STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BACCHUS FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 75-CE-169-F 4 ALRB No. 26

DECISION AND ORDER

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

On March 22, 1977, Administrative Law Officer (ALO) Robert G. Werner issued his attached Decision in this case, in which he concluded: (1) that Respondent had constructively discharged employees Ignacio Yanez, Antonio Nava, Sr., and Jorge Guerrero in violation of Section 1153 (c) and (a} of the Act; (2) that the Yanez and Guerrero discharges were also violations of Section 1153 (d), but that the discharge of Nava, Sr., was not; (3) that Respondent did not violate the Act by discharging employee Antonio Nava, Jr.; and (4) that Respondent violated Section 1153 (a) of the Act by instructing employees not to attend an ALRB representation hearing and by creating the impression of surveillance of employees' protected activities.

General Counsel and the Charging Party each timely filed exceptions to the ALO' s Decision and a brief in support thereof .

Respondent filed no exceptions itself but filed a brief in response to those of the General Counsel and the Charging Party.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order, as modified herein.

General Counsel and the DFW excepted to the ALO's finding that Antonio Nava, Jr., was discharged because he was a slow worker rather than because he engaged in protected concerted activities. We find merit in these exceptions. Although Nava, Jr., may have been a slow worker, the record as a whole establishes that his work pace was not the sole, or motivating, reason for his discharge.

Nava, Jr., is the son of Antonio Nava, Sr., who is a member of the UFW's Ranch Committee and one of the three individuals whom we affirm were constructively discharged on December 19,1975, in retaliation for their attendance at an ALEE hearing on objections. Nava, Jr., worked for Respondent in December of 1974, and was rehired on December 3, 1975, and assigned to Supervisor Gustavo Leon's pruning crew. At the end of the work day on December 15, 1975, Nava, Jr., was told that he was being, transferred to a rooting job starting the next morning. He worked at the rooting job for three hours on December 16 and then was told to report to Supervisor Ruben Reinoso's replanting crew, with which he worked for the remainder of that day and again on December 17. During his lunch hour on December 17, Nava, Jr., distributed, to the other members of his crew, leaflets which urged

them to attend the ALRB representation hearing scheduled for December 18. Nava, Jr., testified that while he was handing out the leaflets, crew Supervisor Reinoso was seated in a nearby car, in a position to observe the distribution. Reinoso did not deny this in his testimony. At the end of the workday on December 17, Nava, Jr., was terminated.

Nava, Jr.'s first supervisor, Gustavo Leon, testified that although he considered Nava, Jr., to be a slow worker, he never discussed this with Nava, Jr. Gustavo Leon stated that he never heard Nava, Jr., say anything about the Union, although Nava, Jr., testified that he had discussed his support of the Union with Gustavo on December 10, 11 and 12. After Gustavo Leon reported to his brother, Supervisor Christobal Leon, that Nava, Jr., lagged behind the other workers, Gustavo told Nava, Jr., at the end of the workday on the 15th, that he would be assigned to another job the next day.

Nava, Jr., and Jose Flores, another slow worker, spent three hours at rooting work on December 16. Although they performed the rooting at a satisfactory rate, they again were transferred, this time to replanting work under Supervisor Ruben Reinoso. Although Christobal Leon ordered the transfers, he did not speak to Nava, Jr., about why he was being transferred or to advise him that he worked too slowly.

Reinoso gave self-contradicting testimony as to who discharged Nava, Jr. He stated that General Foreman Antonio Laredo had assigned Nava, Jr., to his crew although he had not requested any more workers, but could not recall discussing with Laredo the

reason for the transfer. At one point in his testimony, Reinoso stated that Laredo ordered him to discharge Nava, Jr. Reinoso stated that although he found Nava, Jr., to be a slow worker, he did not know whether he would have discharged Nava, Jr., on his own if Laredo had not directed him to do so. Laredo gave Nava, Jr.'s termination check to Reinoso on December 17. When Reinoso handed it to Nava, Jr., the latter asked why he was being terminated. Reinoso testified that he told Nava, Jr., to ask Laredo. At another part of his testimony, Reinoso claimed that he fired Nava, Jr., because he "was having problems with him and that wasn't to my advantage"; that on December 17 he asked Laredo's permission to fire Nava, Jr., and that Laredo agreed.

Laredo testified that although he did not discharge Nava, Jr., he took responsibility for the action. He stated that although it was customary for him to warn a worker that he or she was working too slowly before firing him or her, and that although he saw Nava, Jr., lagging behind other workers, he never warned Nava, Jr., about slow work before the discharge.

Nava, Jr., made repeated attempts to determine who had fired him and why, but never received a definitive answer. He was the son of a Ranch Committee member and Respondent was aware that he was a UFW supporter. Given Respondent's reprisals against other employees (including Nava, Sr.) who attended and/or testified at the ALRB objections hearing, the timing of Nava, Jr.'s discharge a few hours after he distributed leaflets concerning the hearing, the above facts, and the record as a whole, we conclude that his

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discharge was motivated in substantial part[1/] in reprisal for his protected activities. In these circumstances, even if the employee's slow work performance was a contributing factor in the decision to discharge him, his termination nonetheless constitutes a violation of Section 1153 (c) and (a) of the Act. NLRB v. King Louie Bowling Corp., 472 F.2d 1192 (8th Cir. 1973), 82 LRRM 2576; Sinclair Glass Company v. NLRB, 465 F.2d 209 (7th Cir. 1972), 80 LRRM 3082.

Although the ALO found that Nava, Sr., Yanez and Guerrero all were constructively discharged in violation of Section 1153 (c) and (a) of the Act, he found a violation of Section 1153(d) only as to Guerrero and Yanez, because they had testified at an ALRB hearing on objections, whereas Nava, Sr., merely attended the hearing. Section 1153 (d) makes it an unfair labor practice for an agricultural employer "to discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony" under the Act; the quoted language is identical to that in Section 8 (a) (4) of the NLRA except for the inclusion of the word "agricultural"' in the ALRA. The NLRB has consistently used a broad and liberal interpretation of Section 8 (a) (4) and has applied the protection of that section to employee participation in various aspects of its processes, in

[1/]The ALO noted that Nava, Jr., admitted that one of the reasons he was transferred from job to job was because he was slow, seemingly ignoring the fact that this was only one of the reasons Nava advanced, the other being his conversations with Supervisor Gustavo Leon about the Union. Moreover, his response to the question as to why he had been transferred does not go to the issue of the reason he had been discharged, which Nava, Jr., testified he believed was because Reinoso had seen him distributing the leaflets.

addition to filing charges or testifying. See, for example, E. H., Ltd., d/b/a Earringhouse Imports, 227 NLRB No. 118, 94 LRRM 1494 (1977), in which the NLRB held that employees have a statutory right, protected by Section 8(a) (4) and (1), to attend a Board hearing, or otherwise to participate in various stages of the Board's processes, and that discharging an employee for such attendance or participation is clearly unlawful. The U. S. Supreme Court has affirmed the broad and liberal interpretation of Section 8 (a) (4) as applied by the NLRB for more than 35 years. NLRB v. Scrivener (AA Electric Co.), 405 U.S. 117 (1972). In accordance with these applicable precedents, we conclude, contrary to the ALO, that by its constructive discharge of Antonio Nava, Sr., Respondent violated Section 1153(d), as well as Section 1153(c) and (a) of the Act.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent, Bacchus Farms, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against employees with respect to their hire or tenure of employment or any other term or condition of employment.

(b) Discharging or otherwise discriminating against employees for attending, participating in, or testifying at any

hearing conducted by the Agricultural Labor Relations Board.

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

2. Take the following affirmative actions which will effectuate the policies of the Act:

(a) Offer to Ignacio Yanez, Antonio Nava, Sr., Jorge Guerrero and Antonio Nava, Jr., immediate and full reinstatement to their former jobs or, if those no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges.

(b) Make Ignacio Yanez, Antonio Nava, Sr., Jorge Guerrero and Antonio Nava, Jr., whole for any losses they may have suffered by reason of their discharges on December 17 and 18, 1975, from the date of such discharges to the dates on which they are offered reinstatement, together with interest thereon at the rate of 7 percent per annum.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to determine the back pay due to the four above-named employees.

(d) Sign the Notice to Employees attached hereto which, after translation by the Regional Director into Spanish and other appropriate languages, shall be provided by Respondent in sufficient numbers in each language for the purposes set forth hereinafter.

(e) Within 20 days from receipt of this Order, mail a copy of the Notice in. appropriate languages to each of the employees on its payroll in December 1975 as well as to all its 1977 peak-season employees.

(f) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including the office-shop area and places where notices to employees are usually posted, for a 60-day period to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced or removed.

(g) Permit an agent of the Board to distribute and read this Notice in all appropriate languages to its employees assembled on company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

Dated: April 28, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

After a hearing at which all sides had an opportunity to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice:

1. The Act is a law which gives all farm workers these rights:

(a) To organize themselves;

(b) To form, join, or help unions;

(c) To bargain as a group and to choose whom they want to speak for them;

(d) To act together with other workers to try to get a contract or to help and protect one another; and

(e) To decide not to do any of these things.

2. Because this is true, we promise that we will not do anything else in the future that forces you to do, or stops you from doing, any of the things listed above.

3. The Agricultural Labor Relations Board has found that we discriminated against Ignacio Yanez, Antonio Nava, Sr., and Jorge Guerrero by telling them that they must take lower-paying jobs because they attended an ALRB hearing. We will reinstate them to their former jobs and give them back pay plus 7 percent interest for any losses that they had while they were off work.

4. The Board has also found that we discriminated against Antonio Nava, Jr., by firing him after he passed out leaflets for the UFW. We will reinstate him to his former job and give him back pay plus 7 percent interest for any losses that he suffered while he was off work.

5. We will not take action against any of our employees for supporting the United Farm Workers of America, or any other labor organization, or for filing charges with, or testifying before, or attending hearings of the Agricultural Labor Relations Board.

Dated: BACCHUS FARMS

By: _____
Representative Title

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

CASE SUMMARY

Bacchus Farms (UFW) 4 ALRB No. 26
Case No. 75-CE-169-F

ALO DECISION

On March *22, 1977,* Administrative Law Officer (ALO) Robert G. Werner issued his Decision.

1. He found that the Respondent violated Section 1153 (c) and (a) of the Act by constructively discharging three employees by making material changes in the terms and conditions of their employment. The Respondent changed the working conditions of two of the employees and changed their rate of pay from hourly to a piecerate basis, and the Respondent demoted the third employee.

2. He found that these discharges also violated Section 1153(d) for the two employees who testified at an ALRB hearing but not for the third who merely attended the hearing.

3. The ALO found that the General Counsel did not prove that a fourth employee was discriminatorily discharged since there was credible testimony that he was a slow worker.

4. The ALO found independent Section 1153 (a) violations by Respondent for threatening workers not to attend an ALRB hearing and for stating that it was observing which workers were attending the hearing.

BOARD DECISION

The Board affirmed the ALO's findings in paragraphs 1 and 4, above. As to paragraph 2, the Board found that the NLRB has broadly interpreted Section 8(a)(4) which is comparable to Section 1153(d) to grant protection to employees attending hearings as well as testifying at them. Therefore, there was a violation of Section 1153(d) in regard to all three employees in paragraph 2. As to paragraph 3, the Board found that although the employee's slow work performance might have been a contributing factor in the decision to fire him, his termination was a violation of Section 1153(a} and (c) since motivated in substantial part in reprisal for his union activities.

REMEDIAL ORDER

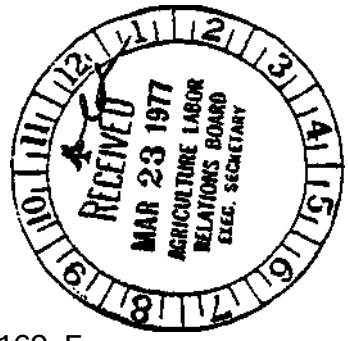
As a remedy for the above violations, the Board ordered the Employer to cease and desist from such conduct, and to sign, post and mail to its employees a copy of a Notice explaining its actions and to arrange for a

reading of the Notice to employees on company time. The Board also ordered the Employer to offer reinstatement to the discriminatees and to make them whole for losses suffered.

This summary is furnished for information only and is not an official statement of the Board.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of BACCHUS FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case. No. 75-CE-169-F

Alberto Y. Balingit, Esq., and Casimiro U. Tolentino, Esq., of Fresno, CA. for the General Counsel

James S. Shepard, Esq., of Fresno, CA., for Respondent

Nancy Marsh, Esq., Ms. Grace Solis, and Mr. Steven Hopcraft, of La Paz, Keene, CA. for the Charging Party.

DECISION

Statement of the Case

ROBERT G. WERNER, Administrative Law Officer: This case was heard before me in Fresno, California, on February 21 - 25, February 28, March 1, and March 2, 1977. The complaint issued on February 6, 1976, and alleges violations of Sections 1153(a), (c) and (d) of the Agricultural Labor Relations Act, hereinafter called the Act, by Bacchus Farms, hereinafter called the Respondent.

Pursuant to Section 20222 of the Board's Regulations, paragraph 6 of the complaint was amended at the hearing to add the names of Ruben Reinoso and Gustavo Leon as supervisors within the meaning of Section 1140.4(j) of the Act. The complaint is based on a charge filed on December 22, 1975, by the United Farm Workers of America, AFL-CIO, hereinafter called the Union or Intervenor. Copies of the charge and complaint were duly served upon Respondent.

On January 5, 1976, Respondent filed an answer to the charge; however, no answer to the complaint was filed by Respondent. The General Counsel and the other parties apparently treated Respondent's answer to the charge as if it were the answer to the complaint. (G.C. Ex. 1-E) Accordingly, no issue was made over Respondent's failure to file an answer to the complaint until the first day of the hearing, at which time both General Counsel and Intervenor moved for an order that all the allegations of the complaint be deemed admitted because of Respondent's failure to file an answer. The motions were denied subject to reconsideration on the basis of the written briefs.

All parties were given full opportunity to participate in the hearing, and all parties submitted post-hearing briefs in support of their respective positions.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction

Bacchus Farms is owned as a partnership by Jack H. Farrior and Richard V. Wilsey. It is engaged in agriculture in Madera County, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The Union is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. Motion for Judgment on the Pleadings

As noted above, Respondent filed a document titled "Answer of Employer" in response to the charge, but no answer to the complaint was filed by Respondent. No issue was made of the missing answer until the first day of the hearing, February 21, 1977, at which time both General Counsel and Intervenor requested an order that all the allegations of the complaint be deemed admitted in accordance with Sections 20230 and 20232 of the Board's Regulations. Under these Regulations, Respondent was in default on its answer on and after February 16, 1976. Yet no motion was made to the Board or the ALO until more than one year later. From the record it appears that all parties treated Respondent's answer to the charge as though it were an answer to the complaint. Indeed, General Counsel included it in his formal exhibits as G.C. Ex. 1-E, labelled "Answer of Employer." Neither General Counsel nor Intervenor made any

showing of prejudice resulting from this error. As Intervenor observed, any possible prejudice was substantially reduced by the fact that many of the same issues involved in this action were litigated before the California Unemployment Insurance Appeals Board in the Spring of 1976.[1/]

Respondent argues that California Labor Code Section 1160.2 specifies that the person complained against shall have the right to file an answer and to appear in person to give testimony, is controlling over any conflicting Regulations of the Board. If Sections 20230 and 20232 of the Board's Regulations are interpreted to authorize default on failure of Respondent to file an answer, then, Respondent argues, these sections are in conflict with Labor Code Section 1160.2 and beyond the authority granted to the Board in Labor Code Section 1144 to adopt such rules and regulations as are necessary to carry out the provisions of the Act.

Intervenor argues that Sections 20230 and 20232 are absolute and require a ruling that all the allegations of the complaint be deemed admitted. Intervenor stresses that unlike the National Labor Relations Board's Rules and Regulations, Section 102.20, which provides for agood cause exception, Section 20232 contains no good cause exception.

[1/] Intervenor's Exhibit 1, of which I have taken judicial notice, is the Appeals Board Decision No. 76-4506.

I reject both arguments. On the one hand, Section 20232 seems to be clearly within the powers of the Board as set out in Labor Code Section 1144 and is not in conflict with Labor Code Section 1160.2. On the other hand, I am convinced that the Board is not required to mechanically apply Section 20232 without consideration of the overall circumstances and basic fairness to the litigants.

This motion was one which should have been brought before the Board long before the hearing. It is not a motion which should be first advanced on the opening day of the hearing.

In view of the conduct of the General Counsel and Intervenor in treating the answer to the charge as though it were the answer to the complaint, the lack of any prejudice to General Counsel or Intervenor, and the strong policy of the law favoring resolution of disputes on the merits rather than by default on technicalities [2/], I find that the motion should be denied and the answer to the charge deemed to constitute Respondent's answer to the complaint.

III. The Alleged Unfair Labor Practices

A. Introduction

The complaint alleges the Respondent violated Sections 1153(c) and (d) of the Act by changing the terms and conditions

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2/ E.g. Key System Transit Lines v. Superior Court, 36 Cal.2d 184 (1950); Pearson v. Continental Airlines, 11 Cal.App.3d 613 (1970)

of employment of Ignacio Yanez, Antonio Nava, Sr., and Jorge Guerrero on December 19, 1975, because of their activities on behalf of the Union and because they gave testimony on behalf of the Union at a representation hearing before the Board on December 18, 1975; it is alleged that the changes constituted constructive discharges. The complaint also alleges that Respondent violated Section 1153(c) by discharging Antonio Nava, Jr., because of his activities on behalf of the Union. The Respondent admits that the alleged actions were taken but denies that the actions were taken for any illegal motive related to the employees' Union activity or testimony at the hearing; instead, Respondent asserts, the actions were taken solely for valid business reasons, and Mr. Yanez, Mr. Nava, Sr., and Mr. Guerrero voluntarily quit.

The complaint further alleges independent violations of Section 1153(a) in that Respondent instructed employees not to attend the representation hearing and created an impression of surveillance by informing the employees it would know if they attended the hearing. Respondent denies these charges.

B. The Evidence

1. The Operation of Bacchus Farms

Bacchus Farms is a partnership comprised of Jack Farrior, who is in charge of operations, and Richard V. Wilsey, who handles the financial aspects of the business. Bacchus grows several varieties of premium wine grapes on 2600 acres in

Madera County near Chowchilla. The property is divided into various ranches, including Alamo, Borden, Chino, Delhi and North Ramona. Each ranch is further divided into blocks consisting of numerous rows of vines.

The supervisor in charge of overseeing all of Respondent's operations is Christobal Leon (hereinafter called C. Leon), who reports directly to Jack Farrior. He and Mr. Farrior are in daily contact either by radio or in person. Mr. Leon assumed his duties as head supervisor sometime in 1974. He supervises all aspects of the ranch and gives orders directly to the crew foremen. He makes daily inspections of the crews to make sure the work is being done correctly.

Under C. Leon is Antonio Laredo. He was hired by Bacchus in 1972 and became a foreman in .1975. In 1975 Laredo had no particular crew assigned to him, but supervised a little bit of everything, including rootings, cuttings, and tractor work. Under C. Leon and Mr. Laredo in 1975 were various crew foremen who were generally in charge of 15-25 men. In 1975 Jorge Guerrero, Erasmo Garcia, and Gustavo Leon were pruning foremen; Ruben Reinoso was a transplanting foreman.

2. The Preliminary Events

On September 16, 1976, the Board conducted a representation election among the Respondent's workers. The Union won the election and Respondent objected on the ground that the election allegedly had not been held at a time of fifty per cent

of peak employment. A hearing on this issue was scheduled for December 18, 1975, in Merced. On December 17, 1975, Antonio Nava, Sr. and Antonio Nava, Jr. distributed leaflets during the lunch hour urging the workers to attend the hearing. Steven Hopcraft, a Union legal worker, talked to workers for the purpose of obtaining witnesses and spectators for the hearing. He encountered fear among the workers that they would suffer reprisals at the hands of Respondent if they attended or testified at the hearing. Mr. Hopcraft testified that he observed the fear in the expressions and actions of the workers to whom he spoke as well as from statements they made to him. Two of the workers he convinced to testify were Jorge Guerrero and Ignacio Yanez; he assured them that the Act would protect them from reprisals.

At the hearing on December 18, 1975, Ignacio Yanez and Jorge Guerrero testified on behalf of the Union. Antonio Nava, Sr., attended the hearing but did not testify. Also present were Mr. Wilsey, one of Respondent's partners, Craig Wallace, an agent of Respondent, and Mr. Shepard, Respondent's attorney.

3. Ignacio Yanez

On December 19, 1975, the day following the hearing, Mr. Yanez reported for the work he had been doing for two weeks, driving a small tractor repairing stakes and replacing vines at the Alamo ranch. He was met by Mr. Laredo who advised him

that there was no more tractor work for him and that he was being transferred to the job of preparing rootings. [3/] Mr. Laredo also informed him that the rooting work would be paid on a "contract" or piecework basis rather than hourly. Mr. Yanez, who was then making $3.50 per hour on his tractor work plus a year end bonus of $.25 per hour protested being paid on a piecework basis. Mr. Yanez also observed that work remained to be done where he had been working. Mr. Yanez offered to do the rooting work if he were paid his hourly rate; Mr. Laredo replied that he would be paid piecerate because the others doing the work were paid in that manner. Mr. Yanez refused to do the work on a piecework basis and Mr. Laredo instructed him to wait for the secretary who would give him his final check. When Mary Logan, the secretary/bookkeeper arrived, Mr. Yanez told her he did not think he could make enough money doing rootings at piecerate so he would have to leave. Mary Logan testified that she told Mr. Yanez that he could make as much as his hourly rate in the rootings if he worked hard.

Mr. Yanez was first employed by Bacchus in 1972. Mr. Yanez was considered to be a good worker and on November 15, 1975, was made a "steady worker." As a steady worker he was entitled to work year round, to receive a year end bonus of

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[3/] Rooting work was described by Mr. Yanez as follows: canes are cut from the vines and buried for a year until roots develop; after a year, the canes are dug up and the roots trimmed; the unearthing and trimming of the canes is referred to as rooting.

25 cents per hour, and to receive insurance and medical benefits. In 1975 Respondent employed seven or eight steady workers in addition to its supervisors and foremen.

After the Union's election victory in September, 1975, Mr. Yanez was elected president of the Union Ranch Committee, which was responsible for contract negotiations with Respondent. It is clear from the record as a whole that Respondent was aware of Mr. Yanez's prominent role in the Union on December 19, 1975.

The day preceding the representation hearing, Mr. Yanez was replacing vines and repairing stakes using a small tractor and trailer. He testified that he had been doing that work for about two weeks and that the work was not finished. He estimated that the work was perhaps half finished. Mr. Yanez testified that a few days before December 18, Mr. Laredo had told him he would be moved to the Borden ranch to continue doing the same type of work when he had finished the Alamo ranch work.

Mr. Yanez estimated that he would have made about $3.00 per hour doing the rooting job on a piecerate basis. Respondent's payroll records for the two individuals who did the rooting work in December, 1975, show that they were originally paid $3.00 per hour and then in January, after the charges were filed in this case, their pay was corrected to piecerate; the piecerate they received for the rooting work amounted to between $3.00 and $3.50 per hour.

Mr. Yanez testified that the change of jobs caused him to feel humiliated. In his view, rooting was a job not usually

given to a steady worker and he was convinced he could not make his hourly rate doing rootings piecerate. He had done rootings for about two hours the year before and earned approximately $5,00. He believed he was being transferred because he had testified at the hearing and in order to force him to quit. This view was reinforced when he saw Mr. Nava, Sr. and Mr. Guerrero also in the office the same morning because they had refused to accept job changes. No other Bacchus workers had their job assignments changed on December 19, 1975.

Respondent's witnesses testified that Respondent had a policy, kept secret from the workers, of guaranteeing that employees doing piecework would be paid their regular hourly rate in the event they did not produce enough piecework to earn more than their hourly rate. The workers all uniformly testified that they were unaware of such a policy. Mr. Laredo and Ms. Logan both testified that they did not tell Mr. Yanez of this policy when he expressed concern over his ability to earn enough money on the piecerate basis. Instead, Ms. Logan told him he could make his hourly rate if he worked hard enough. There is no doubt that Mr. Yanez was unaware of Respondent's alleged policy on December 19, 1975, when he refused to be changed from hourly pay to piecework.

Mr. C. Leon and Mr. Laredo testified that the rooting job to which Mr. Yanez was transferred on December 19, 1975, was high priority work at that time. C. Leon testified that it

was his usual practice to use his tractor drivers for such "special jobs." Mr. C. Leon testified that at the time Mr. Yanez was transferred to the root trimming, his other work was nearly finished. He estimated that there was a day or so to go on that job. Antonio Laredo, the person who was directly supervising Mr. Yanez's tractor work, testified that he could not recall whether there was any work remaining when Mr. Yanez was transferred on December 19. He said C. Leon told him the work was finished and he took his word for it. Mary Logan testified that she did not have any idea whether Mr. Yanez's tractor work was finished on December 19; however, at the unemployment hearing on March 17, 1976, she testified unequivocally that there was no more work of the sort Mr. Yanez had been doing remaining on December 19. Later Ms. Logan testified that she had reviewed the payroll records for December 15-31, 1975, and determined that the following tractor work of the sort Mr. Yanez had been doing was done on the Bacchus Farms after December 19, 1975: 1. Jose Miranda December 20 and 22 at the Alamo; 2. Jose Vasquez December 20, 21, and 22 on North Ramona. On cross-examination, Ms. Logan examined the crew sheets for that same time period (Intervenor Ex. 7-B) and they showed Mr. Yanez and Mr. Miranda both doing work coded 662-9 (repair and maintenance) on December 17, 1975. The crew sheet indicated Mr. Yanez was using tractor 1530 #10 at Alamo on the 17th. The crew sheets showed Mr. Miranda working December 22 at

Alamo, December 23 at Alamo and Chino, and December 27th at Borden; on the Borden work he was using tractor 1530 #10.

4. Antonio Nava, Sr.

On December 19, 1975, at about 7:00 A.M., Antonio Nava, Sr. reported to his pruning work at North Ramona. His foreman Gustavo Leon told him to report to the office where he would be given a new job. At the office Mr. Nava was told by Antonio Laredo that he was being transferred to rootings on a piecework basis. Mr. Nava told him he would go to the new work, but only if he were paid his hourly rate. Mr. Laredo stated this was impossible since the other workers doing rootings were paid piecerate. Mr. Nava had done rootings once the year before and was convinced he could not make his hourly rate. He also considered the rooting job more arduous than pruning because it was necessary to bend over to trim with one-handed shears whereas in pruning one could remain upright and use two-handed shears. Nevertheless, he stated he was prepared to do the rooting job if he were paid on an hourly basis. It is clear that Mr. Nava was not aware of any policy of Respondent guaranteeing an employee's hourly wage while working piecerate.

Mr. Nava was 47 at the time of this hearing and had been a farm worker from the age of 12 or 15. During that time he was never fired from a job. He began working for Respondent in 1972 and was a seasonal employee in December 1975. Respondent had no criticism of the quality of Mr. Nava, Sr.'s work.

Mr. Nava was one of the five members of the Union's Ranch Committee. Prior to the representation hearing on December 18, 1975, he passed out leaflets urging workers to attend the hearing. He did this on either December 16 or December 17 during the lunch period. His foreman Gustavo Leon observed him handing out the leaflets and, in fact, Mr. Nava gave one of the leaflets to Mr. G. Leon; Mr. Leon admitted that he read some of the Union literature, presumably this leaflet. There is no doubt that Respondent was aware of Mr. Nava, Sr.'s activities on behalf of the Union.

Respondent asserts that Mr. Nava, Sr. was transferred out of his pruning crew to do rootings not because of his union activities but'because of a problem created by Mr. Nava and three or four of his friends who tended to stay together while they worked so that they could talk to each other. C. Leon testified that his brother Gustavo Leon had informed him of this problem and that when G. Leon followed a suggestion to separate these workers they became angry with him. Mr. Nava was transferred to solve this problem according to C. Leon. The testimony of G. Leon did not wholly corroborate C. Leon's testimony. When initially asked about Mr. Nava, Sr., he stated that C. Leon told' him he was to be transferred to do another job and he (Gustavo) did not know any more. At first he testified that he never had a conversation with his brother about any problem with Mr. Nava, Sr. Upon further questioning, he recalled mentioning the talking situation to his brother.

However, G. Leon testified that his brother alone made the decision to select Nava, Sr. to be transferred. When asked why Mr. Nava, Sr. was selected rather than one of the others, he answered that he did not know.

Mr. Laredo testified that after Mr. Yanez and Mr. Nava, Sr. refused assignment to the rootings on December 19, 1975, no other additional workers were assigned to that work.

5. Jorge Guerrero

Jorge Guerrero, age 52, has worked as a farmworker since he was 18. He has never been fired from a job. He was originally hired by Bacchus in 1972 and became a foreman in 1973. Between 1973 and December 19, 1975, he never worked for Respondent in any capacity other than as a crew foreman. Prior to December, 1975, his work had been praised by Respondent.

Mr. Guerrero testified that when he applied for work again in 1975, he had a conversation on December 4, 1975, with C. Leon. Mr. C. Leon told him that he would give him a job but there was a problem because of his participation in a Union rally involving Caesar Chavez. Mr. Leon told him Mr. Farrior had seen Mr. Guerrero's picture in the paper following the incident and was upset by it. Nevertheless C. Leon agreed to speak to Mr. Farrior. Mr. Guerrero testified he called C. Leon that night and was told to bring his crew to work, that he had talked to Mr. Farrior and Mr. Farrior liked the way Mr. Guerrero works. Mr. C. Leon denied saying anything to Mr. Guerrero about his Union activities in this conversation.

Mr. Guerrero testified that from the time of his rehiring in December 1975 he felt pressure from C. Leon in the form of constant criticism that he had not received before they became aware of his Union activity. On December 16, 1975, his crew was required by C. Leon to redo a field they had pruned and, in Mr. Guerrero's view, the field was made worse by doing it again. Mr. C. Leon testified that the third year vines required a different type of pruning depending on the strength of each individual vine, that this pruning was different from what Guerrero had done in earlier years, and that his crew was not doing the job properly. He spoke to him about it several times. Mr. Leon testified, however, that he never warned Mr. Guerrero that his crew might be taken away.

On the morning of the representation hearing at about 5:00 A.M. Mr. Guerrero telephoned Mr. C. Leon to tell him that he would not be at work that day. Mr. Guerrero told Mr. Leon he would not be at work that day because he had to fix his truck; he testified he was afraid to tell him that he was going to the hearing because he knew of Respondent's opposition to the Union and feared for his job. From this point on, the two versions of the conversation are in' direct conflict. Mr. Guerrero testified that C. Leon told him he had better come to work, that he knew there was going to be a meeting in Merced with the Union and the Company, and if he did not come to work Jack (Farrior) would think he was at the meeting. C. Leon denied

making any statement about the hearing in Merced. He said he told Guerrero to come to work because he needed him and suggested that he send one of his sons to have the truck fixed.

When he went to work that morning, C. Leon combined Mr. Guerrero's pruning crew with the crew of Erasmo Garcia.

Mr. Guerrero testified that while he was eating dinner on the 18th after the hearing, his son came and gave him his regular paycheck and said that C. Leon had told him to tell him he did not have a crew anymore and if he wanted to go back to work, he would have to bring his own pruning shears so he could do his own row. C. Leon denied that he gave Guerrero's son any such message.

Mr. Guerrero then telephoned C. Leon that night to find out what had happened. Again the two versions of the conversation are in conflict. According to Mr. Guerrero, C. Leon replied that he had warned him not to go to that hearing, that Jack had sent one person, Craig Wallace, to the hearing to see how many Bacchus workers went to testify, and that if he wanted to work he would have to bring his shears. According to C. Leon, he told Mr. Guerrero to come to work the next day but that his crew had been put with another crew. C. Leon testified nothing was said about the hearing and, in fact, he did not know that Mr. Guerrero had been at the hearing until sometime later.

Craig Wallace testified that he was employed by Respondent at the time of the representation hearing on December 18, 1975, but that he had already given his notice. He stated that it was

possible that he may have had a conversation with Mr. Farrior by radio on the evening after the hearing. He did not recall any conversation with C. Leon that day and he did not recall telling Mr. Farrior who had attended the hearing until sometime later.

Mr. Richard Wilsey testified that he had no conversation with either Jack Farrior or C. Leon after the hearing on December 18. He further testified that he took no steps to advise anyone of who had testified or was present at the hearing.

Mr. Farrior did not testify.

On December 19, 1975, Guerrero went to the office and was invited by C. Leon to take a ride around the ranch with him. During that trip, C. Leon offered Mr. Guerrero a job with a tractor and trailer repairing stakes at the same pay he had been receiving. C. Leon testified he told Mr. Guerrero his crew was happier combined with Erasmo Garcia's crew because they were more sure of what they were doing. Mr. Guerrero declined the offered work saying it was not his work, but it was all right because he had another job. Mr. Guerrero testified that C. Leon once again mentioned that he should not have gone to the hearing; C. Leon denied saying this. Mr. Guerrero testified that the job he mentioned to Mr. Leon was with Claude De Boer but he did not tell him when he would have that job. Mr. Guerrero testified he went to work for

DeBoer as a foreman on February 2, 1975.

To corroborate C. Leon's testimony that Guerrero's crew was not pruning correctly, Respondent called Ignacio Musquiz and Manuel Vega. Both were members of Guerrero's crew and were transferred to Erasmo Garcia's crew. Both testified that Garcia supervised the crew's work more closely than did Guerrero. However, Mr. Musquiz testified that Garcia and Guerrero did not give any different instructions on how to prune. And Mr. Vega testified that there was no difference in the way he pruned with Garcia's crew than he had with Guerrero's crew.

6. Antonio Nava, Jr.

Mr. Nava, Jr., the 19 year old son of Mr. Nava, Sr., was originally hired by Respondent in 1974. On December 3, 1975, he was hired for pruning and placed in G. Leon's crew. He testified that he spoke with G. Leon on December 11, 12, and 13 about the Union and G. Leon asked him several questions about the Union including whether he was a member. G. Leon testified to the contrary that he never personally heard Mr. Nava, Jr. say anything about the Union.

On December 15, 1975, G. Leon told Nava, Jr. that he was going to be transferred to another job. One other member of the crew, Jose Flores, was also transferred. Mr. Nava, Jr. was first put on the job of trimming roots for about three hours. Mr. Laredo, his supervisor for that work, testified that his

rooting work was satisfactory. After the three hours of rooting work, he was transferred to Ruben Reinoso's crew which was replanting missing vines. Jose Flores had also been transferred to this same crew. During the lunch period on December 17, 1975, Mr. Nava, Jr. passed." out leaflets concerning the representation hearing to members of Reinoso's crew. Nava, Jr. is of the opinion that Mr. Reinoso observed his doing this. At the end of the day, Nava, Jr. was given his paycheck by Mr. Reinoso, an indication that he had been fired. Mr. Nava, Jr. testified that he tried to find out from Mr. Reinoso, C. Leon, Mary Logan, and Antonio Laredo who had fired him and could learn only that Mr. Laredo had instructed Ms. Logan to prepare his check. According to Nava Jr., Mr. Laredo on December 20, 1975, denied that he had fired him.

Mr. Nava Jr. testified that he was generally able to keep up with the other members of the pruning crew but would occasionally be behind when he had a difficult row. He recalled being behind on December 15, along with two other persons, because he had a heavy row to prune. He testified that C. Leon helped one of the others who were behind but did not help him.

When asked why he felt he was transferred on December 15, Mr. Nava Jr. answered that there were two reasons: 1. because he was behind the other pruners and 2. because he had been talking to G. Leon concerning the Union.

Mr. Nava testified that he was never criticized or warned by either G. Leon or Ruben Reinoso. In fact, according to Nava,

he asked G. Leon how he was doing and Leon said he was doing all right. G. Leon confirmed that he never warned or criticized Nava. Mr. Reinoso testified that he told Nava to pick up his pace because he was going to slowly.

G. Leon testified that he had a problem with Nava, Jr. lagging behind from the day he started working in his crew. At first he attributed it to his lack of experience. Later when Nava, Jr. had learned how to do the pruning, he still lagged behind. He also had the same problem with Jose Flores. He spoke to C. Leon about the problem and it was decided to transfer them to another crew. Mien asked on cross examination whether Nava could have fallen behind because he had a difficult row, Leon answered that he could have but not all the time.

C. Leon testified that he had Nava, Jr. transferred because he lagged behind in his brother Gustavo's pruning crew. He said his brother wanted to fire him, but C. Leon thought it was better to give him another chance with another crew. However, Mr. Nava, Jr. did not improve with the replanting crew and continued to fall behind. He testified that he personally observed that Nava, Jr. and Jose Flores were behind every day with the pruning crew.

Ruben Reinoso testified that Nava, Jr. lagged behind on his crew and also told other workers not to work too fast. He pointed out to Antonio Laredo that Nava was a slow worker. Jose Flores, on the other hand, kept up with the replanting crew. He testified he fired Nava, Jr. at the direction of Mr. Laredo.

Antonio Laredo testified that on the replanting crew, Nava, Jr. lagged behind and also told other workers to slow down to his pace. He took responsibility for the firing of Nava, Jr., although he did not do it personally. He testified that he would normally talk to a worker who lagged behind but not always. He did not talk to Nava, Jr., about his rate of work.

Jose Flores' testimony corroborated the testimony of Respondent's supervisors that he and Nava, Jr., always lagged behind on the pruning crew and that Nava, Jr. on the replanting crew fell behind again. He also said Nava, Jr. talked about the Union and said that there was no need to go too fast because they would be protected by the Union.

Mr. Nava, Sr. testified that he did not observe where his son was while he was working, but that he did not hear anything about his son being behind.

C. Analysis and Conclusions

1. Basic Legal Principles

Labor Code Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended. Sections 1153(a), (c) and (d) are essentially identical to Sections 8(a)(l),(3) and (4) respectively of the National Labor Relations Act.

It is a fundamental principle of law that the General Counsel has the burden to prove affirmatively and by substantial evidence the facts which it asserts in an unfair labor practice proceeding against an employer. N.L.R.B. v. Gottlieb & Co., 33 LRRM 2180 (7th Cir. 1953), N.L.R.B. v. Winter Garden Citrus Products Co-Operative, 43 LRRM 2112 (5th Cir. 1958). This is true with respect to independent 8(a)(1) violations, N.L.R.B. v. Peerless Products, Inc., 43 LRRM 2720 (7th Cir. 1959), as well as 8(a)(3) violations, N.L.R.B. v. Agawam Food Mart, Inc., 74 LRRM 2034 (1st Cir. 1970); Dryden Mfg. Co. v. N.L.R.B., 73 LRRM 2209 (5th Cir. 1970).

> Although Section 8 (a)(3) does not literally require a showing of the employer's motive, such a requirement is now well established by judicial interpretation of the section.[4/] The Supreme Court in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) established the basic rules as follows: if the employer's discriminatory conduct is "inherently destructive" of "important employee rights," the General Counsel need not introduce evidence of anti-union motivation, and the Board can find a violation of the Act despite the employer's showing that its conduct was motivated by business reasons. However, if the employer's discriminatory conduct has only a "comparatively slight" adverse effect on employee rights and if the employer

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4/ For a convincing argument that this interpretation is contrary to the original legislative design, see Christensen & Svanoe, Motive and Intent in the commission of Unfair Labor Practices; The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968).

has introduced evidence of "legitimate and substantial business justifications for the conduct" then the General Counsel must prove anti-union motivation. It is well established that the proof of motivation may be by circumstantial evidence rather than by direct evidence which will seldom be available. E.g. Shattuck Denn Mining Corp. v. N.L.R.B., 362 F.2d 466, 470 (9th Cir. 1966).

The proof required for Section 8(a)(1) violations is less stringent. E.g. N.L.R.'B. v. Burnup & Sims, Inc., 379 U.S. 21 (1964). A violation of Section 8(a)(1) is made out if it is shown that the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights. Electrical Fittings Corp., 216 NLRB 1076 (1975). It is not necessary to show that the employer acted out of animus to the union or that the interference, coercion or restraint succeeded. N.L.R.B. v. Corning Glass Works, 293 F.2d 784, 48 LRRM 2759 (1st Cir. 1961).

2. The Constructive Discharges of Yanez, Nava, Sr. and Guerrero

I find on all the evidence that the changes in the terms and conditions of employment imposed on Mr. Yanez, Mr. Nava, Sr., and Mr. Guerrero on December 19, 1975, amounted to constructive discharges and that the actions were based on the Union activities of these individuals, including their participation in the representation hearing on December 18, 1975, rather than on any valid business considerations as asserted by Respondent.

As such the conduct of Respondent constitutes a violation of Sections 1153 (c) and (a) of the Act with respect to each of the individuals; as to Mr. Yanez and Mr. Guerrero, Respondent's actions also constitute a violation of Section 1153(d) of the Act.

To begin with; there is no doubt that the change of Mr. Yanez and Mr. Nava, Sr. to work they considered to be less desirable and on a piecerate basis rather than the hourly basis they had been on before constituted a material change in their terms and conditions of employment. Both individuals credibly testified that although they considered the new work to be less desirable than the work they had been doing, they offered to accept the work provided they continued to receive their same hourly pay. They were convinced that they would be unable to earn as much as their hourly rate on the piecework basis. Respondent's witnesses admitted that the alleged policy of in fact paying pieceworkers at least their hourly rate was kept secret from the workers. Ms. Logan testified that she did not advise Mr. Yanez of this policy even when he told her the reason he was leaving was that he would not be able to earn his hourly rate at piecework; instead she told him he could do it if he worked hard enough.

Likewise, the demotion of Mr. Guerrero from crew boss to worker, even though it was at the same rate of pay, was undoubtedly a material change in the terms and conditions of his employment.

I find that the constructive discharge of these individuals for their Union activities and participation in the Board's representation hearing to be "inherently destructive" of "important employee rights." Thus, under the rules set forth above, it is not necessary for the General Counsel to prove unlawful motive. Nevertheless, there is substantial direct and circumstantial evidence of Respondent's unlawful motive to discourage Union membership. Respondent's offered business justifications were not convincing; instead, they appeared to be pretexts designed to mask the unlawful motive for the actions.

With respect to Mr. Yanez and Mr. Nava, Sr., Respondent claims that there was a high priority need for additional help doing rooting work on December 19, 1975, and that was why the two were transferred. The evidence does not, however, support this contention. Most telling is the testimony of Mr. Laredo that after Nava, Sr. and Yanez refused the rooting work no other additional workers were placed on this work. This does not support Respondent's claim that the work was of a high priority nature. In addition, Mr. Yanez credibly testified that he was told by Mr. Laredo that there was no more tractor work for him to do although Mr. Yanez knew that there was more tractor work to be done at Alamo and he had been told that he would move to Borden to do similar work when he had finished at Alamo. Moreover, Respondent's records show that tractor work of the sort done by Mr. Yanez was performed at Alamo on December 20, 22, and 23 and

on December 27 at Borden. Respondent's offered business justification having been shown to be pretextual it is necessary to look elsewhere for the real motive. There is a strong inference that the motive sought to be hidden is an unlawful one. Shattuck Denn Mining Corp v. N.L.R.B., supra, at 470. Moreover, the timing of the actions is highly suggestive of antiunion motivation. All three individuals were changed the morning after they attended or participated in the representation hearing on behalf of the Union. No other workers had their job assignments or rates of pay changed on December 19, 1975. Such timing is a traditional indicium of unlawful motivation. E.g., Marx-Haas Clothing Co., 211 NLRB 350 (1974); Howard Johnson Co., 209 NLRB 1122 (1974).

Respondent offered an additional justification for its selection of Mr. Nava, Sr. for the rooting work. He was assertedly working together with a group of his friends so that they could talk to each other. The testimony of the Leon brothers to this effect was not convincing. Mr. Nava's crew foreman testified that he did not know why Mr. Nava had been selected for transfer rather than one of his talkative friends. It appears that he was selected because he passed out leaflets on December 17 urging workers to attend the representation hearing and because he himself attended the hearing. Since Mr. Nava, Sr. did not in fact testify at the RC hearing, his constructive discharge cannot constitute a violation of

Section 1153(d) as alleged in the complaint and I shall recommend that the allegation be dismissed.

Respondent's asserted business justification for removing Mr. Guerrero from his position as pruning crew foreman is no more convincing. Respondent's claim is that Mr. Guerrero's crew was not doing its pruning job properly. Two of Mr. Guerrero's crew members, Mr. Musquiz and Mr. Vega testified to support Respondent's position. Their testimony in fact seriously undermined Respondent's claim. Although they both testified that Mr. Garcia supervised their work more carefully, they both testified that the pruning work they did for Garcia was done in the same manner it had been done for Mr. Guerrero.

In evaluating the conflicts between the testimony of Mr. Guerrero and Mr. C. Leon, *I* found the testimony of Mr. Guerrero to be more credible. He testified convincingly that when he applied for work in December of 1975 Mr. Leon told him there was a problem with hiring him because it had come to the attention of Mr. Farrior that Guerrero had been involved in a Union rally. From the time he started work in December, 1975, Guerrero felt pressure from C. Leon that he had not felt before. He attributed it to Respondent's knowledge of his Union activities. Mr. Guerrero also credibly testified that Mr. Leon told him on December 18 that he had better come to work or Mr. Farrior would think he had gone to the hearing in Merced. The evening of December 18 Mr. Guerrero called C. Leon and was told

that he should not have gone to the hearing and that Mr. Farrior had sent Craig Wallace to see who attended the hearing. On the morning of December 19, 1975, C. Leon again told Guerrero he should not have gone to the hearing.

Craig Wallace testified that he attended the hearing and observed the workers present but did not tell Jack Farrior on December 18 who had been present. He testified that he did tell Farrior who was present, but at some later time. He testified he could not recall having any conversation with C. Leon on December 18. He thought he may have spoken to Mr. Farrior by radio on December 18, but did not discuss the hearing with him. I did not find Wallace's testimony convincing. I was also impressed by the fact that Mr. Farrior himself did not testify.

The evidence is clear that Respondent had ample opportunity to and did in fact know which workers had attended and participated in the hearing on December 18, 1975. There is a strong inference that the adverse actions taken the following day on December 19, 1975, were related to the employees' participation in the hearing.

As indicated above, Respondent's alleged justification for demoting Mr. Guerrero from crew foreman to worker was not convincing. The circumstantial evidence and the conversations of C. Leon with Mr. Guerrero indicate that the Respondent's actual motive for the change was Mr. Guerrero's Union activities and his testimony at the RC hearing. This action of Respondent

constituted a violation of Sections 1153(c) and (d). The actions also constituted interference with the exercise of Section 1152 rights and, as such, were violative of Section 1153(a).

3. The Discharge of Antonio Nava, Jr.

I find that the General Counsel has failed to carry his burden of proof with respect to the discharge of Mr. Nava, Jr. There is no direct evidence of unlawful motive in Mr. Nava's discharge. The circumstantial evidence of discriminatory motive, namely the Respondent's failure to warn Mr. Nava before he was fired, its failure to tell him who had fired him, Respondent's unexplained action in transferring him from rooting work where he was performing satisfactorily to replanting, and the fact he passed out leaflets in view of his supervisor on the day he was fired, is not sufficient to outweigh the credible testimony that Mr. Nava, Jr. was terminated because he lagged behind the other workers and because he told the other workers to slow down to his pace.

I am particularly influenced by Nava, Jr.'s own testimony that one of the reasons he thought he was transferred to other work on December 15, 1975, was that he was behind the other workers. A co-worker Jose Flores testified that he and Nava were both consistently behind the other workers in the pruning crew; he further testified that Mr. Nava fell behind the others again on the replanting crew and that Mr. Nava told

the other workers to slow down. It is significant that Mr. Nava was transferred for lagging behind on December 15, two days before he passed out leaflets on December 17. Thus, it seems clear that the first steps as to Nava were taken before his protected activity of passing out leaflets. That does not dispose of the question of whether or not the action against Nava was-based on his conversations with G. Leon about the Union. I do not find sufficient evidence in the record to support such an inference.

Respondent's supervisors and foremen C. Leon, Mr. Laredo, G. Leon, and Ruben Reinoso all testified that Mr. Nava was transferred and ultimately fired because he lagged behind the other workers on the pruning and replanting crews and that he told workers to slow down. The only testimony offered by General Counsel other than that of Nava himself was his father's testimony; it was not very helpful. Mr. Nava, Sr. could only say that he did not observe his son's work because he was occupied with his own work and that he did not hear anything about his son's being behind. I find it significant that no witnesses were called by General Counsel to rebut the testimony of Respondent's witnesses, particularly co-worker Jose Flores. Accordingly, I shall recommend that the portions of the complaint alleging the discriminatory discharge of Mr. Nava, Jr. be dismissed.

4. The Independent 1153(a) Violations

In addition to the derivative Section 1153(a) violations

found above, it is alleged that Respondent committed independent violations of Section 1153(a) by C. Leon's instructing employees not to attend the representation hearing and by creating the impression of surveillance. I find that the threats of Mr. C. Leon to Mr. Guerrero that he should not attend the hearing and his statement to Guerrero that Respondent had sent Craig Wallace to the hearing to observe which workers attended and participated in the hearing constitute independent violations of Section 1153(a) because they were an attempt to interfere, restrain, and coerce employees in their exercise of their Section 1152 rights. As indicated above, I credited the testimony of Mr. Guerrero over the conflicting testimony of C. Leon.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153(a), (c), and (d) of the Act, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Ignacio Yanez, Antonio Nava, Sr., and Jorge Guerrero, I shall recommend that Respondent be ordered to offer each of them full and immediate reinstatement to his former or substantially equivalent job. I shall further recommend that Respondent make each employee whole for any losses he may have incurred as a result of the unlawful discriminatory action by payment to him

of a sum of money equal to the wages and benefits he would have earned from the date of his discharge to the date of reinstatement or offered reinstatement, less his net earnings from other sources, together with interest thereon at the rate of seven percent per year, and that loss of pay and interest be computed in accordance with the methods established by the National Labor Relations Board in F.W. Woolworth Co., 90 NLRB 289 (1950) and Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

The unfair labor practicies committed by Respondent strike at the heart of the rights guaranteed to employees by Section 1152 of the Act. The inference is warranted that Respondent maintains an attitude of opposition to the purposes of the Act with respect to protection of employee rights. Accordingly, I shall recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

In addition I shall recommend that the Notice to Employees attached hereto as "Appendix" be posted in both English and Spanish in conspicuous places on Respondent's property, including the office-shop area, for no less than sixty (60) days during the next peak season. Recognizing that this method of notification may not reach all workers, particularly those who worked in 1975 but did not return, I shall recommend that said notice in both English and Spanish be mailed by Respondent to all of the employees listed on its master payroll for

December 1975 as well as to all its 1977 peak season employees. In addition, I shall recommend that the notice be read in English and Spanish to the assembled employees on company time and property at the commencement of the 1977 peak harvest season, by an agent of the Board and that this agent be accorded the opportunity to answer questions from employees concerning the notice and their rights under the Act. Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

General Counsel and Intervenor urge that Respondent be ordered to pay the costs and attorneys fees incurred by the Board and Charging Party in connection with this proceeding. It is clear that both the Board and the NLRB have authority to grant such a remedy in a case where a party raises patently frivolous defenses. Valley Farms and Rose J. Farms, 2 ALRB No. 41 (1976); Tiidee Products, Inc., 194 NLRB 1234 (1972). However, this is not such a case and such an extraordinary remedy would be inappropriate. I find that Respondent's defense was not frivolous.

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, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Discriminating against or threatening to discriminate against its employees in regard to their hire, tenure or employment or any term or condition of employment to discourage membership in the Union, or any other labor organization.

(b) Discharging or otherwise discriminating against its employees for filing charges with or giving testimony before the Agricultural Labor Relations Board.

(c) In any other manner interfering with, restraining, or coercing its 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.

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

(a) Offer to Ignacio Yanez, Antonio Nava, Sr., and Jorge Guerrero immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or others rights and privileges, and make them whole for any losses they may have suffered as a result of their constructive discharge, in the manner described above in the section entitled "The Remedy."

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records and reports, and other records necessary to analyze the back pay due.

(c) Post the notice attached hereto and marked "Appendix" in both English and Spanish in conspicuous places on its property, including the office-shop area, for no less than sixty (60) days during next peak season. In addition, Respondent shall mail a copy of this notice, printed in both English and Spanish, to each of the employees on its payroll in December 1975 as well as to all its 1977 peak season employees. Copies of this notice, including the appropriate Spanish translation, shall be furnished Respondent by the Regional Director for the Fresno Regional Office.

(d) To permit an agent of the Board to read this notice in both Spanish and English to employees assembled on company time and property at the commencement of the 1977 peak harvest season. Said agent shall be allowed to answer questions from the employees concerning the notice and their rights under the Act.

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

It is further recommended that the allegations of the complaint that Antonio Nava, Jr., was discriminatorily discharged in violation of Section 1153(c) and that Antonio Nava, Sr. was discharged in violation of Section 1153(d) be dismissed.

DATED: 3/22/77

Robert G. Werner

ROBERT G. WERNER
Administrative Law Officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act, and has ordered us to notify all persons now working for us or who worked for us in December, 1975, that we will remedy those violations, and that we will respect the rights of all our employees in the future. Therefore we are now telling each of you:

(1) We will reinstate Ignacio Yanez, Antonio Nava, Sr., and Jorge Guerrero to their former jobs and give them back pay for any losses that they had while they were off work.

(2) We will not threaten or take action against any of our employees for their support of the United Farm Workers of America, or any other labor organization, or for their filing charges with or testifying before the Agricultural Labor Relations Board.

(3) All our employees are free to support, become or remain members of- the United Farm Workers of America, or of any other union. Our employees may wear union buttons or pass out union literature or talk to their fellow employees about any union of their choice provided this is not done at times or in a manner that interferes with their doing the job for which they were hired. We will not discharge, lay off, or in any other manner interefere with the rights of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

DATED: Signed:

BACCHUS FARMS

By:_____

(Title)