STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| SAHARA PACKING CO . ,<br>Respondent,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Charging Party. | ) | Case No. 77-CE-45-E<br><br><br><br>4 ALRB No. 40 |

DECISION AND ORDER

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

On December 17, 1977, Administrative Law Officer (ALO) James Wolpman issued the attached Decision in this matter. Thereafter, Respondent filed timely exceptions and a supporting brief, and the General Counsel filed a brief in reply to Respondent's exceptions.

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.

Respondent has excepted to the ALO's findings and conclusions concerning its refusal to rehire Refugio Acosta for the 1976 melon harvest, but it has not excepted to any other part of the ALO's Decision as to Mr. Acosta or to any part of the Decision concerning the second alleged discriminatee, Rogelio Barraza. We

reject the ALO's conclusion that Respondent violated Section 1153 (c) and Cal of the Act by its refusal to rehire employee Acosta in June 1976 for the melon harvest, as such refusal occurred more than six months before the filing and service of the charge herein. See Labor Code § 1160.2. The ALO's award of back pay for Mr. Acosta is therefore modified to exclude the June 1976 melon harvest.

## ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent, Sahara Packing Co., 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 refusing to rehire or by otherwise discriminating against employees with respect to their hire or tenure of employment or any other term or condition of employment.

(b) 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 Refugio Acosta and Rogelio Barraza 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 whole Refugio Acosta and Rogelio Barraza

for any losses they may have suffered by reason of Respondent's refusal to rehire them on December 13, 1976, and January 17, 1977, respectively, from the date of such refusal to rehire to the dates on which they are offered reinstatement and backpay 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 backpay due to the 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 attached Notice in appropriate languages to each of the employees on its payroll in December 1976 as well as to all its 1978 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) Arrange for an agent of the Board or a

representative of Respondent 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: June 23, 1978

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

JOHN P. MCCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing at which each side had an opportunity to present facts, evidence and arguments, 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 Refugio Acosta and Rogelio Barraza by refusing to rehire them because of their prior union activities We will reinstate them to their former jobs and give them backpay plus 7 percent interest for any losses that they had while they were off work.

4. We will not take action against any of our employees for supporting the United Farm Workers of America, or any other labor organization.

Dated: SAHARA PACKING COMPANY

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

Sahara Packing Co. (UFW} 4 ALRB No. 40
Case No. 77-CE-45-E

ALO DECISION

A complaint issued, based on charges filed and served on Respondent on January 21, 1977, alleging that Refugio Acosta and Rogelio Barraza were refused reemployment for the 1976-77 lettuce harvest because of their union activities. An additional allegation in the original charge that Refugio Acosta had been denied reemployment for the June 1976 melon harvest was neither alleged in the complaint nor added thereafter by amendment.

The ALO found that Respondent violated Section 1153(c) and (a) of the Act by failing or refusing to rehire Refugio Acosta during the 1976 melon harvest and the 1976-77 lettuce harvest, and by refusing to rehire Rogelio Barraza for the 1976-77 lettuce harvest.

Citing Great Dane Trailer, 388 U.S. 26, as the basis for deciding a discrimination case, the ALO rejected Respondent's defense that its refusals of reemployment occurred months after the election, at a time when UFW activity could no longer represent a threat to the Respondent and that other UFW supporters were reemployed after the election campaign. The ALO found that Respondent failed to establish a legitimate justification for its actions by its complete failure to explain why, contrary to its stated policy, two experienced and capable employees who had long work histories with Respondent were refused reemployment and their jobs given instead to workers who had little or no previous service with Respondent.

BOARD DECISION

The Board decided to affirm the findings, rulings, and conclusions of the ALO and to adopt his recommended Order with some modifications. Citing Labor Code Section 1160.2, the Board rejected the ALO's conclusion that Respondent violated Section 1153(c) and (a) of the Act by its refusal to rehire employee Acosta in June 1976 as such refusal occurred more than six months before the filing and service of the charge. The Board therefore modified the ALO's recommended award of backpay for Acosta to exclude the 1976 melon harvest.

REMEDY

The Board's Order requires Respondent to reinstate the two discriminatees, to pay them backpay plus 7 percent and to post, distribute and read an appropriate Notice.

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

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|---|---|---|
| SAHARA PACKING COMPANY,<br><br>Respondent ,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA,<br><br>AFL-CIO,<br><br>Charging Party. | ) | Case No. 77-CE-45-E |

Michael AuClair-Valdez, for the
General Counsel

Scott A. Wilson, Imperial Valley
Vegetable Growers Association of El
Centro, California, for the Respondent

Anita Morgan of Calexico, California, for the
Charging Party

DECISION

STATEMENT OF THE CASE

JAMES WOLPMAN, Administrative Law Officer: This case was heard before me on October 17, 18, 19, 20, 1977, in El Centro, California; all parties were represented. The complaint alleges that the Respondent, Sahara Packing Company, violated Sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereafter called the "Act"). The complaint is based on a

charge filed by the United Farm Workers of America, APL-CIO (hereafter called the "Union"), a copy of which was served on the Respondent on January 21, 1977. Briefs in support of their respective positions were filed after the hearing by the General Counsel and Respondent.

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

## FINDINGS OF FACT

### I. Jurisdiction.

Respondent, Sahara Packing Company, is a corporation engaged in agriculture in California, and was admitted to be by the Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

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

### II. The Alleged Unfair Labor Practices.

The complaint alleges that Respondent violated Sections 1153(a) and (c) of the Act by refusing to rehire or reinstate Refugio Acosta and Rogelio Barraza because of their sympathies for, membership in, or activities in support of the United Farm Workers.

Respondent questions whether the two ever actually sought rehire or reinstatement; alleging, in the case of Barraza, that he quit voluntarily and did hot seek reemployment, and, in the case of Acosta, that, even if it should be determined that he did seek reemployment, he was not refused because of his sympathy for, membership in, or activites on behalf of the United Farm Workers.

### III. The Facts.

#### A. Background

The Sahara Packing Company is a corporation engaged in harvesting, packing, shipping and selling fresh lettuce and melons. The lettuce harvest begins in November in Arizona and then shifts to California in December where it continues until March. Melons are presently harvested in May and June in California. The workers who do the harvesting are hired and paid by

George Sakata, a Labor Contractor who is licensed under State and Federal law. Sakata, both directly and through his foremen Conception ("Concho") Flores and Ramon Montano, exercises day to day supervision over his workers. He has no financial interest in the crop; nor does he provide anything but the labor. He receives a fee for his services.

Typically hiring is handled by "Concho" Flores. He sees to it that the word is gotten out and prospective workers show up. early in the season--not necessarily on the first day--at a Cafe, generally referred to as Rosita's, in Mexicali, Mexico. There they speak with Flores and he decides whether they are to be hired on. Those employed board the bus provided and are driven across the border and to the fields by Ramon Montano, the other foreman. Thereafter they assemble daily, early in the morning, at Rosita's to be transported by the bus to the fields. This regimen changes during the Arizona harvest: workers assemble at Rosita's late Sunday afternoon and are transported by bus to Poston, Arizona where they spend the entire week, returning the following Friday or Saturday.

The two alleged discriminatees--Refugio Acosta and Rogelio Barraza--have regularly worked the Arizona and California lettuce harvests for Sakata: Acosta since the 1966-67 season and Barraza since the 1973-74 season. Acosta also appears to have worked a number of the melon harvests. Both were conceded to be capable workers by Sakata and by their foremen.

In 1973, Sahara recognized and entered into a collective bargaining agreement with the Western Conference of Teamsters (hereafter "Teamsters") for its employees, including those of its Labor Contractors. The agreement expired in 1975, and a new multi-employer agreement was executed[Employer Exhibit No. 2]. This agreement was in force throughout the period here at issue.

In late 1975, the United Farmworkers (hereafter"UFW") began an extensive organizing drive in the Imperial Valley, including the Sahara operations. A Petition for Certification was eventually filed in late January, 1976, by the UFW and the Teamsters intervened. The election was held on February 6, 1976. Objections to that election are still pending.

Both Refugio Acosta and Rogelia Barraza were employed during the campaign and election and both were active on behalf of the UFW. They continued working after the election until the conclusion of the lettuce harvest. Barraza was re-employed in November, 1976 for a week of work during the Arizona harvest, but was not re-employed thereafter. Acosta was not

re-employed at all during the 1976-77 season. Both claim that--although they had been regularly employed in previous seasons--they were refused further employment in 1976-77 and this refusal was due to their activities on behalf of the UFW during the previous season. Forman Flores denied that either worker had come to him seeking re-employment; and the employer asserts that, even if Flores is mistaken, Acosta and Barraza were not refused work because of their Union membership, sympathies or activities.

B. Union Activities and Employer Knowledge

There is no serious dispute that both Acosta and Barraza were active supporters of the UFW; nor is there any question that the employer was aware of this. Sakata acknowledged that, while Acosta was far and away the most active, Barraza's involvement was greater than the three other workers--Padilla, Calzada and Castellanos--who took an active part in the UFW campaign.

Acosta's activities included talking to workers about the advantages of UFW representation; obtaining their signatures on Authorization Cards.: passing out bumperstickers, buttons and leaflets; and maintaining the "Employee List" which was used by the UFW in determining its plans and tactics for the election. These activities occurred at Rosita's in the morning while workers were preparing to leave for work, on the" bus while they were being transported to and from work, and during meal breaks out in the fields. He made no secret of his sympathies: his conversations with workers about the UFW were carried on in the immediate vicinity of Sakata and the Foremen during lunchtime and in the near presence of Flores at Rosita's and Montano on the bus; he constantly wore a baseball cap bearing the UFW insignia., and he spoke openly to the UFW organizers who came out to the fields. There were even one or two instances where he actually placed UFW stickers on company vehicles.

Barraza's activities included talking to workers about the advantages of UFW representation; obtaining their signatures on authorization cards; and passing out UFW»buttons and leaflets. These activities occurred at Rosita's in the morning and in the fields before work and during meal breaks. He, like Acosta, did not conceal his sympathies: he spoke with the UFW organizers in the fields; his conversations with workers about the UFW and the authorization cards occurred in the near presence of his foreman; and, on a number of occasions, he wore UFW buttons on his shirt or hat. Just before the workers left off work to vote, he shouted, "Viva Chavez!" while his foreman was present; and, after the election, he allowed himself to be interviewed by a television crew that was filming the occasion.

While it may be true that Flores and Montano were not aware

of every bit of pro-UFW activity engaged in by Acosta and Barraza, I find their testimony that they had no knowledge of any union activity by these two to be inherently unbelievable; especially in the face of Sakata's candid admission that he was well aware of the level of their involvement. The two foremen certainly had greater opportunity to observe union activity because of the additional contact which one or the other of them had with the two workers at Rosita's, on the bus, and out in the fields.

C. Anti Union Animus

The General Counsel introduced a considerable amount of evidence in attempting to establish that the actions of the employer must be construed against a background of hostility toward the UFW and favoritism toward the Teamsters. The evidence adduced falls into four categories: (1) Support for the Teamsters; (2) Derogatory statements about the UFW (3) The granting of a wage increase during the election campaign; and (4) statements and conduct containing explicit or implicit threat of economic reprisal should the UFW win the election. The employer objected to the admissability of much of the evidence; denied harboring any bias against the UFW; and directly challenged many of the facts adduced by the General Counsel.

1. Employer Free Speech. Taking the first two categories together, there is no question that--so long as there are no illegal threats or promises--an employer during the course of an election campaign has the right to indicate its preference for one union and its disfavor for another. The question raised by the evidence falling within these first two categories is not, therefore, whether such conduct is illegal, but whether it occurred and, if so, whether it is rendered inadmissable by §1155 of the Act which forbids the use of protected free speech as evidence of the commission of an unfair labor practice.

Section 1155 has been taken directly from Section 8(c)of the Labor Management Relations Act. There is' no reason (especially in view of §1148) why the precedent developed under 8(c) should not be followed. That precedent allows the use of protected statements and conduct, not as evidence of the commission of an unfair labor practice, but "to draw, the background of the controversy and place other nonverbal acts in a proper perspective." U.A.W. v. N.L.R.B. 363 F. 2d 702, 707 (D.C. Cir. 1966); Hendrix Mfg. Co. v. N.L.R.B., 321 P.. 2d 100 (5th Cir. 1963). Therefore, so long as such statements are used simply to explain and clarify other ambiguous conduct they are relevant and admissable.

Acosta and Barraza both testified to a number of statements made by their foremen to the effect that a vote for the UFW would not be to their benefit and that workers under Teamster agreements were making better wages. For reasons which will be discussed at greater length hereafter, I fully credit their

testimony in this regard and discredit the denial of such statements by Flores and Montano. Moreover, there is uncontradicted evidence establishing that the Teamsters were recognized by Sahara without proof of a majority; that there was a Teamster contract in force during the campaign, and that the Teamsters had done little to see to it that the terms of that agreement were carried out. All of this substantiates the inference that Sahara was much more favorably disposed toward the Teamsters than toward the UFW, and, therefore serves to corroborate the occurrance of the alleged statements.

2. The Wage Increase During the Campaign. Three or four weeks prior to the election and during the time that the employer was aware of the existence of an organizing drive by the UFW, a unilateral wage increase was put into effect under which workers received an additional 3 1/2 cents per box. This increase was not called for by the collective bargaining agreement; nor was it granted pursuant to any wage reopener. Never before had such an increase been given in January. The employer acknowledged that it came about because the UFW had been successful in negotiating an agreement for such an increase with another Imperial Valley grower, Interharvest.

The danger inherent in such pre-election favors has been clearly delineated by the United States Supreme Court:

> "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." N.L.R.B. v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

It is for this reason that the granting of such an increase during a campaign is enough, standing alone, to raise a presumption of a violation of Section 1153(a), which the employer must rebut. International Shoe Co., 123 N.L.R.B. 682 (1959). The justification offered by Sahara was the fear that, unless such an increase were granted, workers would likely walk off their jobs. However, when Sakata and Hausmann (one of the owners of Sahara) were questioned about the basis for their fears of a walk-out, they were unable to come forward either with evidence that such a walk-out had actually been threatened or with any but the sketchiest historical precedent for fearing such consequences. Moreover, these employees, it must be remembered, were working under a collective bargaining agreement containing a "No Strike" clause.

The justification offered is simply too weak to overcome the presumption that the increase was given in order to affect

the outcome of the election. This is reinforced by the background of favoritism for the Teamsters discussed above and by the anti-UFW conduct considered below. The conclusion is inescapable that Sahara did not want UFW organizers to be able to say that they had obtained better wages for their members than-Sahara was paying. Therefore, I find the granting of the wage increase is legitimate evidence which can be used in establishing anti-UFW motivation in dealing with Acosta and Barraza.1/

3. Threatening Statements and Conduct. Acosta and Barraza testified to a number of statements of Flores and Montano which go beyond the bounds of protected speech. According to Acosta and Barraza, workers .were told: "If the UFW wins, and the company plants lettuce, it will be harvested by machines and packing in the packing shed." "Only locals were working in t-he packing shed." "If the UFW wins, the company will plant alfalfa." In addition, Acosta testified that one day during the campaign Montano drove the crew to a packing shed in El Centro and, while, there, he offered to take them inside to see how the shed was being reconditioned so that, if the UFW won, the lettuce could be packed there rather than in the fields. This tied into other statements that if packing were taken out of the field and done in the sheds, the migrant workers who comprised the work complement would no longer be utilized, and their work would be given to U.S. residents.

The employer did not attempt to justify any of the above statements as legitimate predictions, rather than threats. Instead, it relied on the testimony of Flores and Montano, who denied they they had made such comments to workers. And so the issue once again reduces itself to the credibility to be afforded Acosta and Barraza, on the one hand, and Flores and Montano, on the other. For the reasons which are set out in the Discussion of the Issues hereafter, I credit fully Acosta arid Barraza and discredit Flores and Montano. I find, therefore, that the threats were made and that, like the unilateral wage increase, they maybe considered as evidence, albeit circumstantial, of the employer's motivation toward the two workers.

Finally, there was a great deal of testimony on both sides concerning privileges which were extended to Teamster Organizers but denied to those of the UFW. The evidence was so conflicting, and the status of the Teamsters [who were functioning both as collective bargaining representatives and as Organizers] is so ambiguous that I do not rely on this conduct either as background or as evidence of motivation.

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1/In this regard it should be noted that, unlike protected speech, this conduct can be considered actual evidence of motivation, not simply as helpful background.

D. The Failure to Re-Employ Acosta and Barraza

1. Refugio Acosta. Acosta testified that, after hearing from other workers that Sakata was hiring for the melon harvest in June, 19.76, he went to Rosita's on the day cutting was to begin and asked Flores for work. Flores told him that he could no longer give him work, but indicated that work would be available the following week. Acosta did not again seek re-employment during the melon season.

He testified that he again sought employment from Flores when Sakata began cutting lettuce in Arizona. He arrived at Rosita's Sunday afternoon, November 14th, with the clothing and belongings he needed for the week's stay in Arizona, and told Flores that he was ready to go to work. Flores told him that he would not be hired on.

After hearing from other workers that work in the Imperial Valley lettuce fields was beginning, Acosta testified that he presented himself to Flores for the third time on December 13, 1976, but was told he would not receive work because preference would be given to those who had worked the Arizona cutting. Flores indicated that he might possibly be hired in two weeks when the next crew was being readied. Acosta did not reapply because he felt that he was simply being given the run-around.

Flores testified that Acosta never approached him for work at any time either during the melon cutting in 1976 or during the lettuce season in 1976-77.

General Counsel produced Jose Carlos, an ALRB representative, who testified that he had interviewed Flores on January 31, 1977, about the case. Since Carlos had no present recollection of the interview, his past recollection properly recorded was introduced into evidence as General Counsel's Exhibit #2. Those notes contain the admission by Flores that Acosta had been refused employment for the melon cutting; that it was the employer's practice to give preference to those who had worked previously; and that persons with less previous experience had been hired on prior to Acosta's request. This evidence is admissable not only to cast doubt on Flores' testimony, but as direct evidence that Acosta had been refused work. Evidence Code §§770, 1235.

2. Rogelio Barraza. Barraza was hired in November, 1976, to cut lettuce in Arizona. He testified that after working three days the crew returned. He was feeling ill and when the following Sunday came he went to Rosita's and told Flores that he was too sick to return to Arizona. According to Barraza, Flores told him to take all the time he considered necessary to recover. He did not return the following Sunday because he heard that the season was almost over.

He testified that in Mid-December, 1976, after hearing from fellow workers that the Imperial Valley season had begun, he went to Rosita's and contacted Flores, but was told that there would be little work in December and that he should return in January, 1977. He testified that he did return on January 17th, after hearing that Sakata was again hiring. He went over to Flores' pickup truck,, but Flores ignored him and continued talking to another person. While there, he observed Flores hire a worker who had less previous experience with Sataka than he. Barraza testified that he tried again on January 19th, but was again refused by Flores without explanation.

Flores testified that Barraza did not tell him he would be unable to work in Arizona because of illness, but instead simply stated that he no longer wished to work "in the lettuce" He went on to deny that Barraza ever sought employment from him thereafter.

In rebuttal General Counsel produced Juan Corona, a fellow worker of Barraza's, who testified that he saw Barraza at Rosita's on two occasions in January, 1977, and that, on one of those occasions, he was present when Barraza asked Flores for work and was refused.

The determinative factor in evaluating the above evidence concerning the re-employment of Acosta and of Barraza is credibility. Who is to be believed: the two workers or their foreman? Because the credibility issue is so critical to the decision here, consideration of it is reserved for the Discussion of the Issues which follows.

3. Sakata's Hiring Policy and the Availability of Work During the 1976-77 Season. Sakata conceded that, while not formally required to do so, it was his policy to give preference in hiring to workers who had proven themselves capable in previous seasons. Both Acosta and Barraza had built up enough experience with Sakata to be considered part of his regular complement of seasonal workers.

In order to establish that a number of new or less senior workers were hired, on in 1976-77, General Counsel had Sakata review the "employee cards" which were kept on all workers employed during the year. While those cards do not conclusively establish how much previous experience each work had with Sakata, they do serve to establish that there were a number of persons working during the 1976-77 season with whom Sakata had less familiarity that he had with Acosta and Barraza. Given the fact that Sakata made it a practice to keep close tabs on his workers, it is fair to infer from this that workers were hired during the lettuce season who had less "seniority" than either Acosta or Barraza, and since Respondent did not produce any evidence to rebut this inference, I so find.

## DISCUSSIONS AND CONCLUSIONS

### I. The Status of Sahara Packing Company as the Responsible Employer

The threshold legal question raised by Respondent is whether and to what extent Sahara Packing is reponsible for the actions of George Sakata and his foremen. Sakata, in carrying out his functions as a labor contractor[2/], operates very much in the manner of an -independent contractor in traditional Agency law. Under the National Labor Relations Act this fact could have considerable effect on his principal's liability and responsibility. However, the definition of an "Agricultural Employer" as found in §1140.4(c) of the Agricultural Labor Relations Act alters the normal law of agency by specifically providing that:

> "The employer engaging such labor contractor . . . shall be deemed the employer for all purposes under the Act."

Thus the law which has grown up around the N.L.R.A. is inapplicable to the Agricultural Employer-Labor Contractor relationship; and Sahara must accept responsibility for the acts of Sakata and his foremen.[3/]

### II. The Legal Framework for Deciding Discrimination Cases

Section 1153*(c) is,* in applicable part, identical to Section 8(a)(3) of the National Labor Relations Act, as amended. Section 1148 requires the Board to follow applicable NLRA precedents. There are certainly no lack of precedents under Section S(a)(3). Indeed, if anything, it is the abundance of precedent which creates the problem. The meaning and interpretation of Section 8(a)(3) has been before the U.S. Supreme Court on at least eleven occasions since the Jones & Lauglin

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2/ The Respondent made no attempt to argue that Sakata was anything but a labor contractor or that he possessed any of the incidents which would remove him from that status and render him a "custom harvester". See Kotchevar Brothers, 2 ALRB No. 45 (1976).

3/ That Sahara is the employer here is given additional weight by the terms of the Teamster Contract which provides for the same result as the Act. Sakata, it will be recalled, specifically ratified that agreement.

decision in 1937.[4/] Those decisions cover the ambit of employer conduct which is arguably discriminatory: discharge of union adherents, lockouts, favoritism because of union membership, the right to go out of-business to avoid unionization, super-seniority for non-strikers, reduction of benefits to former strikers and the failure to rehire them. These decisions—perhaps because they involve such a variety of employer conduct—contain no consistent analysis of the meaning of Section 8(a)(3); instead each decision is marked by a shifting and recasting of the elements required to establish a violation. Most are further riddled with concurring and dissenting opinions , indicating that there still remain substantial differences as to the interpretation of the section. The current test is the one formulated by Chief Justice Warren in Great Dane Trailers, Inc.:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. 'Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight' an anti-union motivation must be proved to sustain the charge 'if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[1]" 388 U.S. at 34.

This test is useful in focusing on the sort of conduct which can be seen as having aspects of business justification while, at the same time, having a substantial adverse impact on employee rights. Super-seniority for non-strikers is a good example. But when it is applied to other sorts of cases, it is not very helpful, primarily because the categories "inherently destructive"

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[4/] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) ; Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); Truck Drivers Local 449 v. NLRB (Buffalo Linen Supply Co.), 353 U.S.. 87 (1957); American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964): Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263 (1965); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

and "comparatively slight" are too nebulous. "It. is doubtful, for example, that the Chief Justice intended that a discharge of a union adherent would be overturned without proof of anti-union motivation and in the face of business considerations. Yet it is difficult to say such a discharge is not "inherently" destructive" of employee rights, and consign it to the category, of "comparatively slight".

An analysis has been suggested which is more helpful in cases involving discharges, but which likewise takes into account the variety of situations in which discrimination questions arise and will continue to arise. In addition, it does rationalize the many precedents which do exist in this area of the law5/.

Under this analysis the first question to be asked is: What business interest does the employer appeal to in seeking to justify conduct which adversely affects or tends to affect the right of employees to join, sympathize with or engage in activities in support of a union? The next inquiry is: Is that interest the real reason for the conduct or is it a pre-texts, And the final question is: If the reason offered is the actual reason, does the societal interest in allowing employers to further their business interests by such conduct outweigh the harm which that conduct inflicts on the ability of workers to pursue the legitimate and important goal of forming and maintaining unions.

This third inquiry can be very important in some contexts--the use of the lockout, super-seniority for non-strikers, and so on--but it is not especially important in individual hiring or discipline situations like those at issue here; for, in such cases the employer generally is appealing to an interest which all would acknowledge he is entitled to pursue. Here, for instance, no one would claim that Respondent had to seek out Acosta and Barraza if they had failed, as Flores claims, even to request re-employment.

The inquiry that is important to this case and ones like it is the second one: Is the reason advanced by the employer the real reason, or is his conduct the result of wanting to punish or deter workers for engaging in activities in support of unionization? Notice that such an inquiry involves, almost inevitably, the issue of motivation, something which is not at all germane to the balancing test which terminates the

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5/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).

analysis[6/].

But does this analysis speak to the important question of how the burdens of producing and going forward with the evidence are to be allocated?

It does, and to see how it does, it is necessary to return to the first inquiry: What business justification does the employer appeal to in seeking to justify conduct which adversely affects or tends to affect the right of employees to join, sympathize with, or engage in activities in support of a union. Obviously, the starting point is: Conduct which adversely affects union membership, sympathy or activity. And that is the initial burden on the General Counsel: It must produce substantial evidence of conduct which interferes with union membership, sympathy or activity. In most cases this entails proof that the discriminatee was engaged in (1) union activity, (2) that the employer was aware of it, and (3) that adverse action was taken against the worker. Once this has been established, then the employer must come forward with some justification for his action; namely, that he was pursuing a legitimate business interest. NLRB v Great Dane Trailers, 388 U.S. at 34. At which point the General Counsel must rebut this either (a) by offering substantial evidence that the asserted interest was a pretext and the employer was actually motivated by hostility toward unionization and/or (b) by accepting the justification offered and establishing that, even if it was not pretextural, the societal interest in allowing the employer to further his business interest by such conduct does not outweigh the harm which that conduct inflicts on the ability of workers to pursue the legitimate and important goal of forming and maintaining a union.

II. Discussion of the Issues.

Applying this analysis to the facts of the case, it is clear that both Acosta and Barraza were active in the UFW campaign and Respondent knew it. "There is, however, the question of whether Respondent did, in fact, take any adverse action against them; i.e., did they ever actually apply for re-employment? Unless such adverse action is first established, the General Counsel has not made out a prima facie case and the question of business justification will not even be reached. This issue, as was noted earlier, depends on who is to be believed: Acosta and Barraza or Flores and, to a lesser extent, Montano.

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[6/]The chief virtue of this test is that it consigns motivation to a specific place, rather than allowing it to color-- and very often confuse--every element of the alleged violation.

I find, for a number of reasons, that Acosta and Barraza are to be believed and Flores and Montano are not. First of all, there is the general demeanor which I had the opportunity to observe while they were testifying. Flores' testimony was marked by a noticeable guardedness and a general reluctance to come forward with information on crucial issues. Some portions of his testimony--a good example being his awareness of the activities of the UFW in the Imperial Valley and of the organizing activities of Acosta and Barraza—I found inherently unbelievable 7/. Furthermore, his testimony concerning Acosta's failure to seek employment during the 1976 Melon harvest was effectively impeached by Jose Carles' notes of his prior inconsistent statements. His testimony concerning Barraza's attempt to gain employment in January, 1977, was effectively contradicted by Juan Corona, a witness who had nothing to gain and who impressed me as honest and straightforward in his testimony. All of this is further reinforced when Flores' demeanor is contrasted with that of Acosta and Barraza. Both were open and cooperative in testifying, and showed none of Flores' reluctance, guardedness and covert hostility to questionings 8/. I therefore conclude that he is not to be believed and, in those areas where there is conflict between his testimony and that of the witnesses produced, by, the General Counsel, their evidence is to be accepted.

While Montano's demeanor was not as palpably revealing as Flores', he nevertheless showed, albeit to a lesser degree, the same guardedness and reluctance in testifying. I likewise find his claimed ignorance of the UFW and of Acosta's and Barraza's activities on its behalf in herently unbelievable. Nor does his testimonial demeanor compare favorably with that of the

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7/ This is underscored by the fact that Sakata, who had even less exposure to the union activities of Acosta and Barraza, had no trouble in recognizing what was going on and was even able to pinpoint the relative involvement of the two.

8/ Respondent argues that Acosta’s and Barraza's testimony should be discounted by the fact that they have a stake in the outcome of these proceedings and because, as UFW partisans, their ability to view facts objectively is impaired. I did not observe these factors to have affected their testimony: their recollection did not appear distorted, they both testified as to facts which would not necessarily have been favorable to their cases, and they were not hostile to Respondent's probings in cross examination.

two workers. For this reason I likewise conclude that where there is conflict between his evidence and that offered by the General Counsel, it is the General Counsel's witnesses who are to be believed.

General Counsel, therefore, has made out a prima facie case. Acosta and Barraza were engaged in UFW organizational activities, Respondent knew it, and they did seek and were refused re-employment.

It is incumbent on the employer, then, to come forward with a legitimate explanation for its actions. Respondent sought to meet this burden by pointing out: (1) that the refusal of re-employment occurred months after the election at a time when UFW activity could no longer have represented a threat to the employer, and (2) that other UFW supporters were re-employed and, in fact, Barraza did work in November, 197-6.

While the timing of employer actions can be an important factor in determining motivation, it is one which must be seen in context. Barraza and Acosta finished out the lettuce season. But the completion of that season cannot serve to insulate the employer from charges; especially where, as here, the first opportunity which would not raise an almost irrefutable inference of discrimination occurred, with respect to Acosta, when he sought work fir the Melon harvest. In Barraza's case, since it did not appear to be his practice-to work in that harvest, the first opportunity was in November. The fact that he was briefly re-employed attenuates matters only slightly, since his illness and denial of re-employment followed his hiring so closely. In other words, in the context of this case, it would be misleading to place undue emphasis on the time periods involved and forget that, in seasonal employment, re-employment is generally the first opportunity for more subtle discrimination to occur. As for the argument that Acosta and Barraza no longer posed a threat, the simple answer is that, as long as objections were either possible or pending, there existed the possibility of a new election where they would be a threat. But even if matters had proceeded to a point where the. UFW was completely out of the picture, retaliation for protected activity remains a possible explanation for employer behavior.

Turning to Respondent's second argument, it is true that three other known UFW supporters--Padilla, Calzada and Castel-lanos—were re-employed. It is also true that Acosta was acknowledged as being far more active than they and that Barraza was considered slightly more active. It is not necessary that every union activist be punished before adverse action toward any particular one will be found illegal. Given their relative

involvement, it would be just as reasonable to infer that the employer saw that the goal of deterring or chilling UFW support could be achieved with less risk and just as effectively by getting rid of the two most active union adherents. That the employer was thinking along the lines of minimizing risks and eliminating only key union activists helps explain the Barraza situation: he was re-employed for three days, but when he became ill and had to leave off work 9/, the employer saw an oppourtunity to eliminate him as well as Acosta.

But the real gap in Respondent's attempt to establish a legitimate justification for its actions is its complete failure to come forward with any evidence to explain why it was that--contrary to its stated policy--two capable, experienced employees who had a long work record with Sakata, were refused employment and their jobs given, instead, to workers with whom the Respondent had little or no previous experience.

While this crucial, unexplained behavior on the part of Respondent would be enough on which to premise a finding of discrimination, when it is interpreted against a background of favoritism toward the Teamsters and hostility toward the UFW, and when the unlawful wage increase, the threathening statements and conduct, and the lack of candor and credibility on the part of the foreman who refused to re-hire Acosta and Barraza 10/ are placed beside it on the scales, there can be no doubt but that the refusals to rehire were unlawful.

III. Conclusion and Recommended Remedy.

Based on the above, I therefore conclude that the Respondent violated §1153(c) and, derivatively, §1153(a) of the Act by failing to hire Refugio Acosta during the 1976 melon harvest and the 1976-77 lettuce harvest. I likewise conclude that the same sections were violated by Respondent's refusal to re-hire Rogelio Barraza for the 1976-77 Imperial Valley lettuce harvest.

The purposes of the Act will best be effectuated by the following recommended remedy:

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9/ For the reasons already stated, I credit Barraza's and not Flores' explanation of why he left off work in November, 1976.

10/ Respondent makes one other argument: that Flores' actions are isolated incidents, contrary to Respondent's specific instructions. The "isolated incident" theory has been almost exclusively confined to statements and not to conduct; certainly not to conduct which deprives workers of employment. Besides which--inview of the wage increase and the other factors mentioned above--Flores' actions can hardly be characterized as "isolated."

1. Acosta and Barraza shall receive back pay, together with interest at the rate of 7% per annum, from the date they were first refused re-employment and for each season for which it was their practice to work for Respondent's Labor Contractor George Sakata. In the case of Acosta this would begin with the 1976 melon harvest and begin again on December 13, 1976 of the 1976-77 lettuce season, and it would include every melon and lettuce harvest thereafter until he is offered full reinstatement. In the case of Barraza back pay whould begin January 17, 1977 and would include that harvest and each lettuce harvest thereafter until the date he is offered full reinstatement. The computation shall be made as provided in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

2. Acosta and Barraza shall at once be offered full reinstatement to their former jobs. With respect to Acosta, if there is no season in progress on the effective date of the Order, then he shall be offered reinstatement at the beginning of the next following season, be it melon or lettuce. With respect to Barraza, if there is no lettuce season in progress on the effective date of the Order, then he shall be offered reinstatement at the beginning of $he next following lettuce harvest.

3. The attached Notice to Employees is to be translated into Spanish and copies shall be posted in conspicious places on Respondent's property during the next melon season and the next lettuce season for the full term of each such season; except that if either season is in progress when this Order becomes effective, it shall be posted forwith for the remainder of that season and during the following season for the other crop.

4. Respondent shall mail a copy of such Notice, in English and in Spanish to the last known home address of each and every worker employed by Respondent's Labor Contractor Sakata during the 1976 Melon harvest and during the 1976-77 lettuce harvest; and Respondent shall give a copy of such Notice, in English and in Spanish, to each worker hired in the next melon harvest and the next lettuce harvest at the time of hiring or within two (2) days thereafter; except that if either season is in progress when this Order becomes effective, each current worker and each worker hired threafter shall be given a copy and each worker hired for the following, season for the other crop shall be given a copy.

5. Respondent or its Labor Contractor Sakata, or their representative, shall, in the presence of an ALRB Agent, cause to be read in Spanish and in English said Notice to Employees. This reading shall occur near the beginning (but after the substantial complement of workers have been hired), for the

next lettuce harvest and the next melon harvest; except that if either season is in progress when this Order becomes effective it shall be read forthwith in that season and then at the beginning of the following season for the other crop. After such readings the ALRB Agent shall be afforded the opportununity to answer questions, outside the presense of the Respondent, its Labor Contractor and supervisors, which the employees might have concerning their rights under the Notice and the Act.

5. Finally, Respondent and its Labor Contractor George Sakata shall make such periodic reports to the Board, under penalty of perjury, as the Board deems necessary to satisfy itself of compliance with this Order.

The remedial action contained in Paragraphs 3 and 4, I find necessary based on conditions among farmworkers and in the agricultural industry as set forth in Samuel S. Vener, Co. , 1 ALRB No, 10 (1975) , and Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

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

## ORDER

Respondent Sahara Packing Company, its officers, agents, successors, and assigns, and including its Labor Contractor George Sakata, his agents, successors and assigns, shall:

1. Cease and desist from:

a. Discouraging membership in or activities on behalf of the United Farm Workers or any other labor organization by unlawfully refusing to hire or re-hire, by discharging or by laying off employees, or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code §1153(c).

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 chosing, 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 the type of which is authorized by Section 1153(c) of the Act.

2. Take the following affirmative action:

a. Post copies of the attached notice in Spanish and English in a conspicuous place or places on Respondent's property, as determined by the regional director. Posting shall occur throughout the next melon harvest and the next lettuce harvest; except that if either harvest is in progress when this Oreder becomes effective, it shall be posted forthwith for the remainder of that season and throughout the following season for the other crop . Copies shall be furnished by the regional director and Respondent shall exercise due care to replace any notice which has been altered, defaced or removed.

b. Mail copies of such notice in English and in Spanish to the last known address of each worker employed by Respondent's Labor Contractor Sakata during the 1976 Melon harvest and during the 1976-77 lettuce harvest; and give a copy of such notice in English and in Spanish to each worker hired during the next melon harvest and the next lettuce harvest at hiring or within two (2) days thereafter; except that if either season is in progress when this Order becomes effective, each current worker and each worker hired thereafter during such harvest shall be given a copy and each worker hired for the following season for the other crop shall be given a copy.

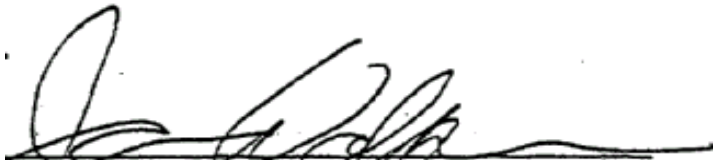
c. Have the notice read in English and Spanish by Respondent or its Labor Contractor Sakata, or their representative, in the presense of an ALRB Agent, at a time to be determined by the Regional Director near the beginning of the next lettuce harvest and the next melon harvest; except that if either season is in progress when this Order becomes effective, it shall be read forthwith during that season and then at the beginning of the following season for the other crop. After such readings the ALRB Agent shall be afforded the opportunity to answer questions, outside the presense of the Respondent, its Labor Contractor and supervisors, which the employees might have concerning their rights under the notice and the Act.

d. Immediately offer Refugio Acosta and Rogelio Barraza reinstatement to their former or substantialy equivalent jobs without prejudice to their seniority or other rights and privileges on the following terms: with respect to Acosta, if their is no season in progress on the effective date of this Order, then he shall be offered reinstatement at the beginning of the next following season, be it melon or lettuce. With respect to Barraza, if there is no lettuce season in progress on the effective date of this Order, then he shall be offered reinstatement at the beginning of the next following lettuce harvest.

e. Make Refugio Acosta and Rogelio Barraza whole for any losses they may have suffered as a result of the discrimination against them by paying them back pay, together with interest at the rate of 7% per annum, from the date they were first refused re-employment and for each season which they would have worked thereafter for Respondent's Labor Contractor Sakata. In the case of Acosta this would begin with the 1976 melon harvest and begin again on December 13, 1976 with the 1976-77 lettuce season, and it would include every melon and lettuce harvest thereafter until he is offered full reinstatement. In the case of Bariraza, this would begin January 17, 1977 and would include that harvest and each lettuce harvest thereafter until the date he is offered full reinstatement. Back pay shall be computed as provided in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

f. Notify the regional director, in writing, within 20 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, notify him, under penalty of perjury, periodically thereafter, in writing, of what further steps have been taken to comply with this Order.

Dated: December 17, 1977.



JAMES WOLPMAN, ADMINISTRATIVE
LAW OFFICER

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 interfered with the right of workers not to be discriminated against for their Union membership, sympathies or activites. The Board has told us to distribute and read this Notice:

We will do what the Board has ordered, and also tell you that:

The Agricultural labor Realtions act is a law that gives all firm 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:

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

WE WILL NOT refuse to rehire you because of your membership sympathies or activities on behalf of the United Farm Workers or any other Union

WE WILL OFFER Refugio Acosta and Rogelio Barraza their jobs back and pay them any money they lost because we didn't rehire. them.

FINALLY, we recognize that the Agricultural Labor Relations Act is the law in California. If you have any questions about your rights under the Act, you can ask an agent of the Board. The nearest Board Office is at_____and its phone number is _____

Dated:

SAHARA PACKING COMPANY

By _____
Representative Title

GEORGE SAKATA

_____
(Signature of George Sakata)

This is an official Notice of the Agricultural Labor Relations Board, an agency of, the State of California

DO NOT REMOVE OR MUTILATE.