Earlimart, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

M. B. ZANINOVICH, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 76-CE-48-F 4 ALRB No. 70

DECISION AND ORDER

On December 30, 1977, Administrative Law Officer (ALO) Morton P. Cohen issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party and the General Counsel each filed exceptions and a supporting brief, and Respondent and the General Counsel each filed a reply brief.

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.

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, to the extent consistent herewith, and to adopt his recommended Order, as modified herein.

Three of the six alleged discriminatees in this case, hereinafter called the settlement employees,[1/] were beneficiaries

[1/]Abdo M. Aldafari, Mohamed M. Aldafari, and Abdo Mosleh.

of a settlement agreement which Respondent entered into during the year prior to the instant proceedings. The ALO found that the remaining three alleged discriminatees, hereinafter called the nonsettlement employees,[2/] had been denied reemployment by Respondent because of their relationship with the three who had participated in the settlement.

Respondent excepted to the ALO's conclusion that the nonsettlement employees were denied reemployment. We find merit in this exception. The only testimony in support of that conclusion was given by one of the nonsettlement employees, Thabet Aldafari. He testified that he and his father, Mosleh Aldafari, went to Respondent's office, two days after all six of the employees had applied there,[3/] and that his father was informed by Respondent's ranch manager, Phil Maxwell, that there was no work. Thabet also testified that his brother Mohamed subsequently went to see Maxwell and reported back to Thabet that no work was available at that time but that Thabet and his father should apply later.

Maxwell testified that Mosleh Aldafari and another person — the record indicates it was Thabet -- came to Respondent's office, two or three days after all six employees had been there, and were told by Maxwell that he still had not had a chance to check the records and that they should return

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[2/]Thabet Aldafari, Mosleh Aldafari, and Abdo A. Aldafari.

[3/]On that occasion Maxwell told Mosleh Aldafari and Mohamed M. Aldafari that he would check the applicants' eligibility for employment and that they should return in two or three days.

in one or two days. Two days later, Mohamed appeared at the office. On that occasion, according to the testimony of both Maxwell and Mohamed, Maxwell declined to hire the three settlement employees, but said that the other three should return for possible hiring. However, none of the three nonsettlement employees returned thereafter, according to Maxwell's testimony.

Even if Thabet and Mosleh were in effect advised, on the occasion of their visit to Maxwell, that there was no work then available for them, it *is* clear from other testimony that Maxwell, in his later conversation with Mohamed, encouraged the nonsettlement employees to apply later for rehire. Although Mohamed conveyed that message to Thabet, the nonsettlement employees did not thereafter apply for work. On this record, therefore, there is insufficient evidence to support the ALO's finding that the three nonsettlement employees were denied reemployment with Respondent.

With regard to the three settlement employees, the ALO concluded that they had been denied reemployment in violation of Section 1153 (a). We reach the same conclusion, but on the basis of somewhat different reasoning.

The Respondent contends that under its seniority system, a seasonal employee who fails to respond to a written recall to work loses all seniority and will be rehired only after other employees with seniority and first-time applicants have been hired. The Respondent states that the intent of this "negative seniority" system is to encourage experienced former employees to return when they are needed each year and to

provide an orderly and even-handed method for Respondent's use in hiring and layoffs. The Respondent chose to treat the settlement agreement as being equivalent to a written recall offer. Because it was not acted upon by the three settlement employees, the Respondent assigned them negative seniority, that is, relegated them to a hiring status below that of applicants who had never before worked for this employer.

The ALO concluded that because of these individuals' lack of knowledge of the terms of the settlement agreement, a reasonable period of time for seeking reinstatement had not elapsed at the time they presented themselves for reemployment. In our view, irrespective of whether the terms of the settlement agreement were still in effect when the three employees presented themselves for reemployment, Respondent violated Section 1153(a) of the Act by assigning them "negative seniority", in effect penalizing these employees for their participation in Board processes. Regardless of the motivation for this application of Respondent's personnel rules, we conclude that, in the circumstances of this case, assigning negative seniority to these workers constitutes conduct which is "inherently destructive of important employee rights" protected by the Act, and therefore violates Section 1153 (a). NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967).

General Counsel and the Charging Party argue that Respondent should also be found in violation of Section 1153(c) and Section 1153(d) for its refusal to hire the three settlement workers. As such findings would not affect our remedial Order

in this case, we need not make such a determination.

Having concluded that Respondent violated Section 1153 (a) of the Act as to the settlement employees, we shall order that Respondent grant reinstatement with back pay to Abdo M. Aldafari, Mohamed M. Aldafari, and Abdo Mosleh. The allegations in the complaint as to the nonsettlement employees are hereby dismissed.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, M. 3. Zaninovich, Inc., its officers, agents, and successors and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to rehire or reinstate former employees because of their efforts to redress union-related grievances through the processes of the ALRB.

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

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Mohamed M. Aldafari, Abdo M. Aldafari and Abdo Mosleh immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges. Said offer shall remain in effect until the end of Respondent's harvest season in 1979.

(b) Reimburse Mohamed M. Aldafari, Abdo M. Aldafari and Abdo Mosleh for any less of earnings and other economic losses they may have suffered as a result of Respondent's refusal to rehire them in August, 1976, from the date of such refusal to rehire to the date on which they are offered reinstatement, together with interest thereon at the rate of seven percent per annum, computed in accordance with the formula set forth in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

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

(d) Sign the Notice to Employees attached hereto and, after the said Notice is translated by the Regional Director into Yemeni and other appropriate languages, provide sufficient numbers of the said Notice in each language for the purposes set forth hereinafter.

(e) Within 30 days from receipt of this Order, mail a copy of the attached Notice in appropriate languages to each of the employees on its payroll during the 1976 harvest season.

(f) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including Respondent's offices at Earlimart, California, and places where notices to employees are usually posted, for a

90-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, covered or removed.

(g) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate *of* compensation to be paid by Respondent to all nonhourly-wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps Respondent has taken in order to comply with this Order.

Dated: October 11, 1978

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

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

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

(1) To organize themselves;

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

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

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

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

this is true, we promise that:

We will not do anything in the future that forces you to do, _or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT do anything which penalizes you for getting help from the Agricultural Labor Relations Board in protecting your legal rights.

WE WILL offer Mohamed M. Aldafari, Abdo M. Aldafari and Abdo Mosleh their old jobs back, and we will pay them any money they lost because we refused to rehire them in August 1976.

Dated:

M. B. ZANINOVICH, INC.

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

M. B. Zaninovich, Inc. (UFW) 76-CE-48-F
4 ALRB No. 70

ALO DECISION

Six former employees of Respondent, mostly a family group, sought reemployment several weeks after the beginning of Respondent's 1976 harvest. Three of them were subject to an ALRB settlement agreement, entered into in late 1975, whereby they were to receive reinstatement and back pay from Respondent. Although the three received their back pay through ALRB agents, they were not informed that they were entitled to reinstatement and were to use a certain procedure to obtain it.

Respondent has a seniority system whereby workers who do not respond to a recall to work lose their seniority. Even applicants who have never before worked for Respondent are given priority over former employees with broken seniority.

The ALO found: that Respondent knew of the connection between the settlement group and the nonsettlement group; that the settlement group was subject to Respondent's aforesaid seniority policy on the grounds that they did not respond to a recall to work; that the nonsettlement group was told to return for possible employment and was later informed by Respondent that no work was available; and that Respondent was doing substantial hiring at the time the six applied.

The ALO concluded: that Respondent did not rehire the three nonsettlement workers because of their connection with the three who participated in the settlement, and in so doing acted out of anti-union animus; that although the settlement workers were refused employment because of business reasons, no reasonable time period for seeking reinstatement had elapsed, as the settlement workers were not informed of their reinstatement rights, and therefore Respondent's treatment of those workers had an inherently intimidating impact on them. The ALO concluded that Respondent violated Section 1153 (c) and (a) as to the nonsettlement workers and Section 1153 (a) as to the settlement workers.

BOARD DECISION

The Board overturned the ALO's finding that the nonsettlement workers had been denied reemployment with Respondent. It found that Respondent encouraged these workers to return later for rehire but none of them did. Accordingly, the allegations as to the nonsettlement employees were dismissed.

With regard to the settlement employees, the Board agreed that Respondent had violated Section 1153 (a) by its refusal to rehire them. Applying "negative seniority" to settlement employees who had not received a routine recall to work or the reinstatement offer provided in the prior settlement agreement was held to be conduct "inherently destructive of important employee rights" protected by the Act since, in effect, it penalized those workers for their participation in Board processes.

REMEDY

Respondent was ordered to grant reinstatement with back pay to the three workers involved in the settlement and to comply with the standard remedial provisions with respect to posting, mailing, distributing and reading an appropriate Notice to Employees.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of M.B. ZANINOVICH, INC., RESPONDENT, -and- UNITED FARM WORKERS OF AMERICA, AFL-CIO, CHARGING PARTY.	CASE NO. 76-CE-48-F DECISION OF ADMINISTRATIVE LAW OFFICER

Appearances:

For the General Counsel of the Agricultural Labor Relations Board, Edwin F. Lowry, Esq., Agricultural Labor Relations Board, 627 Main Street, Delano, California 93215.

For Respondent M. B. ZANINOVICH, INC., Jay V. Jory, Esq., Thomas, Snell, Jamison, Russell, Williamson, and Asperger, 10th Floor, Fresno's Townehouse, Fresno, California 93721.

For Charging Party UNITED FARM WORKERS OF AMERICA, AFL-CIO, Michael C. Blank, United Farm Workers of America, P.O. Box 130, Delano, California 93215.

Decision:

By MORTON P. COHEN, Administrative Law Officer.

This case was heard before me in Delano, California on August 3, 9, 10, 11, 12, 1977, and in Oakland, California on August 23, 1977. Post-hearing briefs on behalf of the General Counsel and Respondent were submitted on September 22, 1977, and a rebuttal brief was submitted by Respondent on October 5, 1977.

The complaint, dated April 28, 1977, is based on written charges made on August 25, 1976, and amended in writing April 6, 1977 by the UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereafter UFW), charging M. B. ZANINOVICH, INC. (hereafter RESPONDENT), with committing unfair labor practices in violation of Section 1153 sub. a, b, c, d of the Agricultural Labor Relations Act (hereafter: ALRA). The resultant complaint charged violations of Section 1153; sub. a and c of the ALRA. The alleged discriminatees included Mohamed M. Aldafari, Abdo Ahmed Mosleh, Abdo M. Aldafari, Thabet Aldafari, Abdo A. Aldafari, and Mosleh Aldafari.

RESPONDENT served its answer to the complaint on May 6, 1977, admitting that RESPONDENT is a California corporation engaged in agriculture in Kern and Tulare counties, and that Phil Maxwell, Mohamed Abdulla and Saif H. Ahmed are ranch manager, supervisor and foreman respectively for RESPONDENT. Otherwise, RESPONDENT denied all material aspects of the complaint. No affirmative defenses were raised.

At the outset of the hearing, motion was made by the representative of the UFW for full intervention, and said motion was, granted. Full opportunity was given to all parties to call, examine and cross-examine witnesses and introduce exhibits at the hearing. All documents entered into evidence have been included herein and are being transmitted to the Agricultural Labor Rela-

tions Board (hereafter ALRB) together with this decision.

Upon consideration of the testimony of witnesses, the credibility thereof, the documentary evidence produced at the hearing, review of the transcripts, review of the briefs, and review of the applicable law, I hereby make the following findings of fact, conclusions of law, and proposed order:

I

JURISDICTION

RESPONDENT is a corporation engaged in agriculture in the counties of Kern and Tulare, State of California, and is an agricultural employer within the meaning of Section 1140. 4(c) of the ALRA.

Charging Party, UFW, is a labor organization within the meaning of Section 1140. 4(f) of the ALRA.

II

ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that on or about August 11, 1976, RESPONDENT "established, implemented and otherwise enforced a discriminatory hiring policy which was designed to and did in fact result in the refusal to hire and re-hire workers because of their participation in settlement proceedings with the Board and their support of and activities on behalf of the UFW." (Complaint, paragraph 4(a), GC Ex, #1-C) Such activity was alleged to be in violation of Section 1153(a) and (c) of the ALRA.

At the hearing, General Counsel sought co amend the complaint (Transcript, pages 926-3) to include a charge of an unfair labor practice for failing to obey the settlement agreement entered into between RESPONDENT and the ALRS on October 31, 1975 (GC Ex. #5) and approved by the ALRB on November 7, 1975 (GC Ex. #6). Decision was reserved on the motion.

III

HISTORY

RESPONDENT is involved in raising table grapes. During December and January of any year, little work goes on, as the harvest has ended. Thereafter, pruning occurs. In late March through April, a process of cutting wild shoulders occurs and in late April and early May, leaf-pulling is done. In May and June, certain types of grapes are girdled, tipped and thinned, which process goes on into July (TR, page 601). Thereafter, from July to November, the harvesting is done. Peak hiring occurs during the harvesting period (TR, pages 602-603).

RESPONDENT'S hiring process operates through a seniority system wherein hiring preference is given to persons who have been previously employed without quitting, being fired, or failing to report after being contacted for work (TR, pages 613-619). In cases where people who have worked before are contacted and return to work, hiring is done by foremen or crew bosses, but if a firing, quitting, or failure to report has occurred and the person seeks to return, P. Maxwell does the hiring (TR, page 621). RESPONDENT employs seven or eight crews, and a total of about seven to eight hundred people at peak times (TR, page 626). During the period of August 10, 1976 to August 31, 1976, a total of eleven people were hired on the crew on which the alleged discriminatees had worked in the past, i.e. "O" crew, only one of whom had any seniority (TR, page 682). "O" crew was made up of Yemeni

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IV

FINDINGS OF FACT

On October 31, 1975, an agreement was entered into between RESPONDENT and representatives of the ALRB (GC Ex. #5). That agreement, insofar as pertinent herein, states as follows:

> The Respondent, M. B. Zaninovich, Inc., its officers, agents, successors and assigns, shall:
>
> 6. A. Cease and desist from:
>
> (3) Refusing to hire, rehire or fire or take any reprisal on any employee because he or she is a "CHAVISTA" or a supporter of any union.
>
> B. Take the following affirmative action to effectuate the policies of the Agricultural Labor Relations Act:
>
> (1) Offer to rehire and reinstate the following employees to their former jobs ... (2) Abdo M. Aldafari; (3) Mohamed M. Aldafari; ... (6) Abdo Musleh; ... .
>
> 8. The California court of competent jurisdiction may, upon application of the Board, enter its judgment enforcing the Order of the Board in the form set forth in paragraph 6 hereof. The Respondent waives all defense to the entry" of that judgment and waives its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words and figures set forth in paragraph 6 hereof. However, the Respondent reserves its right to raise any and all defenses it may have to any subsequent enforcement of that judgment by contempt proceedings. The Respondent shall be required to comply with the affirmative provisions of the Board's Order after the entry of that judgment only to the extent that it has not already done so.

> 9. The execution of this Stipulation does not constitute an admission that the Agricultural Labor Relations Act has been violated.
>
> 10. This Stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal or otherwise, which varies, alters or adds to it.
>
> (GC Ex. #5, pages 2-5, 6)

During and after the negotiations concerning the agreement subsequently approved by the ALRB, discussions were held as to the method by which the various persons whose jobs were to be reinstated were to be located. Letters were exchanged between representatives of the ALRB and RESPONDENT wherein the ALRB agreed that:

> As to each employee who desires reinstatement and is entitled thereto as indicated above, he will be advised by a Board Asent that he is to contact directly, "Elaine" at the Company office located 1/2 mile South of Avenue 24 on Road 154 in Tulare County. "Elaine" will have been instructed by your client to immediately rehire each of the employees who have been so identified.
>
> (Respondent's Exhibit #8, page 3)
>
> Per our agreement, those seeking reinstatement will contact "Elaine" at the "MBZ" offices. In addition, we will inform you as soon as possible regarding the desire of the subject employee.
>
> (GC Ex. #4)

Subsequently, and during the exchange of correspondence concerning the locating of employees, and their desire to return to work, efforts were being made to locate the employees, of whom none of the three involved as alleged discriminatees herein were then living on property owned by RESPONDENT herein.

Said efforts were made with great difficulty (TR, page 931). The expectation according to Mr. Kalkstein was that, when located, "They would be coming back to work right away or at the I next function that was going on at your clients (sic) farm which vaguely recall was pruning ..." (TR, page 932). Fred Lopez, a Board Agent, was given the responsibility of contacting the workers, having informed an attorney for RESPONDENT that Lopez would contact RESPONDENT to let them know which workers wanted to return to work (TR, page 973). Thereafter, Lopez went into the hospital and transferred the responsibility for locating the workers to Jack Matalka, a Board Agent who spoke Arabic. Lopez never contacted RESPONDENT regarding which workers sought reinstatement

Jack Matalka contacted one of the three alleged discriminatees involved in the settlement and the instant matter, this being Abdo Mosleh (TR, page 826), and also contacted another employee not involved in the instant case. Matalka had never been told how the workers were to seek to gain reinstatement and so he never told such workers that they were to contact a particular employee with RESPONDENT, namely "Elaine" (TR, page 823). Thus, although each of the three alleged discriminatees named in the settlement indicated by declaration dated between December 1975 and January 1976 that each wanted to return to work with RESPONDENT

(RES. Ex. #l, 6, 7), none were ever told how to go about seeking such reinstatement according to the exchange of letters between the ALRB and the RESPONDENT.

Nevertheless, one of the alleged discriminatees, M charred M. Aldafari, did contact RESPONDENT after October of 1975 and ask for work (TR, pases 123, 153). Mohamed M. Aldafari asked only for work for himself, having done so from the UFW office in Delano California (TR, page 513). At the time he spoke with an unidentified woman, identified himself by name, and was told there was no work. This was at a time when the RESPONDENT has its fewest employees and does the least amount of hiring (TR, page 707). None of the other alleged discriminatees sought such employment actively.

Between December 1975 and August 1976, the six alleged discriminatees performed various tasks unrelated to RESPONDENT. In early August 1976, all six worked together for Elmco, another grape grower in the Delano area. In July 1976, all six were unemployed (TR, page 269). Earlier, Thabet Aldafari, Abdo Mosleh and Mohamed A. Aldafari worked for Tri-Valley Growers (TR, page 299). At another point these three worked at M&R Growers (TR, page 227). A grocery store in Tracy, California, owned and operated by Mosleh Aldafari, Thabet Aldafari and Mohamed M. Aldafari, was worked by various of the three during the period in question (TR, page 477). In March and April 1976, Abdo Mosleh, Abdo M. Aldafari, Mohamed M. Aldafari and Abdo A. Aldafari, worked in asparagus while Mosleh Aldafari worked the grocery store (TR, pages 480-481). The store was sold in July 1976 (TR, page 477).

Prior to the settlement in Question, all of the six had

worked intermittently for RESPONDENT (TR, pages 607-612). In 1975, all six worked approximately from June 13 to September In 1974, at least five of the six worked during July through September together, there being no records for the sixth, and four stayed until November. In 1973, four of the six worked from August 15 until November 7. Before that, Mohamed M. Aldafari had worked doing pruning in the period between the end of 1971 and the beginning of 1972 (TR, page 111). Thabet Aldafari had worked during December of 1971 and January and February of 1972 (TR, page 610). Mosleh Aldafari had worked from May to December 1971 and January into February 1972 (TR, page 612).

In August 1976, the six alleged discriminatees were temporarily laid off at Eltnco between the end of the white grape harvest season and the beginning of the red grape harvest season (TR, Pags 228). At this point, the alleged discriminatees decided to seek employment with RESPONDENT.

There is a series of inconsistencies as to the testimony at this point in the chronology. The alleged discriminatees, whose testimony is virtually identical on material points, stated that the six went together to Phil Maxwell, the person at RESPONDENT responsible for hiring, at RESPONDENT'S Earlirnart office during August 1976 (TR, pages 135, 187, 200). Mohamed M. Aldafari and his father, Mosleh Aldafari, went into the office while the others stayed outside in the car. At that time, according to the, alleged discriminatees, two lists were prepared, one by Mosleh Aldafari containing the names and social security numbers of three of the alleged discriminatees, while the other list was prepared by Mohamed M. Aldafari containing the names, but not the social

security numbers of the three others (GC Ex. AS, 9, TR, pages 493-1 502). On one list was the name of one of the persons included in the agreement of October 31, 1975, while on the other list were, the names of two of the other persons included in the aforesaid agreement (GC Ex. #3, 9). The alleged discriminatees were told that Mr. Maxwell would check the list and determine if there was employment. Several days later, Mohamed M., Aldafari returned whereupon Phil Maxwell asked who had received settlement checks (TR, pages 142-145). When told that Mohamed Aldafari, Abdo M. Aldafari and Abdo Mosleh had received checks, Phil Maxwell indicated that those three could not return to work but that the other three were to come to him after two days to determine if there was; work (TR, pages 144-143, 163-165). Thereafter, complaint was made; by the alleged discriminatees to the UFW and subsequently to the ALRB, and the instant matter was commenced. There was testimony that two of the three who were not mentioned in the settlement in fact returned and sought their jobs (TR, pages 191-195).

Phil Maxwell's testimony differs considerably from the version told by the alleged discriminatees (See TR, pages 627-653). Maxwell's version was that two persons came to him on August 11, 1976. Only one list of names was given to Maxwell as being persons wanting jobs (GC Ex. #9). He saw no other persons present, nor were there any cars other than those he knew personally (TR, pages 636-637). Maxwell then asked for names and social; security numbers and then went to answer a telephone call. The list sat there for about two days (TR page 873) during which time Maxwell did nothing about it. Subsequently, one of the two persons returned and Maxwell told him to return in another two days

(TR, page 643).

Several days later, Mohamed M. Aldafari, one of the original two who came on April 11, 1977, returned and was told he would not be rehired because he refused an offer of re-employment contained within the settlement (TR, pages 650-651), This was based on an examination of the cancelled checks endorsed by Mohamed M. Aldafari indicating he had been contacted by the ALRS and presumably had had an offer of employment at that time (TR, pages 647-649). As to those not in the settlement agreement, Mohamed M. Aldafari was told to have them return in one week for possible rehiring (TR, page 652) but they did not. It had been Maxwell's understanding that the ALRB would have transmitted the offer of settlement, and the ALRB then was to communicate the re-sponse from the workers to RESPONDENT. No such communication ever occurred (TR, page 663) and the workers themselves were to contact Elaine of the RESPONDENT, which they did not (TR, page 664).

As to the incidents which took place between Mr. Maxwell and the Aldafaris, I am obliged, for several reasons to conclude that die Aldafaris version is the more credible. To begin with, several of them, although not likely to recall incidents with precision, remembered coming in the car to Mr. Maxwell as a group of six. Secondly, Maxwell himself said he had telephone calls at the time and it is then peak season. Indeed, he did not even get to respond to the list as he told them he would. Lastly, the Aldafaris' version makes sense since they were coming to apply for a job, and so all six came from Elmco where there was no work. As to the list, it follows that two lists were made. Mr. Maxwell's comments that his notes on General Counsel, Exhibit 9 help refresh

his recollection are not credible given that the date on the notes was changed, from either August 15, 1976 or August 25, 1975 to August 11, 1976. The note is undoubtedly not one made simultaneously with the receipt of the list. I find there were two lists containing the names of the six alleged discriminatees and that their version is the accurate one. I further conclude that two of the three not included in the settlement did return within several days to RESPONDENT and were told by Phil Maxwell that there was no work (TR, page 195), and that this occurred during a period of time when RESPONDENT hired eleven new people for "O" crew.

V

CONCLUSIONS OF LAW

The charges in the instant matter regard violation of Sections 1153(a) and 1153(c) of the ALRA, as to six alleged discriminatees, three of whom were involved in a previous settlement and three who were not, as well as a possible amendment of the complaint alleging a violation of the settlement itself.

It is deemed best to consider the amendment first. General counsel may successfully move to amend, under the NLRA, so long as the affected party is free from surprise and there is ample opportunity to defend and litigate any additional matters (McGuiness, How to Take a Case Before the National Labor Relations Board, Section 16-14, page 273). Here, RESPONDENT claims surprise and the absence of an opportunity to present proof (Respondent's Hearing Brief, pages 26-31, page 27 of which was not submitted to Hearing Officer). Nevertheless, RESPONDENT sets forth several pages of proofs in its Hearing Brief indicating that there is ample proof that RESPONDENT has not failed to comply with the Settlement Agreement (Respondent's Hearing Brief, pages 31-37). It is concluded that RESPONDENT'S surprise was not prejudicial and that there was ample opportunity to present proof regarding compliance with the Settlement Agreement since that was substantially similar to the charged unfair labor practice regarding the alleged discriminatory refusal to reinstate as of August 1976.

However, such conclusion as to the amendment does not end the matter, as the parties may have precluded jurisdiction by this tribunal given the language of the agreement itself. As set forth

earlier herein, the agreement between the ALRB and RESPONDENT indicates that judgment may be entered, upon application by the Board, by a California court of competent jurisdiction, and enforced by contempt proceedings (GC, Ex. #5, page 8). It would seem clearly not the intent of the parties that violation of said agreement would be determined by an Administrative Law Officer under the auspices of one of the parties to the agreement, but only by the courts themselves. That is, the agreement was intended to be similar to a consent decree which might then be enforced as a judgment when filed. Under such circumstances, it is clear that this tribunal has no jurisdiction, there being none intended by either of the parties from the face of the agreement itself, to enforce the agreement or determine violations thereof. There being no jurisdiction to cake such determination, the motion to amend is denied.

The remaining possible unfair labor practices include violations of Section 1153(a) and (c) of the AIRA.* Section 1153 (c) is violated where there is a "discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." The General Counsel has the burden of establishing the elements which prove discrimination (LU-ETTE FARMS. INC., 3 ALRB 38, NLRB v. Winter Garden Citrus Products Co-Operative, 260 F.2d 193 (CA 5, 1958). One element is anti-union motivation (LU-ETTE

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* In its post-hearing brief, General Counsel claims violations of Section 1153(d) of the ALRA but none were alleged in the complaint and no motion was made to amend to include such violations. Therefore, no consideration is given herein to such violations.

FARMS, INC., supra.) Such motivation is normally not proven directly, but inferentially, and need not be dominant, "but tray be so small as 'the last straw[1] which breaks the camel's back ... ." (S. KURAMURA, INC., 3 ALRB 49. But see HOWARD ROSE COMPANY, 3 ALRB 36, wherein there was insufficient evidence employees discharged "because of" their union activities.)

As to the three alleged discriminatees who were part of the settlement, Abdo M. Aldafari, Mohamed M. Aldafari, and Abdo Musleh, all of the evidence is that the agreement between RESPONDENT and the ALRB as to the procedure for reinstatement was not followed. The ALRB representatives were to contact the employees. give them checks, inform them of the opportunity for reinstate-, ment, discover their desires regarding reinstatement, instruct them as to the procedures, and contact the employer. All was to be done with a view to as speedy a process as possible. Instead, although the employees were contacted, the checks given and the questions asked, nothing else happened. Thus, from January until August 1976, the RESPONDENT heard nothing more from either the ALRB or the three alleged discriminatees mentioned in the settlement, with one exception. Unaware of the procedure, Mohamed M. Aldafari nevertheless called someone at RESPONDENT during or about January 1976 and requested a job but was told there was none. Although it is possible that Mohamed M. Aldafari had informed "Elaine" that he was one of those in the "case", the proof was insufficient to reach this conclusion, but there was sufficient proof that an employee of RESPONDENT was informed that someone in the settlement wanted work (TR, pages 153-163).

The end result, from RESPONDENT'S perspective, is that

these three past employees, having previously been informed of the procedures for reinstatement, failed to comply with such procedures and instead waited for many months before seeking reinstatement. That the responsibility for such mistake was not the alleged discriminatees', but was faulty communications within the ALRB, probably because of the situation which existed during the winter of 1976, cannot result in a conclusion that RESPONDENT is guilty of anti-union animus. General Counsel must show such animus for a violation of Section 1153(c) of the ALRB. Instead what has been shown is that RESPONDENT was never informed by the ALRB that the three alleged discriminatees in the settlement wanted their jobs back, nor did any of the three call "Elaine". Rather, application was made on their part seven months after their checks were cashed and returned to the RESPONDENT and one to two months after they had commenced work for RESPONDENT during the past two years, those dates being June 1975 and July 1974. General Counsel argues in its post-hearing brief that RESPONDENT'S failure to ask the alleged discriminatees whether they had refused reinstatement was indicative of anti-union animus. The proof, however, is that the procedure under the settlement put full responsibility for initiating contact and overtures upon the ALRB and the employees. Thus, as to these three alleged discriminatees, if anti-union animus were dependent entirely upon failure to reinstate based upon the settlement, there would be no violation of Section 1153(c)*.

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* The RESPONDENT'S actions are not so actively and inherently destructive of employees' union rights as to preclude the need for showing anti-union animus under NLRB v. Great Dane Trailers. Inc., 388 U.S. 26.

However, RESPONDENT had been asked to employ all six of the group, not merely the three in the settlement. Under its seniority plan, the three others should have had at least some seniority. Nevertheless, although even by RESPONDENT'S admission some of those alleged discriminatees who had applied had nothing to do with reinstatement (see GC, Ex. #8), these individuals were treated differently from others who applied for employment. In act, those three alleged discriminatees who applied without having been in the settlement were treated worse than other applicants without seniority. Thus, rather than hiring these latter three (Mosleh, Thabet and Abdo A. Aldafari) immediately, given that others were then being hired, they were told to come back to see if there were openings (TR, page 652). Further, Thabet Aldafari testified that he and his father had returned but were told there was no work. All this occurred during a period when RESPONDENT was hiring a sizable number of people with no tenure whatsoever. The conclusion is inescapable that RESPONDENT wanted no part of these three because of their involvement with persons who had been previously engaged in union activities. Nothing has been presented by RESPONDENT to dispell this conclusion.

If then, RESPONDENT took action to refuse to rehire a part of the group because of anti-union animus, can it be said that this would carry over to the other three (Mohamed M. and Abdo M. Aldafari and Abdo Mosleh)? The courts have held, as has the ALRB, that if part of the motive is anti-union and part legitimate, but the "last straw" is anti-union animus, that is sufficient for a violation of Section 1153(c) of the ALRA. Here it is difficult, if not impossible, to separate the two. The emoloyer

had, as seen from its perspective, a perfectly good reason to refuse to rehire the three in the agreement. After the agreement, there was no union activity whatsoever which appears in the record. Thus, I must conclude, as to these three, that there is no proof to indicate anti-union animus as to the three in the sect lenient, particularly with regard to some indication of a tipping of the balance. The opposite is true of the other three since there was no proof presented as to why they were not immediately, or soon thereafter, rehired. Given their seniority under RESPONDENT'S system, they should have been offered the first available jobs.

General Counsel argues that even if the questions of reinstatement are adversely concluded there is a violation of the ALRA in failing to hire the alleged discriminatees since the business justifications were spurious, leaving only anti-union animus: as the moving force (GC Brief, pages 13-15). In fact, the business justifications as to the three in the settlement were eminently sensible given the RESPONDENT'S reasonable conclusion that the employees had knowingly failed to reapply for work. Three workers were offered employment in January, with an understanding between RESPONDENT and the ALRB, that the offer meant that immediate reinstatement upon contact (see TR, page 932) was available; to them. Nevertheless, as RESPONDENT understood it, the workers made no attempt to contact RESPONDENT under the agreement and seek their jobs back. That they misunderstood the procedures, or that everyone misunderstood or neglected to determine procedures (see TR, page 933), does not permit charging the employer with acting upon anti-union animus. Instead, it compels the conclusion that RESPONDENT thought the workers had known of an opportunity for

seven months, and should reasonably have reported for work but did not. As to the three alleged discriminatees involved in the settlement, there has been no violation of Section 1153(c) of the ALRA.

RESPONDENT is also charged, as to the six, with *a* violation of Section 1153(a) of the ALRA. As to the three who applied in August 1976 without having been involved in the settlement, there having been a finding of violation of Section 1153(c) of the ALRA, such finding is enough to conclude a violation of Section 1153(a) of the ALRA. (See Tex-Cal Land Management. Inc. 3 ALRB 14.)

Regarding the remaining three, an exposition of the law concerning Section 1153(a) is necessary to reach a conclusion herein. Section 1153(a) of the ALRA provides that it is an unfair labor practice to interfere with workers in the exercise of the rights quaranteed in Section 1152, which section provides that employees shall have various rights including forming, joining and assisting labor organizations as well as engaging in concerted activities for mutual aid and protection. (See KAWANO, INC. 3 ALRB 54.) In its brief, General Counsel points to no case indicating that the activity of the three workers herein involved in the settlement was protected under Section 1153(a), but instead states that making use of the Board's processes is fundamental to the free exercise of employee rights and therefore protected (GC

***** General Counsel claims the workers desired their "customary work at MBZ in the summer" (GC Brief, page 4), but instead of seeking such work, they went first to another job at Elmco Farms which they only left when they were laid off (TR, pages 223-229).

Brief, page 12).

An excellent summary of the purpose of Section 8(a)(l) of the NLRA, the sister statute of Section 1153(a) of the ALRA, is contained within Gorman, Basic Text on Labor Law, page 133, indicating that the employer commits an unfair labor practice when taking action which tends to interfere with the exercise of employee-union protected rights unless the employer has a legitimate and substantial business justification for such action. No case has been shown, wherein either the ALRB or the NLRB has determined access to its own processes as a protected activity. Instead, the actions protected by the cases are consistently those directly concerning union activities (see e.g., KAWANO. INC., 3 ALRB 54; Howard Rose Co., 3 ALRB 86, AS-H-NE Farms, 3 ALRB 53, Tex-Cal Land Managment Inc., 3 ALRB 14). However, the cases do go so far as to say

> [T]here are circumstances in which dis charges and lay-offs could constitute a violation of Section 1153(a) without a finding that the employer had knowledge of the dischargees' union activities, as when employees are discharged as part of a "get-tough" policy to demonstrate the employer's power and hostility to unionization.
>
> (AS-H-NE Farms, supra)

Thus, it is entirely feasible that demonstrating the ineffectiveness of administrative remedies available for breach of union protected activities serves an employer equally well as actions directly destroying protected rights. As was said in a different but applicable context in Tex-Cal Land Management. Inc., 3

> Such conduct has an inherently intimi-

> dating impact on workers and is incom patible with the basic processes of the Act.

Cases regarding failure to seek reinstatement as alleged unfair labor practices are available. (See NLRB v. Harrah's Club, 69 LRRM 2775 (9th Circuit, 1963), NLRB v. Betts Baking Co., 74 LRRM 2714 (10th Circuit, 1970).) It can be said Chat, as to those who knowingly took unreasonably long to seek reinstatement or re-hiring, there is no coercive effect. The issues resolved themselves to what is a reasonable length of time within which to seek reinstatement, and whether the alleged discriminatees knowingly took unreasonably long. Further, it must be recalled that coercive effect rather than anti-union motivation is the moving force of Section 1153(a).

First, it has been proven that the workers were not told by the ALRB, or anyone else, that they would be returned to work, but merely asked if they wanted to return to work, to which they replied in the affirmative and in two cases that they wanted it to be "soon" (Respondent's Ex. *#1,* #6 and #7). They were never told that they would be reinstated or how to seek reinstatement

In the past several years prior to 1976, they had commenced work with RESPONDENT at consistently earlier times in the harvest season, i.e., August in 1973, July in 1974 and June by 1975. However, in 1976, they not only did not seek work at RESPONDENT until the second week in August, they first went to work for an employer for whom they had never before worked, and only left to go to RESPONDENT when laid off by the previous employer (TR, pages 433-484). If such actions were indicative of total ignorance of the possibility of reinstatement, a violation of Sec-

tion 1153(a) may be found. Alternatively, if the proof is that they knew they had a right to be reinstated but failed to seek such reinstatement within a reasonable period of time, there could be no coercive effect and no violation of Section 1153(a).

I conclude that the workers were never informed that they had a right to reinstatement, and therefore no "reasonable" time period for seeking such reinstatement occurred. Further, the one accidental attempt to seek reinstatement, by Mohamed M. Aldafari, resulted in his being told there was no work at that time. It would be contradictory to expect the workers under such circumstances to believe they had absolute rights of reinstatement.

The end result is that, with the exception of failing to report until well into the harvest season, the workers did in fact seek to regain their previous employment. That they did not act expeditiously is immaterial given that they had no knowledge of any such obligation. The problem thus boils down to a conclusion that, whatever the motive or ignorance of the employer, its conduct in failing to rehire the three undoubtedly had "an inherently intimidating impact on workers" and was "incompatible with the basic processes of the Act". I find therefore that, as to Mohamed M. and Abdo M. Aldafari, and Abdo Mosleh, there has been a violation of Section 1153(a) of the Act.

VI
THE REMEDY

Having found that RESPONDENT violated Section l153(a) and (c) of the ALRA, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that RESPONDENT unlawfully refused to reinstate or rehire Mohamed M. Mosleh, Abdo A., Abdo M. and Thabet Aldafari as well as Adbo Mosleh, I shall recommend:

(1) As to the six alleged discriminatees, that they be offered their former jobs commencing with harvesting in the 197 season. Further, I shall recommend that the six be made whole for any losses they incurred as a result of their loss of employment as of the time they actively sought such employment in harvesting in 1976, by payment to them of a sum of money computed in accordance with the formula set forth in F.W. Woolworth Co., 90 NLRB 289, and Isis Plumbing and Heating Co., 138 NLRB 716.

(2) That the RESPONDENT publish in the manner described within the Order, the attached Notice.

(3) That the Notice be mailed to all employees of RESPONDENT who worked on or after August 11, 1976. That date appears to be the sine qua non of the instant matter and only by mailing the Notice to such employees is there some hope that employees with knowledge of these unfair labor practices can learn of the law, their rights and the outcome hereof.

(4) That the RESPONDENT preserve and, upon request, make available to the Board or its agents pertinent records neces-

sary in order to determine specifically the back pay awards and dates of reinstatement appropriate herein.

(5) That a process be created whereby the Regional Director be enabled to determine what steps, if any, RESPONDENT has taken to comply with the Order proposed.

The complaint also sought expansion of the UFW's access rights, but since access was in no way in issue during the hearing, no remedy will be ordered regarding access.

VII

ORDER

IT IS ORDERED that RESPONDENTS, their officers, agents, representatives, and assigns, shall:

(1) Cease and desist from:

(a) Failing or refusing to rehire or reinstate previous employees because of their direct or supportive efforts to redress union-related grievances.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of their rights quaranteed in Sections 1152, 1153(a) and 1153(c) of the ALRA.

(2) Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Mohamed M. Aldafari, Abdo M. Aldafari, Abdo Mosleh, Thabet Aldafari, Abdo A. Aldafari and Mosleh Aldafari their former positions, beginning with the date in 1978 when harvesting commences, said date being proximately when such indi viduals previously sought and were precluded from work.

(b) Make Thabet, Mohamed M., Abdo M., Mosleh and Abdo A. Aldafari as well as Abdo Mosleh whole for any loss of earnings suffered by reason of the discrimination against them in the manner set forth in the section herein entitled "THE REMEDY".

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

the terms of this Order.

(d) Mail the appended Notice to Workers (to be printed in English and Yemeni) in writing to all present: employees wherever geographically located, and to all new employees and employees rehired, and mail a copy of said notice to all of the employees listed on its master payroll for the payroll period or periods applicable to August 11, 1976, and post such notice at the commencement of the 1978 harvest season for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

(e) Have the attached Notice to Workers read in English and Yemeni to assembled employees on company time and property at the commencement of the 1978 harvest season, to all those then employed, by a Board agent accompanied by a company representative. Said Board agent is to be accorded the opportunity to answer questions which employees may have regarding the notice and their rights under Section 1152 of the Act.

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

IT IS FURTHER ORDERED that the allegations contained in the Complaint, not specifically found herein as violations shall

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be and hereby are, dismissed.

Dated: _____, 1971.

AGRICULTURAL LABOR RELATIONS BOARD

MORTON P. COHEN
Administrative Law Officer

APPENDIX

NOTICE TO WORKERS

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

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

(1) To organize themselves.

(2) To form, join, or help unions.

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

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

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

Because this is true, we promise that:

We will not do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT fail or refuse to reinstate or rehire you because you act together to help and protect one another as a group.

WE WILL offer Abdo Mosleh and Mohamed M., Abdo M., Mosleh, Abdo A. and Thabet Aldafari their old jobs back if they want them, beginning in this harvest and we will pay them any money they lost because we would not rehire them.

We recognize that the Agricultural Labor Relations Act is the law in California. If you have any questions about your rights under the Act, you can ask an agent of the Board. The nearest Board office is at (Insert address of Delano office)_____, Delano, and its phone number is _____,

Dated:_____, 197__.

M.B. ZANINOVITCH, INC.

By _____
(Representative) (Title)

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