-Perts on immigration law presented by General Counsel, and I find It credible. Magana was considered to be a 'good worker by respondent at all relevant times,[17] and is presently employed by respondent having been re-hired shortly before the hearings in the in-Stant matter commenced, but not at the same level of work, relief Milking, as he had previously performed.

On April 13, 1976,[18] Quintero and Cardenas were working at the Dairy as milkers, while Magana was performing his chores as relief Milker. On that day, Chuck Adam came to the dairy with two men Named Joe Toledo and Manuel Ormande, both of whom are Portuguese. Adam said to Quintero, who was there with Cardenas, that Jim Adam.

had received a telephone call from a man saying that there were. People working without papers and that they must be fired. Peter Cohen, a U.F.W. representative, was there at the time this happened, Adam then said that Quintero and Cardenas were to stop work and leave and, when they asked "why?", were told that if they, did not leave the barn at that time, Adam would call the sheriff. Quintero and Cardenas then left their work at the barn, and were replaced as milkers by Toledo and Ormande, both of whom had been hired just prior to this incident at a rate of $800.00 per month each, although neither were then working as milkers, and Ormande had never previously worked as a milker.[20]

At approximately the same time as Chuck Adam informed Quintero and Cardenas that they were relieved of their duties, Adam informed Magana that he too was no longer to be employed at ADAM DAIRY[21] since "My father says so."[22] Later that day Magana went to Chuck Adam to inquire as to why he was fired and was told that Jim Adam had received a call from an unnamed caller saying that workers should be let go. Magana told Adam he had been in touch with the immigration officials and had been told that he should wait for a letter from them and that his case had been accepted and he had a preference to be in the United States since he had a child born in the United States.[23] In fact, he did receive the necessary documentation to be in the United States from immigration officials on November 18, 1976. Nevertheless, Magana was relieved of his work. 'as of the day Chuck Adam informed Magana of his decision, although Chuck Adam had known since 1971 that Magana was not legally in the United States but had had an American born child in 1973.[24]

When Quintero was told about the phone call, he told Chuck

Adam he had the necessary papers to remain in the United States, Whereupon Chuck Adam replied, that since Quintero had been replaced as a milker, he could not get his old job back even if his papers were legal and therefore Quintero was to work in the future. at Changing irrigation pipe and doing ranch work such as poisoning Gophers even if his papers should prove valid. Thereafter, Adam sought to have Quintero go with Adam to an Immigration and Natural Ization Service office in San Luis Obispo but, although Quintero made an attempt to verify his immigration situation, at no time did Adam and Quintero go together to an Immigration and Naturaliza-tion Service office to determine Quintero's status.[25] Thus, as of April 13, 1976, Quintero was removed from the dairy by respondent. As with Magana, respondent had known long before, in fact in 1970, that Quintero was not legally in the United States.*

The reason given to the union and the workers by respondent prior to the hearing for the sudden action as to the two milkers and the relief milker was a telephone call by an unnamed person Indicating that all illegal workers were to be fired. This explan-ation was given to the workers on April 13, 1976, and was reiter-ated to Peter Cohen, the U.F.W. representative, on the same day as being a call from an "anonymous" caller, Subsequently, on May 18, 1976, when Peter Cohen met with Steve Martin, the respondent's. neg-Otiator, Martin mentioned the fact of the anonymous phone call in Conjunction with the action taken as to Quintero and Magana. Thereafter, on November 19, 1976, Chuck and Jim Adam both swore to a statement taken by an A.L.R.B. agent saying that "on or about

*The termination of employment of Ramiro Cardenas, the other milker besides Quintero will be discussed in the next sub -section herein,

March 20, 1976, we received an anonymous phone call that Jesus Magana and Ruben Quintero both milkers for our dairy were illegal aliens." The rationale offered by respondent was that they had recently learned of the law making it a crime to employ illegal aliens and had also recently learned through an anonymous call that two of their workers were illegal. At the hearing, Chuck Adam testified at one point that his father had received an anonymous phone call.

In fact, there never was an anonymous phone tip. Jim Adam admitted during the hearing that he had lied in his sworn statement regarding the anonymous phone call. Chuck Adam admitted that he had committed perjury when he testified at the hearing that ; there had been such a call received by his father. Additionally, during one part of his testimony, Steve Martin indicated he first heard about the so-called anonymous phone tip at or about the time of the May 18, 1976 negotiating session with Peter Cohen but, after a lunch break, Martin testified he first heard about the anonymous call on or about November 19, 1976, when the Adams signed the sworn statement which had been cleared with 'Martin before signing, as to the truth and accuracy of its contents.

The explanation given by respondent at the hearing as to the Discharge action taken was that Jim Adam had called Steve Martin During early April, 1976 to complain that "these goddamned wet-Backs are going to run us out of business", referring to the bacterial count problems the dairy was having, and that they were caused by the milkers and relief milker. Further, that Steve Martin had told them during that conversation that it was a a crime to employ illegal aliens, a response triggered in Martin by the

use of the word "wetback" and a recent conference in November 1976 attended by Martin at which he was told of a United States Supreme Court case regarding such a law.

In fact, respondent had been having problems as to the bacteria count with Knudsen during the last six months of 1975, and' had" hired a new herdsman in February of 1976. The resultant quality evaluation, performed by Knudsen, for the period of March-April, 1976 toward the end of which period Quintero and Magana were fired, reflected the best quality record for either the last six months of 1975 or the eight month period between March and October, 1976.[21] As to the law under which respondent claimed the possibility of prosecution, there was, as of 1972, a judgment issued by the Superior. Court of California, County of Los Angeles, in Dolores Canning Co., Inc. v. George V. Milias, #C-16928, affirmed sub nom Dolores Canning Co. v. Howard, 40 Cal.App.3d 673 (1974), permanently enjoining any prosecutions under the aforesaid law. Thus, no person or organization had been or has been prosecuted under the law respondent claimed to fear.[27] Further, the United States Supreme Court case which' Martin referred to 'did not come down until three months after the November conference Martin attended, and, unlike respondent's conclusory allegation in the brief, very definitely did not permit prosecution or construe the statutory legality of the Act. De Canas v. Bico, 424 U.S. 351. 96 S.Ct. 933-(1976). Parenthetically, Chuck Adam testified at the hearing that he knew that a recent law required that businesses keep a record of the hours worked by their employees, but Chuck Adam has never kept such records, although it is illegal not to do so. Respondent knew that, both Quintero and Magana were "Chavistas" as Chuck and

Jim Adam testified, since the vote was 5-2 for the U.F.W. and respondent knew that the two were Joe Tenascio and Ray Tognazzini, neither of whom are Mexican, and that they were not Quintero and Magana. Further, respondent "knew no[1] Portuguese who were U.F.W. and was of the opinion that neither Toledo or Ormande were U.F.W. Finally, Chuck Adam testified that he had never inquired of Toledo or Ormande as to whether they had immigration papers but presumed they were United States citizens although he did not know if they had been in the United States long enough to be naturalized. Ormande spoke few words of English.

Based upon the above, I do not find credible either the testimony of Chuck or Jim Adam that they feared prosecution for employing illegal aliens.

F. Ramiro Cardenas

Cardenas is a thirty-seven (37) year old married man of Mexican extraction who worked for respondent during 1969-1970 and then from 1971 until the middle of May, 1976. During that entire period of time, while not a United States citizen, Cardenas possessed the necessary legal papers to remain in the .United States and work here.[28] Prior to the union election in September, 1976, Cardenas was told by Jim Adam that Cardenas would receive a $25.00 raise and hospitalization insurance if he voted "no union". Jim Adam also told Cardenas that he did not like the U.F.W. and would sell the cows if the U.F.W. won. Further, Cardenas was present at a meeting held just prior to the election as a U.F.W. representative, Jim Adam was present at the same meeting. At that time, and until mid- April, 1976, Cardenas was a milker for respondent and was considered to be a good employee.[29]

In mid- April 1976, Cardenas was removed as milker at the same time as Quintero and Magana were removed and Toledo and Ormande were hired and installed as milkers. Cardenas was not told anything about faulty immigration papers since respondent knew he had Satisfactory papers. Instead, Cardenas was simply told that these were Jim Adam's orders. As to Cardenas's removal from the barn, Chuck Adam later explained that Toledo and Ormande were a team, although they had never worked together as milkers before, and Ormande had never been a milker before. Cardenas was led to understand he would have other employment with respondent.

Cardenas did no work at all for the next several days after April 13, 1976. On April 18, 1976, Cardenas received a call from his wife from Guadalajara, Mexico, wherein iu became important that) Cardenas leave for Mexico immediately in order to help his wife who was ill.[30] Cardenas then requested a loan of $400.00 from respondent and was given an advance of $325.00.[31] He further asked permission to leave for about fifteen to twenty days and was expected to return and commence work on May 4, 1976.[32] Instead, he became ill with tonsil problems in Mexico and returned to his home 33 in Santa Maria about one week late. At this time he called respondent, apologized, was warned about lateness and was told to report to work at the beginning of the following week.[34] Thereupon, Cardenas did so report to work and in fact worked for three days. On the next working day thereafter, May 13 , 1976, Cardenas found that he had to go to Los Angeles to obtain an immigration paper for his wife. Cardenas then went to Los Angeles, returning to work the following day, May 14, 1976, whereupon Cardenas met with Jim Adam and was told he was being fired for being late from Mexico and

for not having told anyone about his May 13, 1976 absence. The work that Cardenas was to have been doing during the day he was Absent was corral-building, as to which respondent deemed there was, but in fact there was no, rush or urgency.[35] Therefore, the absence of Cardenas was not important to the other worker on that job, Joe Tenascio.[36] Prior to leaving to go to Los Angeles,- Cardenas informed Joe Tenascio of his departure, asked that Tenascio tell Adam, and was told "Go, I'll tell him."[37] While Cardenas was away in Mexico, Chuck Adam interviewed a Portuguese man by the name of Manuel Ferreira, who spoke few words of English. On May 15, 1976, the day after Cardenas was fired, Ferreira came to work as relief milker at a rate of $800.00 per month plus a housing allowance. Chuck Adam did not know if Ferreira had experience with milking machines.

On May 15, 1976, Cardenas went to Jim Adam to obtain a letter of employment in order to facilitate Cardenas' wife coming to the United States. Adam said he would sign such a letter if Cardenas signed a letter prepared by Chuck Adam, in Spanish. That letter, as interpreted, said that respondent was "..'. correct for terminating the work of mine because it is seven days late ..." and also referred to Cardenas's failure to report for work or tell anyone on May 13, 1976.

Cardenas did not sign the letter on that occasion but, because he needed the letter of employment, returned approximately one month later and signed the statement given to him by Jim and Chuck Adam in return for the letter of employment signed by Jim Adam, The purpose of having Cardenas sign a letter according to Chuck Adam was to insure that he "... wouldn't show up in a hearing room

some day."

G. Anti-U.F.W. Motivation

The election to determine if there would be a union at ADAM DAIRY, and if so which one, occurred during September, 1975, Immediately prior to the election, Jim Adam said to Chavez "Tell the-workers I don't want them to .vote for the U.F.W. because I will sell the cows and they will have to work elsewhere." Jim Adam also said, on another occasion before the election, according to Chavez, that he did not want the workers to talk to U.F.W. representatives and that the U.F.W. representatives had no permission to speak with respondent's employees, although the Teamsters did have permission since they had asked for it. Magana testified that the day before the election, Jim Adam had said that he wanted the workers to vote no union because "... I want it." Quintero was not working the week before the election, although he voted, but Cardenas was working. The day before the election, Jim Adam told Cardenas he would give Cardenas a $25.00 raise and hospitalization coverage if Cardenas would sign "no union" because, as Jim Adam said, "I do not like the U.F.W. because if the U.F.W. is here, I will sell the cows."

Jim Adam testified that if he had his choice he would rather have the Teamsters or no union than the U.F.W. since he did not know any dairies that the U.F.W. was representing. He admitted telling the employees that if the U.F.W. won, he would sell the cows and that they had better take the Teamsters because they would let him run his business. Jim Adam said he had in fact listed his cows for sale for a month with a Mr. McCune, a dairy broker in Los Angeles, but could not get the price he wanted for them. He claimed

not to have anything against the U.F.W. but "I don't want them to tell roe how I should run my business." Then he testified "I don't want to be a guinea pig." And subsequently, "I couldn't live with the U.F.W. because they know nothing about the dairy industry. What I said then is no different today from then." Later he testified, "There's several unions in the L.A. area that specialize in dairies only --- the Christian Labor Association and the Teamsters --- many dairies operate with these two organizations and get along fine." Adam also testified that he had discussed with Steve Martin the fact that the U.F.W. knew nothing about the dairy industry and had told Martin his feelings about the U.F.W. Earlier., Jim Adam had testified that he had been called by the Teamsters two weeks before the election and had been asked if they could come out and speak to the workers and he said "Why, certainly", and that the Teamsters came out during work- time, but that the U.F.W. did not ask permission and when they came Jim Adam sent Chuck after them to remove them from the property.

Chuck Adam testified, as had Jim Adam, that the vote was 5-2 for the U.F.W. and that they knew who the two were (Joe Tenascio and Ray Tognazzini), therefore, they knew who the five were. Chuck Adam also testified that they had grouped the milkers and relief milker (Quintero, Cardenas and Magana) together as "wetbacks" in the conversation with Steve Martin referred to previously herein, even though they knew Cardenas was not an illegal alien. Further, Chuck Adam testified that he thought Toledo and Ormande were not U.F.W. and that he did not know any Portuguese who were U.F.W., but thought most Mexicans were. In fact, he testified that all U.F.W. votes in the election were Mexican and he knew who each of

them were and, further, that he thought most members of the U.F.W. are Mexican.

Steve Martin testified that Jim Adam thought that only his Mexican employees were "Chavistas", and that his other employees were not. Martin also testified that Jim Adam was" ... scared to death of the U.F.W.".

As has been set forth earlier herein, the four individuals who are the subject of the allegedly discriminatory firings (Chavez, Quintero, Magana and Cardenas) were active U.F.W. supporters, which fact was known to Jim and Chuck Adam.

The U.F.W. was certified, regarding respondent, on December 5, 1975. At that time, and during the period dating from the election, according to the payroll records and testimony of Chuck Adam, the employees included: the four workers at issue as well as Antonio Cardenas, Gilberto Cepeda, Alphonso Ochoa Zepeda, Rafae Cardenas, Santiago Guerro, Francisco Lizzaroga, Jorge Zepeda, Joe Tenascio, Roy Tognazzini and Salvadore Barragon. Tenascio, Tognazzini and Barragon are not Mexican or of Mexican descent. After Cardenas was fired in May, 1976, none of those of Mexican heritage; remained and the entire work-force was reconstituted to consist of two Portuguese milkers, a Portuguese relief milker, Tenascio and Tognazzini (who were the company and Teamster observers and were of Swiss origin), Overholzer (local friend of the Adam family), and a large group of young men, recently out of local high schools of non-Mexican (or what has come to be termed "Anglo") extraction.

H. Refusal to Bargain

Ann Smith testified, as representative of the U.F.W., that she sent a request for information by registered mail to respon-

dent on January 12, 1976.[38] The request included, inter alia, a list of bargaining unit members, a summary of present fringe benefits for bargaining unit members and non-bargaining unit members and any current contact with any other labor union, all such information to be supplied at "the earliest possible time." Smith did not receive any response and . telephoned Jim Adam on February 17, 1976. Jim Adam said that his bookkeeper was to prepare it and he would mail it to Smith. On or about February 22, 1976, Smith again called Jim Adam who told her it would be given to her by Steve Martin. Smith then called Martin a number of times, finally reached him on or before March 5, 1976, at which time a date was set for a meeting on March 11, 1976. Martin then requested a copy of the U.F.W. proposal in advance of the meeting, which was agreed to by Smith. On March 5, 1976, Smith sent Martin a "general proposal" which did not include economic articles such as hours of work and overtime, vacations, holidays, medical plan, wages and the duration of the agreement, as explained in the cover letter.

At the meeting on March 11, 1976, Martin told Smith he had received the proposal and when asked if he Had read it said "Most of it."[39] There was, thereafter, little discussion of the proposal. Instead, Martin reacted verbally to each of the articles and subsections thereof, of the proposal, asking questions or by saying "rejected", "okay", "no problem", "we'll counter", or "we'll put a hold on that". Thus, eleven articles and subsections were altogether. rejected, two were reacted to with "we'll put a hold on that", twelve were reacted to with "we'll counter", and six were reacted to with a response of "that was no problem.". Martin asked several questions regarding the meaning of portions of the proposal, and

agreed to negotiate as to Article XIV thereof. An example of articles rejected without discussion or negotiation was Article XII regarding supervisors not performing work covered by "the agreement except instruction training or emergencies.

Smith concluded at the March 11, 1976 meeting that Martin's approach prevented discussion since he would simply reject items in the proposal and that, at forty to fifty similar first meetings with other employers, such hostility and total rejections had not occurred.

At the conclusion of the meeting, Martin said he would send the counter-proposals and would call Smith in a couple of days. He suggested that Smith should call after reading the counter-proposals and set up a new meeting. He further stated on cross-examination that there was no impasse resulting from the meeting. The information previously requested by the union was not produced. Martin testified that he had been given the request for information by Jim Adam, that he had compiled the necessary data, and that he had it present at the March 11, 1976 meeting, but that he never gave it to the U.F.W. and did not mention that he had the information since he had not been asked for it at that meeting, After the March 11, 1976 meeting, Smith did not receive the promised counter-proposals for some time, although she called Martin several times. Finally, she received two different proposals several days apart in late April, 1976. These two counter-proposal; over the same cover letter dated April 12, 1976,[40] contained a number of inconsistent clauses between the two counter-proposals, including. the clause on seniority (Article IV, U.F.W. Exhibit 7; Section VI, U.F.W. Exhibit 8). Martin stated that the U.F.W. nego-

tiator would not know until the actual meeting which was the company proposal, and that the U.F.W. negotiator would have to decide which was the company proposal. Martin acknowledged that, although health and safety conditions, rest periods and supervisors doing bargaining unit work were all mandatory subjects of bargaining, and had been rejected by Martin at the March 11, 1976 meeting neither of the two different counter-proposals submitted by the company contained any language on those subjects.

After the March 11, 1976 meeting, Smith was obliged to handle a series of meetings with other employers in Oxnard, and the Santa Maria U.F.W. field office took over the ADAM DAIRY negotiation. Thus, when Smith received the Adam counter-proposals at the end of April, they were sent to Peter Cohen in Santa Maria. Peter Cohen testified that he is a legal worker for the U.F.W. and that when he received the Adam counter-proposals he called Martin and set up a meeting for May 18, 1976. At the May 18, 1976 meeting, Cohen and Paulino Pacheco were present for the union and Martin, Chuck Adam and Dave Miller were present for respondent. Between the March 11 and May 18, 1976 meetings, the incidents concerning the four workers had occurred with the result that, as all parties agree, the May 18, 1976 meeting became a raucous event. Although the versions testified to at the hearing are dissimilar, both Peter Cohen and Dave Miller kept notes which were put into evidence by respondent and certain conclusions can be gleaned consistently with the testimony and the notes.

At the outset of the May 18, 1976 meeting, Cohen said he was prepared to respond to the counter-proposal but first wanted to discuss the fired workers. He said that the union was concerned

as to whether the employer was in good faith and that there roust be discussion and resolution of this discharges if possible in order for the negotiations to move ahead constructively. Dave Miller. present to asist Martin, asked if the meeting was for grievances or negotiating. Cohen then said that the issues of firing practices and right of discharge were essential to contract settlement and that perhaps there should be discussion of each case. Martin agreed, and gave his version of the firings, whereupon Cohen gave his version. During this exchange, a substantial amount of excitement, profanity and loss of temper occurred. Martin, during this process, agreed that the job of milker was a skilled job. Cohen said that he wanted to meet again as soon as possible With the fired employees present to negotiate what rights the employer has and the employees have. He also said the problem must be resolved, if it could be, before an agreement could be reached and the employees must be subject to negotiation. Martin agreed that there would be another meeting at which the fired employees could be present but only as agents of the U.F.W. Martin then took Cohen' s number and agreed to call Cohen to set up the next meeting in Santa Maria.[41] The purpose of the next meeting was expected to be further negotiations including the elements of the contract as well as the possibility of re-instatement of the workers.

Subsequent to the May 18, 1976 meeting, which lasted about forty-five minutes, Martin did not call Cohen. Cohen called Martin on May 25, 1976. Martin said he was involved in a trial but would be free in one week and would call Cohen. By June 5, 1976, Martin had not called so Cohen called Martin. Martin told Cohen he was still involved in the trial and would call Cohen in two

weeks.[42] Again, Martin did not call. Cohen waited two months to hear from Martin but did not. On August 6, 1976, Cohen sent Martin a registered letter, repeating the foregoing chronology of events and requesting a meeting and a response. Copies of this letter were received by Jim Adam and by Steve Martin. At some point after receipt of this letter •, Martin contacted the State Conciliation Service requesting that it assist in breaking what Martin termed an "impasse". Further, Martin told respondent that bargaining had been abandoned at and after the .May 18, 1976 meeting. Martin never responded directly to the August 6, 1976 letter from Cohen.[44]

On August 30, 1976, Cohen wrote a letter to Herb Thorne of the State Conciliation Service, who had contacted Cohen, that "... at the present point in our negotiation with ADAM'S DAIRY we feel it would be inappropriate to involve your services," Instead, Cohen advised that they would pursue their remedies with the A.L.R.B. A copy of the letter, which said Cohen still hoped to reach an agreement, was sent to Martin. On the same date, August 30, 1976, another letter was sent to Martin seeking a meeting "... to reach an agreement ..." with a cut-off reply date of September 15, 1976. This letter, sent by registered mail, was received by Martin on September 8, 1976.

Martin testified that his purpose in contacting the State Conciliation Service (hereafter S.C.S.) was to get the negotiations off dead center. Cohen testified that he spoke with Herb thorne and that the conversation was such that Cohen concluded after the conversation, and after discussion with the Union Negotiating Department, that he would be better off pursuing A.L.R.B.

remedies and seeking direct bargaining meetings, if possible.[45] Martin testified regarding the offer to use the S.C.S, as follows: "That cost us nothing…"[46]

Cohen received no reply "from Martin to Cohen's letter of August 30, 1976. No other communications took place between Cohen and Martin until January 1977; however, on August 31, 1976, the charges of refusal to bargain were filed. In January and February of 1977, immediately prior to the instant hearings, Cohen called Martin again and suggested bargaining. Bargaining commenced two weeks before the hearing but no settlement was reached. During the hearing the parties entered into a stipulation that respondent was to prepare a wage proposal in response to that of the U.F.W. By the end of the hearing, said wage proposal had not yet been presented. It was further stipulated that no meeting would be held until the proposal was received.

As to the information requested in January of 1976, it was never supplied by respondent according to Cohen until, orally on February 11, 1977, Peter Cohen was told that milkers without company housing received $890.00 per month. In fact, when Chuck Adam subsequently testified at the hearing, it turned out that the data given to Peter Cohen was incorrect in that Ormande is receiving $980.00 per month as a milker without company housing. Thus, the only tidbit of data given to the union, thirteen months late, was not only incorrect, but would make it more difficult for the union to negotiate to a satisfactory contract.

I. Unilateral Changes

The factual conclusions regarding unilateral changes as to the four terminated employees (Chavez, Quintero, Magana and Car-

denas) have been set forth above, including the fact that Peter Cohen was present when Quintero, Magana and Cardenas were first laid off but no union official had previously been informed. No union official was told when Cardenas was transferred to relief milker or when he was fired, nor when Chavez was offered different work and on a different pay rate.

Further, the rate for irrigators was changed to a piece-work basis on January 1976 and the piece-work basis was changed from six cents (6c) to eight cents (8c) per pipe during October of 1976. The rate for milker and relief milker was changed from $750.00 per month to $800.00 per month, based, according to Chuck Adam, upon statements by Toledo and Ormande that they would not work for less, in April of 1976. Further, as was stated by Chuck Adam, Joe Tenascio went from $3.35 to $3.50 per hour in October of 1976, Tognazzini went from $3.60 to $3.70 per hour in October of 1976, Joe Toledo was given a housing allowance at the end of 1976, Bob Kotecki went from $2.50 to $3.00 per hour in October of 1976, Ormande received a $180.00 housing allowance in November of 1976, Ron Davis, a mechanic, received a $1.00 per hour increase to $3.00 per hour at the end of 1976. Chuck Adam testified that the above compensation adjustments were made without contacting the U.F.W. but that Martin had said it was okay. Martin had testified, that, after: March 1976, there was an "impasse" but on cross-examination he withdrew this fact and said that after May 18, 1976 there had been an abandonment. Chuck Adam further testified that if his workers asked for a raise he would consider it and try to grant it if it made sense economically. There was no' evidence that the changes specified above were routine, automatic, or a result of a previously

established course of conduct.

III.

CONCLUSIONS OF LAW

A. Jurisdiction

Respondent, ADAM DAIRY, is an agricultural employer within the terms of the A.L.R. A., the U.F.W. is a labor organization representing agricultural employees within the meaning of the A.L.R. A., and the employees are agricultural employees within the mean- s ing of the A.L.R.A.

B. Unfair Labor Practices as to Luis Chavez

1. Upon his return from a routine vacation during December 1975 to January 1976, Chavez was not reinstated to his customary and usual work as feed chopper and hauler, although he had always been so reinstated in the fifteen years prior to the U.F.W. election and certification.

2. The motivation for such failure to reinstate him to his routine duties was not his poor work product, since his work was good, nor was it absence of work due to bad weather, since his routine work was being temporarily performed by Glen Overholzer, but was a result of his U.F.W. activity, sympathy, vote and involvement all of which were known to respondent. Respondent had and has severe anti-U.F.W. animus, evidenced by attempts to discharge or otherwise eliminate from the work force every pro-U.F.W. employee as well as all persons of Mexican heritage, the statements of Jim Adam on the stand, and the inconsistencies, perjury and evasiveness demonstrated by Chuck Adam. Respondent; has filled to satisfactor-

ily prove that it was motivated by legitimate objectives. (See N.L.R.B. v. Great Dave Trailers Inc., 388 U.S. 26, 65 L.R.R.M. 2465 (1967).)

3. The offer of work as an irrigator to Chavez resulted in a situation wherein such work would injuriously affect a pre-existing condition regarding Chavez's hands, which condition was known. to ADAM DAIRY.

4. The offer of work as an irrigator to Chavez at six cents (6c) per pipe, which pipe could be moved and installed at the rate of thirty to forty-five feet (30-45') per hour, the average being somewhere between these two figures , constituted a reduction in pay for Chavez, whose previous pay had been $3.00 per hour.

5. Chavez was not a supervisor as defined by Section 1140.4 (J) of the A.L.R.A. at any time relevant to the instant matter. First, his testimony that he was not performing supervisory duties is more credible than the testimony that he was. Second, at the time of the vacation, there were no irrigators employed for Chavez to supervise and, therefore, he could not have performed any supervisory tasks. (See Valley Farms, 2 A.L.R.B. #41.) Third, his lob as chopper took him around the farm sufficiently to be able to determine which acres were dry. Anyone who traveled the farm could determine which areas were dry and required irrigation. Chavez. testified that he had told Jim Adam he could not add the responsibility of informing the irrigators as to which areas were dry 'to his other chores. Even if his testimony were found lacking credibility, which it does not, such routine direction would not constitute supervisory responsibilities. (See N.L.R.B. v. Sayers Printing Co., 453 F.2d 810 (8th Cir. 1971); N.L.R.B. v. Magnesium Cast-

ing Co., 427 F.2d 114 (1st Cir. 1970).) Any of the three conclusions reached herein would support the determination that Chavez was not, at the time of the constructive discharge, a supervisor.

6. Incorporating 1 to 4. herein, Chavez's refusal to. work., as an irrigator and at six cents (6c) per pipe constituted a constructive discharge. (See Peerless Distributing Co., 144 N.L.R.B. #142, 54 L.R.R.M. 1285 (1963); Polynesian Arts, 100 N.L.R.B. 1312 (1952); Becton-Dickinson Co., 189 N.L.R.B. 121, 77 L.R.R.M. 1627 (1971); Associated Mills, 190 N.L.R.B. 8, 77 L.R.R.M. 1133 (1971). Such discharge constituted a violation of Section 1153(c) of the A.L.R.A. by discriminating against Chavez as to terms and conditions of employment to discourage union membership, and as well constitutes a violation of Section 1153(a) of the A.L.R.A, (See Becton-Dickinson, supra.)

C. Unfair Labor Practices as to Ruben Quintero and Jesus Magana

1. Quintero and Magana were both discharged by respondent on April 13, 1976.

2. At the time of discharge, neither had the requisite legal papers to be in the United States. This fact was then known by respondent and had been known by respondent for some time previous.

3. At the time of discharge, both Quintero and Magana were competent, satisfactory employees. The same applies to Romero Cardenas. There is insufficient evidence that Quintero, Magana and Cardenas were the cause of any bacterial problems on the ranch. which bacterial problems were subsiding when these workers were discharged. Nor were they to be discharged because of such problems.

4. At the time of discharge, Magana had proceeded, and was

likely, to obtain necessary legal documentation but was given an unreasonably short period of time, namely one week, to obtain them

5. Neither Magana nor Quintero were likely to be subject to deportation proceedings.

6. Given the injunction outstanding against prosection for employing illegal aliens as of 1972, there cannot be any such prosecutions under California Labor Code Section 2805(a), nor have there been any, nor could there be any in April of 1976.

7. Respondent knew that Quintero and Magana were actively involved in, supporters of, and voted for the U.F.W., which union respondent vehemently disliked and attempted to influence and coerce the workers against.

8. Respondent was not, at the time of discharge, motivated to discharge Quintero and/or Magana due to a fear of prosecution.

9. It was proven to a preponderance of the evidence that respondent was motivated to discharge Quintero and Magana because of their union activities and support. The defense of good cause for discharge on the basis of incompetent work or fear of prosecution was not proven to a' preponderance of the evidence. Furthermore, the Ninth Circuit has recently said " ... the cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity; a business reason cannot be used as a pretext for a discriminatory firing. (citations omitted,) The test is whether the business reason or the protected union activity is the moving cause behind the discharge, (citations omitted.) In other words, would this employee have been discharged but for his union activity. (cita-

tions omitted.)" N.L.R.B. v. Ayer Lar Sanitorium, 436 F.2d 45 (9th Cir. 1970). The evidence is substantial that Quintero and Magana would not have been discharged had it not been for their union activity. (See also American Sanitary Products Co. v. N.L. R.B., 382 F.2d 53 (10th Cir. 1967), N.L.R.B. v. Wiltse. 188 F.2d 917 (6th Cir. 1951), N.L.R.B, v. Okla-Inn, 80 L.R.R.M. 1697. Enforced 488 F.2d 498 (10th Cir. 1973).)

10. Such discharges constitute violations of Section 1153 (c) of the A.L.R.A. as to Quintero and Magana, as well as violations of Section 1153(a) of the A.L.R.A.

D. Unfair Labor Practices as to Ramiro Cardenas

1. Cardenas was a milker with Quintero prior to April 13, 1976, and had, at that time, valid papers permitting him to be a worker in the United States.

2. On April 13, 1976, at the time of the discharges of Quintero and Magana, Cardenas was removed from his duties as milker and transferred to less skilled duties involving building corrals. Prior to this date, Cardenas had performed competent, satisfactory work as a milker.

3. Cardenas was replaced as a milker by a person with less skill than he had but who was paid more money per month than Cardenas had been paid. Insufficient proof was presented by the respondent as to a valid reason for replacing Cardenas. Cardenas' replacement was interviewed before Cardenas was fired.

4. Respondent knew that Cardenas was actively involved in, a supporter of, and voted for the U.F.W., which union respondent vehemently disliked and attempted to influence and coerce Cardenas to vote against.

5. On April 18, 1976, Cardenas requested and received both leave time and an advance of salary to visit his sick wife in Mexico. Cardenas returned late from Mexico due to his own illness and was warned not to be late again. Cardenas apologized and was returned to work.

6. On May 13, 1976, Cardenas was obliged to go to Los Angeles for immigration papers for his wife at which time he told a fellow-employee, Joe Tenascio, that Cardenas was going, asked him to inform respondent and was told that respondent would be so informed. Cardenas was away for one day and, on his return, was fired.

7. The work Cardenas was scheduled to do was not urgent work despite respondent's attempt to so characterize it.

8. The same legal tests as were used regarding Quintero and Magana are applicable to Cardenas. (See N.L.R.B. v. Ayer Lar Sanitorium, supra.) The issues are whether Cardenas would have been fired but for his union activity .and whether Cardenas was treated differently from non-union employees. The question whether U.F.W. adherents were treated differently from non-U.F.W. adherents must be determined in order to decide if the discharge was a "but-for" situation.

9. Section 1153(c) of the A.L.R.A. requires a discrimination whose motivation is, for purposes of this case, discouragement of union membership. Discrimination has been defined as different treatment accorded union employees solely because of their union Memberships or activities. (See Montgomery Ward v. N.R.L.B., 107 F.2d 555 (7th Cir. 1939).)

10. Based upon the fact that the practice regarding workers taking short periods of leave , such as for one day as with Cardenas

was that the worker was to inform another employee of that fact (as witness the testimony of Jim and Chuck Adam, and the letter they prepared and Cardenas signed saying that he failed to report for work or tell anyone), and upon the fact that. Cardenas had told Tenascio of his leaving, and upon the further fact that such all leged failure was one of the .actual bases upon which he was fired, the conclusion is inescapable that Cardenas, a U.F.W. adherent, was treated differently from others in having been discharged although he had informed another employee of his leaving on May 13, 1976. Further, the allegation and testimony that the work was urgent and that this was another reason for the discharge of Cardenas whereas the truth was that the work was not urgent, according to Tenascio who so informed the A.L.R.B. agent, leads to the same inescapable conclusion.

11. Therefore, it is necessary to determine if Adam's motivation was to fire Cardenas because of his U.F.W. affiliation and interest. The totality of circumstance includes the facts that Cardenas had previously been removed from a skilled, desirable job as milker without good cause since he was not an illegal alien and since his work was good (respondent argues that language barriers were the reason but facts show language problems were easily worked out by respondent), that his replacement, Manual Ferreira, was interviewed while Cardenas was in Mexico with permission, that Ferreira started work the day after Cardenas was fired, that there is substantial indication of anti-union motivation on the part of the respondent, and that Cardenas was the last of the union supporters to be on respondent's payroll before he was fired. Further, since respondent has the burden of showing legitimate motivations (N.L.R.

B. v. Great Dane Trailers, 388 U.S. 26 (1967)), the conclusion is that respondent has failed to meet its burden.

12. Thus, as to Cardenas, respondent is found to have violated Section 1153(a) and (c) of the A.L.R.A.

E. Request for Information

1. A request for information was sent to respondent on January 12, 1976 in writing seeking, inter alia, the names and current fringe benefits of bargaining unit members, which information was relevant and necessary to enable the union to bargain intelligently. (Electric Auto Lite Co., 89 N.L.R.B. 145, 26 L.R.R.M. 1092 (1950).) Several subsequent telephone calls were placed by the union requesting such data, during which time the respondent indicated the information would be sent to the union, and was in the process of being prepared.

2. At the meeting of March 11, 1976, the information was available in writing, according to Steve Martin, but was not given to the union representative because she did not specifically request it and he, therefore, concluded that she had decided that she did not want the information. In early 1977, when the third meeting of the parties was held, approximately one year after certification, the request was again made for information and some slight information was given as to one of the replacement milker's earnings, and that was erroneous.

3. The issue as to the request for information boils down to. whether a union must repeatedly request information at each meeting with the employer before the employer may be deemed to have refused to supply it. There is no doubt that such is not necessary. (See N.L.R.B. v. John S. Swift Co., 277 F.2d 641, 46 L.R.R.M, 2090

(7th Cir. 1960).) The information requested herein was important and necessary to bargaining. There was an unreasonable delay in producing it. (See Southwest Chevrolet Corp., 194 N.L.R.B. 157, 79 L.R.R.M. 1157 (1972); Pennco, Inc., 212 N.L.R.B. 101, 87 L.R.R.M. 1237 (1974); Colonial Press Inc., 204 N.L.R.B. 126, 83 L.R.R.M. 1648 (1973).) There was no waiver by the U.F.W. as to the information, nor could waiver be construed from the tenor of the subsequent events.

4. The instant matter is decidedly different from Chevron Oil Co. v. N.L.R.B., 442 F.2d 1067 (5th Cir. 1971), 77 L.R.R.M. 2129. In that case a portion of the requested information was given to the union eight days prior to the meeting " ... in sufficient time to prepare its proposals ...". (442 F.2d at 1071) Further, the employer wrote to the employee that the remaining requests would be discussed at the meeting and thereafter the union simply did not bring the subject up. That is an entirely different situation from the present one wherein the employer supplied nothing for over one year, had previously told the union the data would be forthcoming, and much later gave a partial, incorrect response. The respondent's actions herein amount to delay, obfuscation and procrastination constituting a refusal to bargain in good faith.

E. Conditional Bargaining by the U.F.W.

1. Respondent claims that its duty to bargain collectively was eliminated after the May 18, 1976 meeting, since, it alleges, Peter Cohen insisted on re-instatement of the four previously employed workers as a condition to further bargaining.

2. The charging party, U.F.W., did not conditionally bargain

at the May 18, 1976 meeting. Cohen, speaking for the U.F.W., consistently indicated that the problem of the dismissed workers must be discussed, negotiated and resolved if possible before an agreement could be reached. There is no credible evidence that the workers must have been re- instated before bargaining could be resumed or agreement reached. Indeed, given the subsequent attempts to set up further bargaining on the part of the U.F.W., the conclusion is inescapable that there was a desire to bargain. Thus N.L.R.B. v. Pepsi-Cola Bottling Co. of Miami, 449 F.2d 824 (5th Cir. 1971), wherein it was determined that the presentation of the issue of workers' reinstatement as a bargainable issue rather than an unconditional demand does not relieve the employer of the duty to bargain further, is decisive herein. Furthermore, in the instant matter, it has previously been held that Chavez, Quintero, Cardenas and Magana had a lawful right to be re- instated (Cf . Midwestern Instruments, Inc., 133 N.L.R.B. 115, 48 L.R.R.M. 1793 (1961).)

3. The cases cited by respondent do not indicate a contrary result. (See, for example, Architectural Fiberglass, 165 N.L.R.B. 21, 65 L.R.R.M. 1331 (1967).) Indeed, the quoted language of Peter Cohen's notes in respondent's brief at page 67 indicates a desire for further discussion.

4. It is therefore determined that the union's actions at the May 18, 1976 meeting did not relieve respondent of further bargaining.

G. Unilateral Changes

1. The United States Supreme Court has held that " ... an employer's unilateral change in conditions of employment under

negotiation is similarly a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." N.L.R.B. v. Katz, 369 U.S. 736, 82 S.Ct. 1107 (1962). The Court in Katz, supra, held that such change constituted a violation of the Act and that there was no need to show a general failure of subjective good faith.

2. The Katz Court, supra, goes so far as to state that even After impasse an employer has no license to grant wage increases if " ... such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union". (369 U.S. at 745) However, the United States Supreme Court did state that the possibility that there might be circumstances which could excuse or justify unilateral action should not be foreclosed.

3. Respondent states that after the May 18, 1976 meeting its duty to bargain collectively was suspended since the U.F.W. was engaged in illegal conditional bargaining wherein the U.F.W. refused to bargain until all the alleged discriminatees were reinstated. Since there has been a conclusion of law established previously herein that there was no such condition placed upon the bargaining process , it follows that there was no excuse or justification proven by respondent as to whatever unilateral changes occurred on or subsequent to May 18, 1976.

4. As to the alleged changes prior to May 18, 1976, respondent has suggested defenses on an individual basis for each of the several changes which occurred therein. As to the changes regarding Chavez's offer at six cents (6c) per pipe whereas his pay had been $3.00 per hour, and the failure to notify the union prior to

the discharge of the milkers, respondent claims that Chavez never took the job, and that the milkers were fired for cause, respectively. Since it has been held herein that the workers were not fired for cause, that defense is fruitless. By discharging four of the five workers who voted for the union, within a period of approximately five months after certification, and without notifying the union thereof, respondent frustrated the statutory objectives of establishing working conditions through bargaining. (See N.L.R.B. v. Exchange Parts Co., 339 F.2d 829 (5th Cir. 1965).)

5. As to Chavez, the fact is that while the employer contemplated a unilateral change, Chavez would not accept it and it was found herein to be a constructive discharge. As such, the employer has evidenced an intent not to negotiate the change of circumstance, the seniority problems or problems of wages and working conditions inherent within. Thus, a unilateral change as that term is set forth in N.L.R.B. v. Katz, supra, is found in regard to Chavez.

6. As to the remaining alleged changes prior to May 18, 1976 i.e., creating a piece-work rate for irrigators, hiring new milkers at $800.00 per month or $50.00 more than previously, and moving an employee from milker to relief milker, respondent argues that these were not changes, and were based on necessity in the event they were changes. To begin with, there is no question all were in fact changes as that terra is defined in that they were either changes in actual wages or working conditions or were changes in policies and systems regarding wages and working conditions. Regarding Cardenas, as was found factually herein, a milker and a relief milker/having to regularly perform a number of non-milking perform different functions, the relief milker

jobs (See footnote 21). As to the new milkers, an immediate, business necessity existed once the previous milkers had been discharge Although the discharge was improper, the employer's proofs as to the need to hire new employees at the rate of $800.00 per month have not been demonstrated to be unworthy of belief even though, increases to new employees might affect their antipathy to the union. However, there was no such need as to the irrigators in regard to the piece-work method of payment.

7. It is therefore concluded that there were unilateral Changes in violation of Section 1153 (e) of the Act as to the:

a. constructive discharge of Chavez and offer of lower pay,

b. irrigation change in pay rate,

c. discharge of Quintero and Magana,

d. change of work and subsequent discharge of Cardenas,

e. increases in irrigator piece-work rate from six cents (6c) per pipe to eight cents (8c) per pipe,

f. increases in hourly rates in October, 1976, to Tenascio, Tognazzini, Kotecki, and Davis,

g. housing allowances to Toledo and Ormande.

H. Refusal to Bargain

1. Employers and unions have a duty to bargain collectively by meeting at reasonable times in good faith with respect to wages Hours and other terms and conditions of employment. (Section 1155 (a), A.L.R.A.)

2. There is sufficient proof herein that the union on request sent its proposal to respondent in March, 1976; that the union met with respondent's representatives in March, 1976; that

the union explained its proposal at that time and was told that a number of the proposals were rejected; that the respondent promised to send counter proposals after the March meeting; that two sets were received by the union about six weeks later containing inconsistent provisions; and that the counter-proposals contained no clauses regarding health and safety conditions, rest periods, and certain other mandatory items rejected in the union proposal, There is further proof that a meeting was held on May 18, 1976 at the request of the union, that at that meeting the fact of the four discharges between the previous and present meeting was discussed; that a subsequent meeting was discussed; that respondent's representative was to contact the union's representative and that the matter of the discharged workers was to be discussed at the next meeting. There is further proof that the employer's representative never thereafter contacted the union's representative but that the union's representative many times called and, in early August 1976, wrote to the employer's representative. There is ample proof that between May 18, 1976 and early August, 1976, the union representative was told several times 'by the employer's representative that the latter was involved in a trial and would call back, but did not. There is ample proof that in August, 1976, respondent's representative contacted the State Conciliation Service instead of replying to the union's letter requesting another bargaining session, and further that the union determined this was another stalling tactic and therefore wrote still another letter requesting a bargaining session. There was no reply to that letter either. In October, 1976, respondent instituted a substantial number of unilateral wage changes. Although bargaining resumed in

February of 1977 , before the instant hearing, the employer agreed to, but did not, give the union a wage proposal.

3. The totality of circumstance of the events set forth above give ample indication of the absence of a good faith desire to meet and bargain toward a contract, (See Southwest Chevrolet Corp., 194 N.L.R.B. 157, 79 L.R.R.M 1156 (1972); Johnson's Industrial Caterers, Inc., 197 N.L.R.B. 352, 80 L.R.R.M. 1344 (1972); Continental Insurance Co. v. N.L.R.B., 495 F.2d 44 (2nd Cir. 1974).) The conduct described in paragraph 2 above is oven more conclusive when considered together with respondent's anti-union motivation, the refusal to provide information, the unilateral changes and the improper discharge of employees. (See Berger Polishing Inc., 147 N.L.R.B. 56 L.R.R.M. 1140 (1964),) Respondent cites in its brief Johnson's Industrial Caterers, Inc., supra, as being supportive of its position, In that case the employer had in its possession a counter-proposal which was never submitted to the union. The N.L.R.B. determined that the counter proposal was silent on numerous issues as to which the union had made previous proposals. Further, it was found that respondent had made numerous unilateral changes. The case, in find ing an unfair labor practice, goes on to speak of " ... the belated submission of a somewhat meaningless counter-proposal ...". A case where, as here, two inconsistent counter-proposals are sent to the union with a comment that the union would have to figure out what the company proposal was. is even stronger than Johnson's Industrial Caterers, Inc., supra.

4. Based upon the foregoing, there has been a violation of Section 1153(e) of the A.L.R.A.

I. Discriminatory Access

1. In their joint brief, counsel for the general counsel and U.F.W. have sought, based on the evidence adduced at the hearing and the stipulation and order conforming the pleadings to the evidence, a finding of a violation of Section 1153(a) as to discriminatory access by the employer.

2. Section 20222 of the Regulations provides for the amendment of complaints and states that complaints may be amended " . . . upon such items as may be just." While containing different language as to procedure, Section 102.17 of the Rules and Regulations of the N.L.R.B. states that there may be amendment " ... upon such terms as may be deemed just." The similar language of the N. L.R.B. has been interpreted to mean that any amendment " ... must afford the affected party freedom from surprise and ample opportunity to defend and litigate the additional matters." Section 16-14, page 273. How to Take a Case Before the N.L.R.B., Kenneth C. McGuiness, B.N.A. Books, 1976.

3. While a complaint may be amended as to changes already contained therein so as to confront it to the evidence adduced, as the instant complaint was, it cannot be amended to incorporate new charges reflected in the testimony, after the expiration of the hearing, without reopening the hearing to permit an adequate defense. Such amendment would deny the affected party sufficient opportunity to defend and litigate the additional matters,

4. Therefore no consideration will be given to hte substance of the discriminatory access charge herein for the reason that such charge cannot be raised for the first time through a post-hearing brief and such charge is therefore dismissed without prejudice.

IV.

REMEDY

A. Having found that respondent has engaged in specified unfair labor practices within Section 1153(a), (c) and (e) of the A.L.R.A. I shall recommend an order to cease and desist therefrom, as well as to take affirmative action designed to effectuate the policies of the A.L.R.A. Such affirmative action follows.

B. As to Luis Chavez, Ruben Quintero , Jesus Magana and Ramiro Cardenas, there having been a violation of Section 1153 (a) and (c) as to each, it is reasonable to recommend that respondent be ordered to offer them immediate and full reinstatement to their former jobs or the substantial equivalent thereof, and at their former pay rate, respectively. Further, it shall be recommended that respondent make each of them whole for any losses each may have incurred as a result of respondent's discriminatory action, by payment to each of an amount equal to the wages each would have earned from the date of the discharge to the date of actual or offered reinstatement, less the net earnings of each, together with interest at seven percent (7%) per annum. The computation of such loss of pay and interest should be made in accordance with the formulae set forth in F.W. Woolworth Company, 90 N.L.R.B. 289 and Is is Plumbing and Heating Co., 138 N.L.R.B. 716, and shall include any and all compensation for refusal to bargain as set forth hereinafter.

C. In consideration of the unfair labor practices committed by respondent, and respondent's position regarding the U.F.W. presently as witnessed by the testimony of Jim Adam, it will according! be

recommended that respondents cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of A.L.R.A. D, The complaint requests the posting of the Board's Order in a conspicuous place on respondent's property. In Valley Farms and Rose J. Farms, 2 A.L.R.B., 41, the A.L.R.B. indicated that in a case involving a pattern of anti-union activity, it was appropriate to order the employer to address his workers by reading them a Board- prepared notice. This is such a case, since only the employer can personally assure that worker's rights will be respected in the future, and therefore such notice will be recommended although not specifically requested in the complaint by the general counsel. Additionally, such address will serve the function of an apology by the employer for committing unfair labor practices and such apology will therefore not be recommended. However, the requested posting will be recommended, in English, Spanish and Portuguese, to be placed in a conspicuous place on respondent's property.

E. In consideration of the conclusion regarding refusal to furnish information requested by the U.F.W., it shall be recommended that the information requested in U.F.W. Exhibit 2, dated January 12, 1976, be furnished to the union with the exception of that information requested in said exhibit which has hitherto been supplied accurately to the union either during negotiations or during the pendency of the present hearings.

F. There shall be a recommendation that the employer maintain, preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records required by law, social security payment records, time-cards, personnel records and reports and all other records necessary to analyze the

amount of back pay due as well as all rights regarding reinstatement under the terms of this Order.

G. There shall be a recommendation regarding refusal to bargain resulting in loss of pay and 'other Beneficial financial rights of the employees of the bargaining unit herein, in accordance with the following considerations:

1. General counsel, at the hearing, requested the opportunity to put in evidence regarding a possible remedy resulting in the members of the bargaining unit being made whole for losses suffered for a violation of Section 1153(e) of the A.L.R.A. if any were found. Based upon the presence in the A.L.R.A. of 'such "make-whole" power (Section 1160.3, A.L.R.A.), as against its absence in the National Labor Relations Act, it was ordered that evidence could be presented as to the appropriateness of the "make-whole" remedy herein, the standards for its application and the specific factors as to what constituted the scope of " ... making employees whole ..." under the A.L.R.A.

2. General counsel presented three witnesses' on the issue, an attorney experienced in labor law and/with the N.L.R.B., an economist and professor of economics at the University of Pittsburgh whose area of expertise was collective bargaining and had studied and analyzed U.F.W. contracts during a sabbatical and an officer of the U.F.W. who testified regarding the need for "make-whole" in refusal to bargain cases. Previously

3. Exhibits were received concerning studies of U.F.W. contracts, as well as AFL-CIO contracts, and hearings before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor of the United States House of Representatives and

N.L.R.B. staff reports to the aforesaid Subcommittee, (See U.F.W. Exhibits 22 through 31.)

4. There was considerable evidence presented that the cease and desist remedies regarding refusal to bargain cases are inadequate in all such cases and particularly the lengthier instances of such refusal. (See, e.g, Oversight Hearings, First Session, p. 494; Staff Report to the Subcommittee on Labor Management Relations p. 77.) It is inadequate in that it does not compensate whatever financial injury had been suffered by the employees during the period of time within which there has been a refusal to bargain in good faith.

5. The National Labor Relations Board, whose applicable precedents must be followed by this tribunal (See Section 1148, A.L.R.A.), has held that it has not been given the power to effectuate an order making members of a bargaining unit whole for wages and other benefits which might have accrued had the employer bargained in good faith. (Ex-Cell-O Corp., 185 N.L.R.B. 20, 74 L.R.R.M. 1740 (1970); see also 12 U. of Pa. Labor Relations and Public Policy Series 230.) Since the A.L.R. A. specifically grants such power to this tribunal (Section 1160.3, supra), it is hereby determined that the Ex-Cell-O Corp. decision is inapplicable herein as that decision held that the "crucial" question therein was one of policies and power. (77 L.L.R.M. at 1743.)

6. Having determined that there is "make-whole" power in a refusal to bargain case herein does not determine the issue but merely provides the springboard to a host of other questions given that language in Section 1160.3 of the A.L.R, A. permits the remedy "... when the board deems such relief appropriate ...". Neither

the Act nor its legislative history clearly indicate a test for application of the remedy. However, in International Union of Electrical, Radio and Machine Workers v. N.L.R.B., 426 F.2d 1243 (D.C. Cir. 1970), hereafter Tiidee, the D.C. Circuit indicated that the N.L.R.B. had both the power and obligation to order "make whole" where the refusal to bargain was " ... a clear and flagrant violation of the law." (426 F.2d at 1248.) The Court further held that " ... a prospective-only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit. Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the 'fruits of its violation[1]". (426 F.2d at 1249.) Other circuits followed the Tiidee Court in determining that, given the absence in the statute of specific "make-whole" power, the policies of the N.L.R.A. were not effectuated by a remedy not specifically found therein unless there was "a clear and flagrant violation of the law." (Culinary Alliance and Bartenders Union, Local 703, AFL-CIO v. N.L.R.B., 488 F.2d 664 (9th Cir. 1973 Lipman Motors, Inc. v. N.L.R.B., 451 F.2d 823 (2nd Cir. 1971).) Still another circuit, relying on Tiidee, supra, found that there was inherent power to make employees whole, but that the "flagrant violation" test resulted from the fact that only through refusal to bargain could an employer litigate an election challenge. (United Steelworkers of America, AFL-CIO v. N.L.R.B., 496 F.2d 1342 (5th Cir. 1974).) That case, hereafter Metco, held that where there was a challenged election and refusal to bargain, Tiidee, supra, had looked, and Metco, supra, would look at the merit of the election objectives, anti-union animus and the harm to the union.

7. In the instant matter, there is no question of a refusal to bargain gaining legitimacy due to the unavoidable need to refuse to bargain in order to raise any defense. Further, the statutory policy clearly, rather then impliedly, authorizes the power. It is therefore appropriate to find that the test for making employees whole upon a refusal to bargain is based upon, under the A.L.R.A., whether there has been substantial harm to the employees. If the harm to the employees is insubstantial, the use of the "make-whole" remedy is inappropriate. Such substantiality of harm can be determined by the length of time of the refusal, unilateral changes, and other similar actions resulting in injury to the employees. By shifting the perspective regarding the remedy from employer to employee, the policy of the Act to protect the employee in the event of an employer engaging in unfair labor practices is effectuated.

8. Nor does such a rule in any way penalize an employer. If the employer has committed no unfair labor practice, then there can be no remedy of any kind ordered, there being no liability. Thus, an employer who undertakes to bargain in good faith need come to no agreement nor need the employer worry about paying compensation through any order of the A.L.R.B. Further, one who bargains in bad faith, but causes no substantial loss to the employees, will merely be ordered to bargain in the future. The employer who refuses to bargain in good faith with a resultant likely substantial loss from the length of time and nature of such refusal, must compensate the loss of the workers as would be the case in a wrongful discharge situation. Thus, as was said about the proposed change to the N.L.R.A. adding language similar to Section 1160.3, "H.R. 12822 would make the make-whole remedy available . .. just as

the 'back pay' remedy is now available to the Labor Board in the illegal discharge violations. H.R. 12822 emphasizes the vindication of employees' rights ...". (See also Console v. Federal Maritime Commission, 383 U.S. 607 (1965); Ex-Cell-O Corp., supra, dissenting opinion.) Nor does the remedy violate the tenets of Section 1155.2 of the A.L.R.A. by dictating or compelling an agreement. (Cf. H.K. Porter Co. Inc. v. N.L.R.B., 397 U.S. 99 (1969).) As was said in Tiidee, supra, regarding the "make-whole" remedy, " ... it imposes no present or future contract obligations and operates as to the future not by assuring the employees any right to certain terms, but only by requiring for the future what could not be provided for the past, i.e., collective bargaining as required by the law." (426 F.2d at 1252.)

9. The fact that the remedy to make employees whole is neither a penalty nor a compelled agreement does not end the inquiry as to whether it can be ordered herein for it may be speculative to ever order such remedy. (See Ex-Cell-O Corp., supra.) However, the United States Supreme Court has said "The wrongdoer is not entitled to complain. that damages cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise..." (Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1930) see also Leeds-Northrup Co. v. N.L.R.B., 391 F.2d 874 (3rd Cir. 1968). Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251 (1945). Buncher Co., 164 N.L.R.B. 340, 65 L.R.R.M. 1139 (1967).) Further, there is within the instant record ample proof regarding standards of measurement which negate the possibility of speculative damages Thus, Gilbert Padilla testified, essentially without objection,

that dairy agricultural work is similar to other agricultural work and that the general agricultural labor pool supplies workers to the dairy industry. This was borne out by the fact that the recently Hired milkers had previously been employed by agricultural employers. Dr. Michael Yates testified that there were available". analyses both of wages before and after contract between the U.F.W. and agricultural employers throughout the State of California as well as analyses of other benefits included in such contracts, (U.F.W. Exhibit 23-26.) This is not to say that respondent would agree to such a contract if bargaining in good faith but merely that such contracts constitute evidence for purposes of determining compensation for bargaining in bad faith.

10. It is therefore to be recommended that an order issue requiring that the present employees, as well as those to be reinstated, be made whole for their damages due to the employer's refusal to bargain in good faith. Since California has given an expansive definition to the concept of pay (California Labor Code Section 200; Ware v. Merrill Lynch, Pierce, Fenner and Smith, 24 Cal.App.3d 35 (1972), and since the policy of the A.L.R.A. is to benefit employees whenever injured by employer's refusal to bargain, the definition includes wages, persion benefits, leave pay, vacation pay, holiday pay, overtime, shift premiums, rest pay, and interest. Should it be determined at compliance that the employees would have received other sums, this can then be determined and granted, but the statutory purpose is to protect employees, not unions, and therefore whatever bargain would result in benefits achieved to the union rather than the employees cannot be the obligation of the employer. (See Tiidee, supra, at 1251, n. 10)

The "make-whole" remedy is ordered herein because, of the period of approximately one year without good faith bargaining, the unilateral changes within that period, the refusal to supply necessary information within that period, the wrongful discharge of the majority of those who voted for the U.F.W. and the conclusion that these actions resulted in substantial financial harm to the members of the bargaining unit.

11. At the compliance stage, general counsel should have the burden of showing what the employees have lost as a result of the refusal to bargain, or put another way, what the employees reasonably expected to gain had there not been such a refusal. (See Staff Report of the Subcommittee on Labor-Management Relations, supra, at 79.) The period within which such sum is measured should be the actual period of refusal to bargain which commenced with the refusal to submit requested information and the discharge of Luis Chavez, both of which occurred at or about the middle of January, 1976, and such period should end whenever bargaining or an offer to bargain occurs in good faith, with liability to toll during such periods when bargaining or respondent's offer thereof occurs in good faith. It need not be repeated that respondent has only the obligation to bargain in good faith as set forth in Section 1155.2 of the A.L.R.A.

H. A request for litigation costs to the general counsel and charging party has been made herein. An order regarding such request should be entered as follows:

a. The Board has power to fix such costs (Labor Code Section 1160.3., Resetar Farms, 3 A.L.R.B. 18, Valley Farms, 2 A.L.R.B. 41, N.L.R.B. v. Food Store Employees, Local 347, 417 U.S. 1

(1973), N.L.R.B. v. Local Union 396, 509 F.2d 1075 (9th Cir. 1975).

b. The test most often used to determine the grant of litigation costs is whether the respondent's defense is frivolous. (Hecks, Inc., 215 N.L.R.B. 142, 88 L.R.R.M. 1049 (1975).)

c. The rationale is that " ... frivolous litigation. such as this is clearly unwarranted and should be kept from the nati already crowded court dockets, as well as our own." (Tiidee Products, Inc., 194 N.L.R.B. 1234, 79 L.R.R.M. 1175 (1972).)

d. The definition of frivolousness is that defense which obviously lacks merit, is not debatable and not one which falls simply upon the Administrative Law Judge's resolutions of conflicting testimony. (12 U. of Pa. N.L.R.B. Remedies for Unfair Labor Practices at 224.)

e. In the instant matter the evidence underlying many defenses was either spurious or was based on false or, in one instance, admittedly perjured testimony.

f. Nevertheless, with some exceptions, it cannot be said that all of the defenses herein were frivolous as that term has been defined. It can be said that at least one defense was frivolous, namely, the refusal to bargain in good faith based on the alleged conditional bargaining at the May 18, 1976 hearing, wherein all proofs indicate that Peter Cohen then and thereafter wanted only to meet and bargain, whereas the respondent had just fired the majority of the union supporters, submitted inconsistent counter-proposals, and thereafter refused to meet with union representatives. As to other defenses, even if based on perjured testi mony, it is undoubtedly difficult to meet the- test of frivolity a test best left for the Board to change. Given the present stan-

dard, it cannot be said that it is met conclusively.

g. There is no reason not to bifurcate frivolous and non-frivolous defenses for purposes of costs , It shall be recommended therefore that an order issue granting fees and expenses necessary to prove such refusal to bargain in good faith at and subsequent to the May 18, 1976 meeting, to the union but not to general counsel. (International Union of Electrical, Radio and Machine Workers v. N.L.R.B., otherwise entitled Tiidee III (D.C. Cir. 1974).)

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 recommended:

ORDER

Respondent Adam Dairy (Rancho Dos Rios), its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the Union, or any other labor organization, by discharging, laying off, or in any other manner discriminating against individuals in regard to their 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 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 continued employment as authorized in Section 1153 (c) of the Act.

(c) Refusing to bargain collectively in good faith with the Union or its authorized representatives as to meeting at reasonable times and conferring in good faith with respect to wages hours, and other terms and conditions of employment, or the negotiotion of an agreement, or any questions arising thereunder,

and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel respondent to agree to a proposal or require the making of a concession by respondent.

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

(a) Offer to Luis Chavez, Ramiro Cardenas, Ruben Quintero and Jesus Magana, immediate and full reinstatement to their former or substantially equivalent job without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their termination in the manner described previously within this decision, including interest thereon at the rate of 7% per annum.

(b) Preserve and, upon request, make available to the Board or its, agents, for examination and copying, all payroll records required by law. 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 fo reinstatement under the terms of this Order.

(c) Issue the attached 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 immediately preceding the filing of the petition for certification in September, 1976, and post such Notice immediately 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, such locations to be determined by the Regional Director.

(d) Have the attached NOTICE TO WORKERS read in English, Spanish, and Portuguese at the commencement of the first working day following the filing of this Order by the Board, on company time, to all those then employed, by a

company representative in the presence of a Board Agent, and accord said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act.

(e) Make whole those persons employed by respondent at any time between March 11, 1976 and the date this Order becomes effective, or the date on which respondent commences collective bargaining in good faith as defined in Section 1155.2(a), which date be the latter, for any losses they may have suffered as a result of the aforesaid refusal to bargain in good faith, as those losses have been defined within Section IV-G of the decision herein.

(f) Pay the costs of litigation of the charging party in such limited manner as is set forth in Section IV-H of the decision herein, at such time as this Order becomes effective.

It is further recommended that the allegations contained in the Second Amended Consolidated Complaint not specifically found herein as violations of the Act shall be dismissed.

dated: May 3, 1977

Morton P. Cohen
Administrative Law Officer

Appendix

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we discriminated against workers to discourage membership in a union, and that we refused to bargain with the union in good faith. 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 join or help unions;
2. to bargain as a group and choose whom they want to speak for them;
3. to act together with other workers to try to get a contract or to help or protect one another.

We will reinstate Luis Chavez, Rairdro Cardenas Ruben Quintero and Jesus Magana to their former jobs and give them back pay for any losses that they had while they were not working here.

We will give back pay to those workers who were employed after March 11, 1976 and who suffered any losses because of our refusal to bargain with the United Farm Workers in good faith.

We promise that:

We will not threaten you with being fired, laid off, or getting less work because of your feelings about, actions for, or membership in any union.

We will not fire you or lower your pay or change your work because of the union.

We will not ask you whether or not you belong to any union, or do

anything for any union, or how you feel about any union.

Dated:

ADAM DAIRY (RANCHO DOS RIOS)

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.

FOOTNOTES

1. This fact; as well as the remainder contained within this jurisdictional subsection, were 'stipulated to by the parties herein.

2. This number, as well as others relating to the number of employees, was estimated with substantial variance by respondent. It is my conclusion that respondent hires field and irrigation workers in accordance with seasonal need and that, therefore there has never been an unchanging number of people employed in each of these categories. Thus, the total number of employees, as well as the job specifications of each, is subject to change.

3. There was inconsistent testimony on this point as to whether Chavez had arthritis or merely a condition worsened by contact with cattle medicine. Based upon the credibility of the witnesses, the fact that Chuck Adam testified he had heard that Chavez had arthritis and the fact that Chavez testified he had arthritis which condition was worsened by contact with water, I concluded that he did in fact have such arthritic condition.

4. Again, there were substantial inconsistencies in the testimony. Chuck Adam testified that Chavez had been responsible, together with Adam, for pointing out dry areas which required irrigation, as well as overseeing and keeping track of the men. Chavez said he had been asked in the past to keep his eye on the irrigators but had told Jim Adam that he did not have enough time to do it. Chuck Adam said that Chavez spent twenty percent (20%) of his time "supervising", but later in his testimony, Adam said that he is the present supervisor of the irrigators and that they require very little supervision since they do their work essentially

on their own. I conclude that Chavez did not direct work for the irrigators (See fn. 6, infra).

5. There was testimony by both Jim and Chuck Adam that Chavez had in fact fired one Antonio Cardenas immediately after Chavez became T "supervisor". According to Jim Adam, this occurred in May of 1975 and it was based on Chavez's agreement to fire Cardenas that Jim Adam made Chavez supervisor and simultaneously gave him a raise. However, Chuck Adam testified that Cardenas was still working for respondent as late as October and November of 1975 and that it was in the fall that Chavez got his raise. Such inconsistencies were rife throughout the testimony of Chuck and Jim Adam. The fact is, as is shown by the wage records put in evidence, that Antonio Cardenas last worked for respondent in May of 1975, while Chavez received his pay increase, as he had testified, in July of 1975 - which was reflected in his August 1975 pay check. Thus, there is no question but that Chavez could not have received a salary increase simultaneous with the firing of Antonio Cardenas and I find that he did not fire Cardenas.

6. Jim Adam had also testified that it was during May of 1975 that Chavez agreed to be the irrigation supervisor, this occuring at the same time as the pay raise and the Cardenas firing. Since I have found that the pay raise did not occur at that time since I have found that Chavez told Jim Adam he did not have time to look after the irrigators, I specifically conclude that no such agreement occurred. Further, I have determined that the reason for the pay raise given to Chavez in July of 1975 was because, as he testified and as reflected in the pay sheets, Chavez's brother-in-law, one Rafael Cardenas, had requested a raise and then quit

in June of 1975 when the raise was denied. Thereafter, Chavez was given a raise and told by Jim Adam that Adam did not want Chavez to quit.

7. Jim Adam admitted saying-this in his testimony.

8. This fact is reflected in respondent s payroll records.

9. Chuck Adam testified and also said in his sworn statement, that he was first told of Chavez's intentions regarding a vacation in December of 1975. However, this does not correlate with the fact that Chavez would normally, and had in the past, planned his vacation long in advance and trained a replacement, that he had done so as to Gilberto Cepeda in October of 1975 and that when Cepeda was injured at that time, Chavez was told to train Overholzer to replace Chavez during his December vacation. Further, this conclusion coincides with the fact that Chuck Adam's testimony during the hearing was very often evasive, inconsistent, and then. eventually resulted in his admission of perjury.

10. A substantial amount of testimony was put in by Jim and Chuck Adam, as well as by Joe Tenascio for the respondent, indicating that Chavez had been, over the years, an extremely negligent and incompetent worker insofar as handling mechanical items. However, in their signed statement, containing numerous changes made by themselves, Jim and .Chuck Adam said, as to Chavez et al, "Were gretted having to discharge these workers, who were all good workers ...". Further, on cross-examination, Chavez denied responsi bility for damaging machinery and being negligent and indicated that much of the machinery was old and in need of repair, I there fore believe what was contained in the statement and in Chavez's testimony.

11. Chavez testified that, in this conversation, Jim Adam said he was no longer the owner of the cows since he had sold them to "Mike" and therefore could not hire Chavez. This explanation would coincide both with the fact that Mike Hays had been hired in February of 1976 as herdsman, and that Adam had attempted to sell the cows. Chavez did not in fact believe that Adam was no longer the owner.

12. Jim and Chuck Adam explained in their testimony that there was no work for Chavez or any of the irrigators in the winter of 1975-76 because of a terrific drought and frost. Thus, Chuck Adam said, the temperature often did not get above 40° during the day and, therefore, there could be no irrigation. In response to this claim, general counsel obtained and put in evidence the Local Climatological Data supplied by the United States Department of Commerce, for Santa Maria, California for 1975 and January through March of 1976. These showed that there was no unusual cold weather during this period. The reply of Chuck Adam to this information was that these records are taken at the airport which has different weather from that at the dairy, although both are in the Santa Maria area. I find this explanation to be lacking credibility.

13. A good deal of testimony was taken regarding the amount of pipe which could be moved in a particular period of time and the distance it would normally be moved. Chavez, Jim Adam, Chuck Adam, Joe Tenascio and Jesus Magana all testified on the subject, and in their brief, counsel for the U.F.W. and A.L.R.B. produced figures from the payroll records of irrigators. I have reached my determination after reviewing all the testimony and recognizing that much of the determination is based on highly subjective criteria

regarding conditions, as well as after consideration of the credibility of the witnesses. I was also particularly conscious of the fact that the new irrigators hired in 1976, all of whom were quite young, were raised from six cents (6c) to eight cents (8c) per pipe in October of 1976 although four of the five continued to make $2.50 per hour for thir non-piece work time.

14. This fact was testified to by Chuck Adam.

15. As with Chavez, a substantial amount of time was spent by respondent at the hearing in the production of testimony regarding the insufficiency of Quintero as a worker, particularly on milk production. Nevertheless, both because of conclusions reached in my subsequent discussion of this point and because of the comments contained in the statement given to the A.L.R.B. board agent (see fn. 10), I have reached the factual conclusion that Quintero was a good worker and a competent milker.

16. Both Jim and Chuck Adam knew who were the U.F.W. supporters by the simple expedient, as they testified, of knowing who cast the two negative votes in the election. Since the election resulted in a 5-2 count for the U.F.W., they could thereby conclude who were the five for the U.F.W. Further, no attempt was made by Quintero to hide the fact that he supported the U.F.W. given the fact that he appeared at a negotiating meeting in March of 1976 as a U.F.W. representative for the workers.

17. The same can be said about the work performed by and conclusions drawn as to Magana as was said about Quintero (see fn. 15), with the exception of the fact that Magana was a relief milker rather than a permanent milker.

18. There was some difference of opinion at the hearing as to

whether the incidents concerning Quintero, Magana and Cardenas occurred on the thirteenth or fourteenth of April, 1976. All agreed, however, including respondent's witnesses, that the incidents occurred on one day. After listening to all the testimony, I conclude that the incidents occurred on April 13, 1976.

19. This was concluded from the testimony of Quintero, Cardenas and Peter Cohen, as well as the A.L.R.B. statement signed by Jim and Chuck Adam.

20. Chuck Adam admitted these facts on cross-examination. Adam further stated, on direct examination, that he had hired the two new men to see if the poor bacteria count would improve. I have found this latter statement not to be credible since the bacteria count was improving before the two were hired.

21. Magana had been employed as was stated earlier, as relief milker. His duties as relief milker included putting up fences, loading cows on trucks, helping separate cows, milking cows and irrigating.

22. This was Magana's testimony which I find to be credible. Before testifying, Magana, who was present under subpoena, exercised his privilege against self-incrimination, as did Quintero. Given my authority under Section 1151.2, A.L.R.A., both Magana and Quintero were immunized transactionally and ordered to testify as both subsequently did. However, both were informed by me that such immunity might not suffice to protect them from subsequent federal prosecution for violation of immigration laws and that they might therefore seek a federal determination of their status should they so desire. Both agreed to testify after being immunized and ordered to testify upon the advice of counsel for the U.F.W.

23. Magana had previously told Jim Adam, on several occasions as early as 1974, that Magana had been in touch with immigration officials to obtain his papers. Magana also told Jim Adam that he had been told his papers were in order and that he had a preference to be in the United States.

24. Chuck Adam had told Magana that Magana had about one week (until April 21, 1976) to obtain his papers during which time he would not work. Magana said he would need about three months to obtain the papers. He was told that would not be acceptable, He was then given $150.00, as was Quintero, as indicated from the payroll records, and according to Chuck Adam, no further attempt was made to determine whether Magana was likely to receive his papers or whether respondent might in fact be prosecuted for continuing Magana in its employ.

25. Although Quintero had been told by Chuck Adam on April 17, 1976 that he would not possibly be returned to his usual work as milker and Quintero told Chuck Adam that he would not work except in the dairy, Quintero went with his wife to a San Luis Obispo immigration office on April 19, 1976, but the office was closed at that time. Chuck Adam had expected that he and Quintero would go together to the immigration office and Adam then went to Magana's house to inquire as to Quintero's whereabouts. Magana told Adam that Quintero had gone, according to Adam, "into town" whereupon Adam told Magana to tell Quintero that "he was fired." Adam never bothered to determine if the office was in fact closed.

26. A further substantiation of the factual conclusion that the workers were not responsible for whatever bacterial problems respondent was having is the fact that the sworn statement of November.

19, 1976 not only speaks of the milkers as "good workers" who respondent "regretted having to discharge", but there is not one word therein regarding bacterial problems. Indeed, from May through October 1976, after removing Quintero and Cardenas, respondent, whose Knudsen code number is 5301 in Krtudsen's documents classifying milk quality, was lowest of nineteen milk producers and yet no action was taken to remove or fire the newly hired milkers, Toledo and Ormande.

27. Chuck Adam testified that there had been no further inquiry than the conversations with Steve Martin to determine whether prosecution was possible. Steve Martin testified that he had been told at the November conference that aliens in the process of getting papers were still illegal, that the employer would then be liable for employing such people and that it did not matter if the spouse was legal so long as the worker was not. I find this testimony incredible given that a permanent injunction then existed against prosecutions and that there had never been any such prosecutions. Further, there is little doubt that, had there been an actual good faith inquiry, there would have been discovery of that fact. Indeed, a policy memorandum of the State Department of Industrial Relations, dated April 6, 1976, specifically refers to the injunction and that there will be no prosecutions at least for some tione. to come after the April 6, 1976 date.

28. These papers were referred to during the testimony as the "green card" and reflects official permission from federal imigration authorities to live and work in the United States.

29. The same considerations regarding the bacterial problems and inconsistencies as to respondent's testimony and sworn statement

apply to Cardenas as were applied to Quintero and Magana in fn. 15 and thereafter.

30. The Adam testimony on this point is quite inconsistent. On the stand, Chuck Adam said Cardenas told Adam that Cardenas had been "... getting union pressure and I want to get away." Nothing was said in Chuck Adam's direct testimony about Cardenas's wife being ill. In the statement signed by Chuck Adam, he said Cardenas requested a two week leave " ... to visit his sick wife ...". Nothing was said about union pressure. This considerable inconsistency between the sworn statement, reviewed and changed at length by Chuck Adam, and testimony three months later, casts substantial doubt on his credibility, particularly when he had admitted to perjury on another point. Further, I find that Cardenas's testimony on this point was quite consistent and credible.

31. The net pay Cardenas received for a normal two week period was slightly more than $325.00.

32. Again, the testimony is at odds as to the Cardenas and. Chuck Adam versions. For several reasons, it is to be resolved in favor of Cardenas. To begin with, the Adam statement says Cardenas requested two weeks leave on Saturday, April 18 whereas this was a Sunday. Thus, Adam is, at least, confused about the dates. Secondly, as has been demonstrated above, I have found Chuck Adam's testimohy untrustworthy. Thirdly, although it would be expected and was admitted to be a legal responsibility that respondent would keep hourly and daily records of employment, no such records were kept. Lastly, Cardenas was simply more credible than Chuck Adam.

33. On cross-examination, Cardenas admitted his lateness and his illness.

34. According to the sworn statement and substantiated by the. testimony, Cardenas was excused for being absent for an extra week " ... due to the gravity of his wife's illness." (See fn. 30.)

35. Again, there were substantial inconsistencies as to this point. Chuck Adam testified, and said in his statement, that the vis-work was "urgent", yet Joe Tenascio, co-worker of Cardenas on the corrals, said in his statement to the A.L.R.B. agent that "There was no rush or urgency with regard to building the coral sic. I felt O.K. about Rotnero being gone, it really didn't matter that much to me." Thus, my resolution that the work was not urgent.

36. See fn, 35.

37. This was a most difficult factual point to resolve. Cardenas said, in his testimony, that when he left, he told Joe Tenascio "Can you tell Jim I have to go and get the paper and I will return. Cardenas testified that Tenascio said "Go, I'll tell him." In his statement, Tenascio said "While Romero left for Los Angeles, he never told me he was going to be gone May 13, 1976." Subsequently, Teriascio said, again in the statement, HI never reported to Mr. Adam that Romero was gone on May 13, 1976. -Someone else must have. In Tenascio's testimony s he said he had phoned Jim Adam to tell him Cardenas had not shown up. In Jim. Adam's testimony he said that Tenascio had told him on the same day that Cardenas had not shown up. Tenascio also claimed, in his testimony , that he had been mis-quoted by the A.L.R.B. agent as to this conflict and that the ab-breviated signature "J. Tenascio" next to this excerpt of the statement, and which appeared to be his signature, was not signed by him. He also said he had ripped a page out of the statement which was not correct in order to insure that his statement was

correct. After considering the entire melange, I have determined that Cardenas is telling the truth on this point, and that Tenascio simply did not remember what Cardenas told him.

38. Ann Smith was an unusually credible witness with an unusually accurate memory. There was never any question in my mind but that she was always telling the truth and that she unerringly remembered it accurately.

39. There is substantial difference of opinion as to the conduct of the March 11, 1976 meeting as well as other occurences regarding Martin and Smith. I have consistently resolved such differences in favor of Smith's testimony based upon her demeanor and memory, the fact that she kept extensive notes, Martin's constant confusion as to dates, his complete failure to keep or produce verbatum notes, and Martin's elusive and belligerent demeanor on the stand.

40. The second of the two counter-proposals contained & handwritten note dated April 30, 1976 on the cover letter which was dated April 12, 1976, which note said that the counter-proposal had been sent twice before. Based upon the differences between the two proposals in evidence, the fact of the first cover letter going out unsigned, Ms. Smith's unusual memory, and Mr. Martin's demeanor on the stand, I believe that there were only two proposal; which were put in evidence, and that they were received only days apart by the U.F.W., at the end of April 1976 and the beginning of May 1976.

41. Although there was testimony that Cohen had said no further negotiations until the workers were reinstated, the very fact of a future meeting being agreed to wherein the workers would be

agents of the U.F.W., Miller's notes that the problem must be solved before there would be an agreement, as well as Cohen's notes that the contract has to work out rights of the employer and employees, lead me to conclude that there was a climate of further negotiations agreed on without a requirement of previous reinstatement of the workers.

42. Martin claimed, at the hearing, that during a similar phone call, Cohen had said there would be no contract until the workers were reinstated and that Martin had said that that was conditional bargaining and he would, therefore, "drop it until you've changed your position." In light of the subsequent letter of August 6, 1976 from Cohen, the fact that Martin testified he had been involved in May and June of 1976 in a trial which lasted three-four weeks in which he was "witness, water boy, messenger, etc.", and both Cohen's and Martin's demeanor on the stand, lead me to conclude that Martin's version of the conversation is not entitled to credibility.

43. Martin indicated in his testimony that he believed he had telephoned Cohen during this period but then indicated he did not know who called whom. He was, he said, quite vague in his mind. I find, after comparing his testimony with Cohen's testimony, that Martin never did call Cohen.

44. Martin claimed that he did not respond to the August 6, 1976 letter because it was self-serving and "I don't send out self-serving letters. I don't stoop that low." He also said that the letters were tempered by the telephonic conditions established by Cohen which required the reinstatement of the workers. Particularly because I found that the latter did not occur (see fn. 42), but

as well because it would reasonably be expected that registered letters would be answered, especially if they were untruthful, I cannot give credibility to Martin's explanation of his failure to answer.

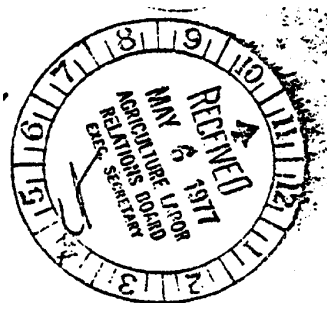
45. Affidavits and letters were put in evidence regarding what Herb Thorne of the State Conciliation Service said to both Cohen and Thorne, Thorne was not called as a witness and therefore his statements were excluded as hearsay, except for the effect they may have had on Cohen's state of mind. To this end, Cohen put in evidence, a declaration of August 26, 1976 wherein Cohen swore that Thorne had told him, essentially, that not much would come of such conciliation proceedings. I have no doubt that this was Cohen's state of mind on or about August 30, 1976 when Cohen sent out his letter to Thorne and Martin, particularly since this had now been approximately three and one -half months since Martin had said he would set up a meeting and the process had been going on since January 12, 1976 with only two meetings. However, I have given no consideration to the various "Thorne" documents or comments regarding their internal truth since they are unquestionably hearsay

46. The full quotation was in regard to the conciliation versus the A.L.R.B, hearing and Martin said "That costs us nothing. This may cost us everything.

CERTIFICATE OF SERVICE

Copies of the Administrative Law Officer's Decision have this 3d day of May, 1976 been sent to the following parties of record by depositing them in the United States Mails, with prepaid First Class Registered postage:

NOEL SHIPMAN, ESQ.,
Halperin, Halperin & Sloan,
1801 Century Park East, 26th Floor,
Los Angeles, Ca 90067



RUTH M. FRIEDMAN, Staff Counsel,
Agricultural Labor Relations Board,
21 West Laurel Drive, Suite 65-M,
Salinas, Ca 93901

W. DANIEL BOONE, ESQ.,
United Farm Workers,
P.O. Box 1049,
Salinas, Ca., 93901

The original of the Administrative Law Officer's Decision herein has this 3d day of May, 1976, been mailed for filing to the Agricultural Labor Relations Board, Sacramento, California.

MORTON P. COHEN,
Administrative Law Officer