STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS DISTRIBUTORS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 77-CE-12-E 77-CE-19-E 4 ALRB No. 80

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146,[1/] the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

On July 5, 1977, Administrative Law Officer (ALO) Les N. Harrison issued the attached Decision in this proceeding, in which he concluded that Respondent, Martori Brothers Distributors, violated Section 1153(c) and 1153(a) of the Act by discharging Adolfo Ponce and the employees in his crew on December 30, 1976 and Section 1154.6 of the Act by hiring Ruben Rodriguez's crew to replace that of Ponce. The ALO concluded that Respondent did not violate the Act by discharging Heriberto Silva on January 6, 1977 and recommended dismissing that allegation of the complaint. Thereafter, Respondent, General Counsel, and the UFW each filed timely exceptions with a supporting brief and the Respondent and UFW each filed a brief in reply to exceptions.

[1/] All references herein are to the Labor Code.

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 excepts, inter alia, to the ALO's conclusion that the discharge of Adolfo Ponce and his entire crew was conduct "inherently destructive" of its employees' Section 1152 rights and therefore justifies a finding of a Section 1153(c) violation in the absence of a showing of unlawful motivation. Because we find ample support in the record for the ALO's conclusion that Respondent exhibited anti-union animus and was motivated by a desire to rid itself of a pro-union crew, we decline to reach the issue of whether the "inherently destructive" criterion set forth in NLRB v. Great Dane Trailer, Inc., 388 U.S. 26, 33, 12 L.Ed. 1027, 87 S. Ct. 1972 (1967) is applicable to the facts of this case.

The General Counsel and the UFW each excepted to the ALO's recommended remedial order in that he failed to recommend reinstatement of Ponce and his crew, limited Respondent's back pay liability to the conclusion of the Imperial Valley winter harvest, and directed calculation of back pay according to the NLRB's "Woolworth formula." We find merit in these exceptions.

The ALO reasoned that because Ponce was hired as a replacement for Rodriquez, who was Respondent’s first choice, Ponce and his crew would not have been rehired in the subsequent winter lettuce harvest. However, in light of supervisor Steven Martori's testimony that he anticipated a combined Rodriguez-Ponce

crew after Rodriguez returned and Ponce's testimony regarding his continued employment with Respondent, we find the record does not establish that Ponce and his crew would have ceased working for Respondent at the conclusion of the 1976 winter lettuce harvest in the Imperial Valley. Accordingly, we hold that the ALO improperly excluded reinstatement from his recommended back pay award to the period ending with the 1976 winter lettuce harvest in the Imperial Valley, see Martech Corp., 169 NLRB 479 (1968); Colonial Corp. of America, 171 NLRB 1553 (1968); Airco Industrial Gases, 195 NLRB 676 (1972), and should have ordered the back pay due Ponce and his crew calculated in the manner established by this Board in Sunnyside Nurseries, 3 ALRB No. 42 (1977).

In addition to the usual means of publicizing the Notice to Employees, we believe that, in view of Respondent's Section 1154.6 violation, the Notice should also be distributed to all employees who participated in the election on January 13, 1977, i.e., to those employees employed during the January 2, 1977 to January 7, 1977 payroll period, in addiiton to those employed during the payroll period in which the unfair labor practices were committed.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent, Martori Brothers Distributors, its officer, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the

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

(b) Willfully hiring employees for the primary purpose of voting in an ALRB representation election.

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

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

(a) Offer to Adolfo Ponce and the employees in his crew immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges to which they may be entitled and make them whole for any loss of pay or other economic losses they may have suffered by reason of their discriminatory discharge, plus interest measured thereon at seven percent per annum.

(b) Preserve and make available to the Board or its agents, for examination and copying, all payroll records and any other records necessary to compute the amount of back pay due and other rights of reimbursement under the terms of this Order.

(c) Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall reproduce sufficient copies of the Notice in

each language for the purposes set forth hereinafter.

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

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed during the payroll periods which include the following dates: December 27, 1976 and January 7, 1977.

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached 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.

(g) Notify the Regional Director in writing within 30 days after 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 have been taken in compliance with this Order.

DATED: October 24, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

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

1. The Agricultural Labor Relations 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 you that:

WE WILL NOT do anything in the future that interferes with your rights under the Act, or that forces you to do, or stop doing, any of the things listed above.

WE WILL NOT discharge or otherwise discriminate against any employee because such employee exercised any of such rights.

WE WILL NOT hire any person or persons for the primary purpose of having them vote in a union representation election,

3. The Agricultural Labor Relations Board has found that we discriminated against Adolfo Ponce and the employees in his crew by discharging them. We will reinstate them to their former jobs and give them back pay plus 7 percent interest for any losses that they suffered as a result of their discharge.

Dated: MARTORI BROTHERS DISTRIBUTORS

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

Martori Brothers Distributors Case Nos. 77-CE-12-E
77-CE-19-E
4 ALRB No. 80

ALO DECISION

The Complaint as amended at the hearing, alleged that Respondent violated Section 1153(c) and (a) by discharging its employee Heriberto Silva for engaging in union activity, by laying off a supervisor and his crew because of the crew's organizational activities and in order to affect the outcome of the election; and violated Section 1154.6 by hiring a replacement crew for the purpose of affecting the outcome of the election.

The ALO found that Silva's discharge was not motivated by anti-union animus, although he was a known union activist, but rather was a result of Silva's goading the supervisor and Silva's insubordination; the ALO recommended dismissal of this allegation.

The ALO found that Respondent violated Sections 1153(c) and (a) and 1154.6 by discharging supervisor Ponce and his crew, and by hiring another supervisor and his crew replacements in order to affect the outcome of the election. In reaching this conclusion, the ALO found that the replacement of the openly pro-UFW California-based Ponce crew by an Arizona-based crew with less visible union support, just prior to the election, was inherently destructive of employee rights and constituted an unfair labor practice under the Great Dane Trailers,Inc. case. The ALO further found that Respondent's ostensible reason for terminating Ponce's crew, the light weight of their lettuce packs, weight variance in their lettuce packs, and the quality of the lettuce packed, was not supported by the record evidence. The ALO found that Respondent evidenced anti-union animus by changing the relevant payroll periods shortly before the election in a manner that disenfranchised the Ponce crew, by certain misleading statements in a leaflet circulated by Respondent, and by its purported reliance on a Teamster contract seniority provision which in fact was violated by the discharge of Ponce. Having found that the apparently pro-UFW Ponce crew was discharged to affect the results of the election, the ALO concluded that Respondent further violated Section 1154.6 by hiring the. apparently less pro-UFW Rodriguez crew in order to affect the outcome of the election.

BOARD DECISION

The Board affirmed the ALO's conclusion that Silva was not unlawfully discharged.

The Board also affirmed the ALO's conclusion that Ponce and his crew were unlawfully discharged, but did so on the basis of the record evidence of Respondent's anti-union animus and declined to reach the issue of whether Respondent's conduct was

inherently destructive of employee rights within the meaning of the Great Dane Trailers, Inc. case. The Board found merit in exceptions taken to the ALO's failure to order reinstatement and his recommendation that back pay be calculated according to the Woolworth formula, and ordered reinstatement for Ponce and his crew and back pay calculated in accordance with Sunnyside Nurseries, 3 ALRB No. 42 (1977). The Board also affirmed the ALO's conclusion that the Respondent unlawfully hired Rodriguez' crew in order to affect the outcome of the election, in violation of Section 1154.6.

REMEDIAL ORDER

The Board ordered Respondent to cease and desist from: (1) discouraging union membership by discharging or otherwise discriminating against employees, (2) willfully hiring employees for the primary purpose of voting in an ALRB election, or (3) in any other manner interfering with, restraining or coercing any employee in the exercise of employee rights. The Board further ordered Respondent to offer foreman Ponce and his crew immediate and full reinstatement to their former jobs or, if these jobs no longer exist/ to substantially equivalent jobs, and to make them whole for any loss of pay or other economic losses caused by their unlawful discharge. The Board also ordered the posting, mailing, distribution, and reading of an appropriate Notice to Employees.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of	)	
	)	CASE NUMBERS: 77-CE-12-E
MARTORI BROTHERS DISTRIBUTORS,	)	77-CE-19-E
Respondent,	)	
	)	
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	
	)	

PROPOSED DECISION

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of MARTORI BROTHERS DISTRIBUTORS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging party.	)	CASE NUMBERS: 77-CE-12-E 77-CE-12-E PROPOSED DECISION

Alicia Becerril, Esq., of El Centro, California for General Counsel;

Dressler, Stole and Jacobs, by Peter M. Jacobs, Esq., of Newport Beach, California for Respondent;

Tom Dalzell of Salinas, California, for the Charging Party.

STATEMENT OF THE CASE

LES N. HARRISON, Administrative Law Officer: This case was heard before me on February 17, 18, 21, 22, 23, 24, 25, 28 and March 1, 28 and 29,in El Centro, California. The United Farm Workers of America, AFL-CIO (hereinafter referred to as the "UFW")filed charges 77-CE-12-E and 77-CE-19-E with the El Centro sub-regional office of the Agricultural Labor Relations Board (hereinafter referred to as the "Board" or "ALRB") against Martori Brothers Distributors (hereinafter referred to as "Respondent" or “Martori Bros.”). On January 17, 1977, the sub-regional director

issued a complaint against the Respondent and upon order of the sub-regional director of the ALRB, these charges were consolidated within the complaint.

The consolidated complaint charges that Martori Bros. laid off a supervisor and crew on December 30, 1976, because of union activity on behalf of United Farm Workers, and hired a replacement crew for the purpose of effecting the outcome of an election. Furthermore, the complaint alleges that Heriberto Silva was discharged on January 6, 1977 for union activity. The Board further alleges in its complaint that such employer actions constitute an interference with rights guaranteed employees by Section 1152 of the Agricultural Labor Relations Act (hereinafter referred to as the "Act"), and are unfair labor practices within the meaning of Sections 1153(a),1153(c) and 1154.6 of the Act. Copies of the charges and the complaint were duly served upon the Respondent. The Respondent filed an answer to the complaint admitting receipt of the filed charged, Respondent's status as an agricultural employer under the Act, the UFW's status as a labor organization under the Act, and denied all other allegations contained in the complaint.

At the commencement of the hearing on February 17, 1977, General Counsel struck section 5b from its complaint and amended sections 7 and 8 by eliminating references to section 5b. General Counsel further moved to amend its complaint by adding an additional unfair labor practice charge (77-CE-33-E), and after entertaining argument from the respective parties, I denied General Counsel's motion to amend based on the tardy presentation by General Counsel

of the further alleged Martori Bros. unfair labor practice.

It was agreed by stipulation that Respondent would admit paragraph 4 of the consolidated complaint; namely, that Steven Martori was a company supervisor, that Ruben Rodriguez was a general foreman and that Adolfo Ponce was a general foreman to and through December 30, 1976 for Martori Bros.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel and Respondent each filed a brief in support of its respective positions.

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

FINDINGS OF FACT

I

JURISDICTION

Martori Bros. is a farming operation owned primarily by members of the Martori family. At the time of the facts set forth in the complaint, it was engaged in agriculture in Imperial County, California, and thus was and is an agricultural employer within the meaning of Section 1140(c) of the Agricultural Labor Relations Act.

Further, the United Farm Workers of America, AFL-CIO, is a labor organization representing agricultural employees within the meaning of Section 1140. 4(f) of the Agricultural Labor Relations Act.

II

THE ALLEGED UNFAIR LABOR PRACTICES

The charges herein relate to two separate, yet related, courses of conduct. The complaint alleges that Respondent violated Sections 1153(a) and 1153(c) of the Act by the discriminatory discharge of Adolfo Ponce and his crew on or about December 30, 1976, and that Respondent violated Sections 1153(a) and 1153(c) of the Act by its discriminatory discharge of Heriberto Silva for his union organizational activities on or about January 6, 1977. The complaint also alleges that Respondent violated Section 1154.6 of the Act in that Respondent arranged for persons to become employees for the primary purpose of voting in an upcoming union election.

Respondent denies that the discharge of Adolfo Ponce and his crew or Heriberto Silva was unlawfully motivated, or that the hiring of a crew on or about January 5, 1977, was in any way related to the imminent union election.

III

FACTUAL SETTING

A. The Lettuce Harvest of Martori Bros. In Imperial County

Martori Bros. is an agriculture operation with its headquarters located in Glendale, Arizona, and with the majority of its operations likewise in Arizona. Primarily, Martori Bros. engages in the growing, harvesting and marketing of row crops such as lettuce, cotten, carrots and grapes.

In December 1976, Respondent purchased the lettuce crop of Arena Imperial Company in the Imperial Valley, California, and on December 8,1976, began to harvest the lettuce. This was the first instance since 1973 that Respondent had harvested crops in California.

Three harvesting crews worked in the lettuce harvesting of Respondent in the Imperial Valley in December 1976, each crew being supervised by a separate foreman who also hired the members of his respective crew.[1/] When a foreman was hired at Martori Bros. it was understood that he had all but total control in the make-up (hiring and firing) of his crew. Similarly, if a foreman was to be fired, "his crew" would likewise be terminated as the new foreman would be compiling a new crew. The three crew foremen hired by Respondent at Imperial Valley in December of 1976, were Camarino Sandoval, Johnny Martinez, and Adolfo Ponce. These same three foreman had just completed harvesting Respondent's lettuce in its Aguila, Arizona operation in November 1976. The majority of Sandoval's and Martinez's crews who began work in the Imperial Valley consisted of the same workers who had harvested Respondent's Aguila, Arizona lettuce crop; Ponce, on the other hand, selected many of his crew members anew from workers present in the Imperial Valley.

[1/] The number of employees of each crew varied from approximately 28 to 44 on any given day throughout the harvest season. Each morning the foreman would either hire additional workers or "layoff" excess workers depending on the size of the field his crew would be working, the maturity of the lettuce in the field, and other daily variants.

The lettuce itself was harvested in a manner similar to other lettuce operations in the Imperial Valley. Three workers(a "trio" or "line") would work as a unit; two workers cutting the heads while the third person walked behind and packed the lettuce into a box. In addition to these "lines," a crew would also consist of a folder and stitcher who would work on top of a truck and distribute boxes to the lines below. After being packed (24 heads to a box), a "closer" would then staple the box of lettuce shut. Approximately 300 boxes would make a "load." It was a foreman's duty to insure that the flow of work was proceeding satisfactorily -- both quanitatively and qualitatively.

During the actual harvesting, either Edward Martori (quality controller with two years field experience) and/or Steven Martori (head of the lettuce operation of Martori Bros. and co-partner with eight years experience) would occasionally be present and check the performance and quality of lettuce harvested by each crew. The basic responsibility, however would lie with each individual foreman (here, Sandoval, Martinez, and Ponce) to insure that the lettuce his crew harvested was of an acceptable nature to the high standards set by Respondent.

The most desirable lettuce to be harvested would consist of firm, mature heads rather than soft, immature heads with excess wrapper leaves. Generally, these firm mature heads would weigh more than young Immature "soft heads," and as market value of the lettuce depends to a large degree on the weight of same, the picking of mature heads is all the more critical. Again, it was the obligation of the foreman as supervised by Edward or Steven Martori, to insure

that "defective lettuce" would be excluded; not only soft heads with excessive wrapper leaves, but also lettuce with tipburn, mechanical defects, or broken ribs. The packing of such defective lettuce would enhance the prospects of further "condition defects" (defects that change during the course of shipping) and lead to discolored ribs or heads and ultimate decay.

Lastly, it was important that the weight of each box of lettuce not only be high, but also be uniform throughout. At the ultimate retailer, the carloads of lettuce would be broken down into boxes, and dis-satisfaction result should there be a wide variance of lettuce weight (e.g.soft heads with less weight) within some lettuce boxes. A retailer, for example, receiving by chance 12 boxes of low weight lettuce of a carload of otherwise satisfactory lettuce might feel deceived if the wholesaler had alleged that the carload was of high average weight.

B. The Termination Of Adolfo Ponce And His Crew

Adolfo Ponce first worked in the lettuce in 1945 and has done so almost continually since 1952. Throughout the years, he has cut, packed, folded, stitched and acted in the capacity of foreman in the lettuce -- first being foreman for Royal in 1952 and lastly with Respondent in December of 1976.

In 1968,Ponce worked as a folder for Martori Bros. in Glendale, Arizona, and he again worked for Martori Bros. in the Spring of 1975 as a folder. After working at Vessy Company in Aloz, Arizona as a foreman in the lettuce from the Fall of 1975 to March 1976, Ponce returned to Martori Bros. where he worked in the lettuce

as assistant foreman with the crew of Ruben Rodriguez until approximately May 12, 1976. Three foreman handled the Spring harvest for Martori Bros. in Arizona -- Camarino Sandoval, Johnny Martinez and Ruben Rodriguez.

As Rodriguez was unavailable for work with Martori Bros. in the Fall of 1976, Rodriguez mentioned to Steven Martori that Ponce might be available to form a crew and act as chief foreman. Rodriguez told Ponce that he might get a call from Steven Martori to this effect. Sometime in September or October, 1976, Ponce, through a personal call from Steven Martori, was hired as foreman of a lettuce thinning crew for Martori Bros.

After thinning for two or three weeks at Brawley, California, Ponce and his crew went to Aguila, Arizona where he continued as a foreman for Martori Bros. Camarino Sandoval and Johnny Martinez were the other foremen for Martori Bros. at Aguila's fall harvest.

The harvest in Aguila, Arizona began approximately October 10, 1976, and was completed November 28, 1976. In Aguila throughout this time period, Steven Martori classified the work of Ponce and his crew as "average to a little above average." According to Steven Martori, Ponce was given no warnings about the weight of the lettuce his crew was packing in Aguila other than the day to day comments regarding packing, etc., "that were always made so the work wouldn't deteriorate."

After the fall Aguila harvest, Steven Martori told Ponce that they would be harvesting lettuce in the Imperial Valley in December and that his crew could start on the first harvest day. Steven

Martori testified that it was his (Martori's) intention that Ponce's crew would be temporarily replacing Rodriguez's, but never communicated this concept to Ponce.

Thus, understanding that he was going to continue as foreman along with Sandoval and Martinez, Ponce started work at Arena of Imperial for Respondent with approximately eight lines on December 8, 1976.

While the make-up of the original crew Ponce started with at Respondent's Imperial Valley operation is difficult (if not impossible) to ascertain from evidence offerred (UFW No. 6, Respondent's Nos.4 and 5).it seems clear that Ponce hired more workers from the Imperial Valley than the crews of the other foremen (Sandoval and Martinez). Uncontroverted testimony allows that Sandoval and Martinez's crews were (at least when work began on December 8th) primarily "Arizona crews" who had worked the fall harvest in Aguila; and while Ponce brought some workers with him, many of his workers were "California Imperial Valley" hands.

Prior to December 30th, Ponce claims that Steven Martori complained approximately three times about the weight of the boxes being packed by Ponce's crew. Ponce didn't consider these complaints unusual as "foremen were always being told to keep the weight up."

According to Steven Martori, on at least three occasions prior to December 30th. Ponce was taken aside and warned of the unsatisfactory nature of his crew's work. Steven Martori testified that it was unusual for a supervisor to take a foreman aside and complain

about the work -- that this was not the ordinary and usual type of warnings a supervisor gives his foreman.

While Steven Martori testified that Ponce's work was unsatisfactory in regards from everything to packing to the trimming of the lettuce heads, it is clear that the main complaint of Respondent revolved around the weight of the boxes packed by Ponce's crew. According to Martori, the boxes were not only too light (a box should range between 49 to 51 pounds) but the range of weight within Ponce's loads varied too widely.

On December 30,1976, Steven Martori took Ponce aside and again told him his weights were too low, and that Ponce's crew would be let go if his weight didn't improve. Even this threat Ponce didn't take seriously as he considered his overall work satisfactory and on the 30th, Ponce's crew was working where the lettuce was younger (ergo -- smaller).

Later on December 30th, Steven Martori told Ponce that he would call him when he had work for him. According to Ponce, Martori was more definite and told him that his crew would probably return to work on Wednesday (January 5th). In any event, none of Respondent's agents informed Ponce that he (and his crew) would be terminated, and Ponce found out he had been replaced approximately January 6, 1977, when he was informed by a friend that Rodriguez's crew was now working for Martori Bros.

Only one member of Ponce's crew was subsequently hired by Rodriguez, Heriberto Silva. At least one other member of Ponce's crew, Jesse Corona, asked Rodriguez for work and was told that

Rodriguez "had his own people."

As stated previously, it is the accepted hiring practice of Respondent and other growers that each foreman make up his own crew. In this case, according to Respondent, Rodriguez was hired for his superior abilities as foreman, because he had "seniority" over Ponce, and because his crew were better workers than Ponce's Rodriguez's "seniority" is ill-defined by Steven Martori as well as Rodriguez himself. Seniority is variously described as seniority under an existing Teamster contract, one who worked the "longest" for Martori Bros., or one who worked most recently for the longest time -- in any event, it is clear that the issue of "seniority" did not flow to the members of a crew; the crew was picked at the direction and by authority of the foreman.

C. Union Organization and Ponce's Crew

The day after harvesting began in the Imperial Valley, December 9, 1976, the United Farm Workers filed a Notice of Intention to Take Access at Respondent's working premises. Thereafter, UFW organizers visited the harvesting crews and solicited union authorization cards. The UFW solicitation would primarily take place in the morning before the harvest while the crews were waiting for the ice to melt. Basically, the UFW organizers would talk about the union and hand out literature while attempting to solicit signatures for authorization cards. Martori Bros. agents and supervisors were present during these organizational meetings but paid little attention and made no effort to interfere.

Subsequent *to* the Notice of Intention to Take Access filed by

the UFW on December 9, 1976, UFW organizers were assigned to the Respondent.

Two UFW organizers, Maria Pacheco and Alberto Gonzales testified abundantly that Ponce's crew was more receptive to the UFW than the crews of Sandoval or Martinez, and that Ponce's crew became the center for UFW organizational activity. Gonzales testified that he alone "signed up" approximately 30 members of Ponce's crew as compared to six to eight from Martinez's crew between December 20, 1976 and December 30, 1976. ("Signed up" refers to the signing of the UFW authorization cards, the primary goal of the UFW organizers.)

The testimony of the two organizers was well corroborated by testimony from members of Ponce's crew (Jesse Corona and Heriberto Silva) that the UFW had far greater success among Ponce's crew than among the workers of the Martinez and Sandoval crews. According to Maria Pacheco, the members of Martinez and Sandoval crews were "mainly from Arizona and not receptive...they would make fun of the UFW leaflets and pushed me off."

Ponce's crew was not only more receptive to the UFW, but openly demonstrated their support for same by wearing UFW buttons. Almost every member of Ponce's crew wore union buttons while very few such buttons were "evident" in the other crews.

Edward Martori testified differently in regard to the button wearing of the crews. According to Edward Martori, about one-half of the members of all three crews wore buttons; i.e. there was an even distribution of "button wearing" among the three crews.

Likewise, while stating they paid little attention to the union organizing, both Edward and Steven Martori infer that Ponce's crew seemed no mere "pro-union" than the two other crews.

A subsequent tally of votes by crews in the union election corroborates the testimony of the UFW witnesses and Ponce's crew members over that of Respondent. Ponce's crew voted 35 to 2 in favor of the UFW, while the total of Sandoval's and Martinez's crews were 44 to 34 for "no union." (General Counsel Exh. No. 2.)

D. The Union Election and Martori Payroll

As previously stated, the UFW had begun an organizing drive at Martori Bros. on December 9, 1976.

On January 7, 1977, at 4:45 PM (a Friday), the Petition for Certification was filed by the union. After receiving the petition, Steven Martori contacted Ivan Alien, an attorney representing Martori Bros. in the UFW election proceedings. Alien explained to Steven Martori his obligations under the Act, and they talked about the "proper payroll period" for the election "a little." [2/]

On January 8, 1977, the following day, Michael Au Clair Valdez, field examiner #1 for the ALRB in El Centro, had a conversation

[2/] Section 1156. 3(a) of the Labor Code of California provides that when a petition accompanied by authorization cards signed by a majority of the currently employed employees is presented, that:

> "The number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition is not less than 50% of his peak agricultural employment for the current calendar year." (Emphasis added.)

While the ejection itself is not an issue in this decision, the interpretation of the "proper payroll period" for said election and the reasons proferred for said proper payroll period must bear the utmost scrutinty in attempting to determine if Respondent had a "motive" in the firing of Ponce's crew.

with Steven Martori regarding the union's petition of January 7th.

Valdez explained to Martori that the payroll period immediately preceding the filing of the petition was relevant in order to determine who would be eligible to vote; Martori stated that the working week of December 27th to January 2nd was the proper payroll period in question.

In response to inquiries from the ALO, Valdez replied that he was certain Martori (rather than himself) had mentioned the specific dates in question as Valdez did not have a calendar in front of him -- Valdez had simply recorded what Steven Martori told him. Steven Martori, on the other hand, testified that in this January 8, 1977 conversation he told Valdez that the pay period ending January 7, 1977 was the relevant period in question and Valdez replied, "That is the pay period I want."

In another conversation between Valdez and Martori early in the day of January 10, 1977, Steven Martori told Valdez that he would not use a previous election at Arena Imperial Company as a bar to the UFW election and further told Valdez that the number of eligible employees for the critical payroll period was 150.

Later that day, on January 10, 1977, Ivan Alien and Steven Martori brought to Valdez the Employer's Response to Petition for Certification (UFW Exh. No. 3). Through that document, Martori Bros. claimed that the previous election at Arena of Imperial was a bar to the UFW election (Labor Code Section 1156.3(c)), and listed 200 employees as being employed in the payroll period immediately preceding the filing of the UFW petition (the number "approximately

150" had been typed, but was crossed out with "200" written in by "I.W.A."). Lastly, the response declared that the relevant payroll period was January 3, 1977 to January 7, 1977, rather than December 27, 1976 to January 2, 1977.[3/]

Alien told Valdez that as the union petition was filed on January 7, 1977 at 4:45 PM (Friday) and as work had stopped at noon, the payroll period immediately prior to the filing was January 3, 1977 to January 7, 1977. Valdez replied that the pattern and practice employed by the ALRB was that a "work day" extended to 12 AM of the date in question and thus the last preceding period was not four hours before filing but December 27, 1976 to January 2, 1977. Likewise, Valdez later noticed that rather than the usual Monday through Sunday work week utilized by Martori Bros., the response claimed a Friday (January 7th) as the "end" of the work week.

Payroll sheets were submitted to Valdez with Martori's January 3, 1977 to January 7, 1977 list of employees. In checking UFW authorization cards against current payroll sheets, Valdez noticed a "large discrepancy;" names on the authorization cards were no longer employed by Respondent. A phone call to the UFW was met with the reply that "a pro union crew had been let go on December 30, 1976."

3/ To be discussed at length, supra, the timing of the payroll period is crucial as to the voting eligibility of Ponce's crew in the upcoming union election.

Being discharged December 30, 1976, Ponce's crew would nonetheless be eligible to vote if the relevant payroll period was December 27, 1976 to January 2, 1977. If, however, the payroll period dates for determining eligibility were January 3, 1977 to January 7, 1977, Ponce's crew would be ineligible and the newly hired crew (Rodriguez) could vote.

Valdez testified that when he questioned Alien about the change of dates for the relevant payroll period (Martori on January 8, 1977 had told Valdez it was December 27, 1976 to January 2, 1977), that Alien replied that just because an employer says so without consulting counsel "doesn't mean they waive the right to objections."

The concomitant issue of the change in work week (taking place one day after Ponce's firing) from the previous Monday to Sunday to the new "week" of Saturday to Friday was also explained by Martori.[4/]

Steven Martori testified that the payroll period change-over had been planned weeks in advance, and that the logical start up date for the change was January 1, 1977. While somewhat vague as to how many years Martori Bros. had previously used a Monday to Sunday week, Martori said the workers convenience in California had prompted the new Saturday to Friday working week. As the company headquarters is located in Glendale, Arizona, and the payroll computer is located in Arizona, under the old system the workers would finish on Friday (little or no harvesting being done on weekends) but the work week would end on Sunday. Then, records would be transferred to Arizona for computer issued checks, and the workers would not be paid until Wednesday or Thursday for work essentially completed the Friday before. With the new work week ending on Friday, the payroll records could be shipped to Arizona and worked on over

[4/] Without the change in the "work week," the Monday to Sunday week would have allowed Ponce's crew to vote in the upcoming election. The January 7, 1977 filing would have been in the middle of the January 3rd to January 9th week and thus the "eligible time period" would have been the week of December 27, 1976 to January 2, 1977, a work week where Ponce's crew was employed.

the weekend -- the workers thus being paid Monday or Tuesday instead of Wednesday or Thursday. Numerous items of evidence introduced relating to General Counsel's, UFW and Respondent's positions on this point will be discussed under "Discussion of the Issues and Conclusions," supra. While the issues concerning the election itself are under judicial review, unfair labor practice charges were filed against Martori Bros. on January 17, 1977 for the termination of Ponce and his crew after additional investigation by ALRB agents.

IV

APPLICABLE AGRICULTURAL LABOR RELATIONS ACT AND NATIONAL LABOR RELATIONS ACT PROVISIONS

Section 1152 of the Agricultural Labor Relations Act defines the basic rights of agricultural employees:

> "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..."

Section 1153 of the ALRA defines what constitutes an unfair labor practice for an employer by stating:

> "It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (a) to interfere with, restrain, or coerce agricultural employees in exercise of the rights guaranteed in Section 1152.
>
> * * *
>
> (c) by discrimination in regard to the hiring or tenure of employment, or any term of employment, to encourage or discourage membership in any labor organization."

Section 1148 of the ALRA directs the Board to follow, "applicable precedents of the National Labor Relations Act as amended," and thus it is important to note that Sections 1153(a) and (c) of the Agricultural Labor Relations Act are essentially identical to Sections 8(a)(l) and 8(a)(3) of the National Labor Relations Act. Likewise, the rights protected by Section 1152 of the Agricultural Labor Relations Act closely parallel those same rights protected by Section 7 of the National Labor Relations Act. Similarly, the Agricultural Labor Relations Board shall consult federal precedent under the NLRA for guidance in determining what conduct constitutes an unfair labor practice.

Section 1154.6 of the ALRA states:

> "It shall be an unfair labor practice for an employer or labor organization, or their agents, willfully to arrange for persons to become employees for the primary purpose of voting in elections."

Quite clearly, discharges in retaliation for union activity constitutes violations of both Sections 1153(a) and 1153(c) of the Agricultural Labor Relations Act, as they both interfere with the exercise of protected employee rights, and the discharge itself constituting discrimination in regard to the tenure of employment to discourage union membership.

A. Standards Of Proof

With the exception of "inherently destructive conduct," supra, it may generally be stated that a violation of Section 1153 (c) requires proof by a preponderance of the evidence that the discharge was illegally motivated by a discriminatory intent to discourage union membership. (Section 1160.2 of the Act sets forth the standard

of proof necessary for establishing the commission of an unfair labor practice as the preponderance of the evidence.)

Different proof requirements stand in alleging a violation of Section 1153(a)and 1153(c) of the Act. A violation of Section 1153 (a) of the ALRA occurs if it is shown that the employer engaged on conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights as guaranteed under Section 1152. There is no necessity to prove that the employer acted out of animosity or anti-union animus, or that the interference, coercion, or restraint to the employees in any way achieved the affect of truly hindering employees Section 1152 rights. NLRB v. Coming Glassworks, 293 F2d 784, 48 LRRM 2759 (1st Cr., 1961). Thus, if an employee is discharged in abrigation of his Section 1152 rights, there would then follow a violation of Section 1153 (a), though perhaps not necessarily a violation of Section 1153 (c), absent a showing of anti-union animus or employer conduct "inherently destructive" of employee 1152 rights.

A violation under Section 1153 (c), where the employer has discriminated in regard to hiring or tenure of employment in order to (in this instance) discourage membership in any labor organization, necessitates a showing that the employer's motive was the discouragement of such membership in a labor organization.

The Board must prove that an employee would not have been discharged but for his union activity in order to establish a violation of Section 1153(c), but in proving the discriminatory motive of a discharge, General Counsel is not required to produce direct

proof of the employer's state of mind, but may rely upon circumstancial evidence. In "discharge" situations, direct evidence of intent is often a difficult commodity to obtain, and thus, circumstancial evidence must suffice as it may be all that is available to prove quite motive in any type of case. NLRB v. Putnam Tool Company. 290 F2d 663, 48 LRRM 2263 (6th Cir., 1961).

B. Inherently Destructive Conduct Standard for Inferring an Improper Motive

NLRB v. Great Dane Trailers. Inc.. 388 US 26, 33; 18 L Ed2d 1027; 87 S Ct. 1702 (1967) sets forth the proposition that some conduct effected by an employer may be so inherently destructive of employee interests, that no proof of anti-union motivation is required to find that a discharge may be an unfair labor practice under Section 8(c) [1153(c) ALRA] even though there was no improper motive for the employer's behavior. Thus, there may be an instance where a discharge was so inherently destructive of guaranteed employee rights, that though this discharge may have been justified by business considerations and flowed from no employee anti-union animus, there may nonetheless be a violation or unfair labor practice.

V

DISCUSSION OF THE ISSUES AND CONCLUSIONS

A. The Actions of Martori Bros. Was Inherently Destructive Toward Those Section 1152 Rights Guaranteed Ponce and His Crew

Counsel for Respondent correctly cites NLRB v. Great Dane Trailer, Inc. 388 US 26, 33; 12 L Ed2d 1027, 87 S Ct 1972 (1967), as the Supreme Court landmark decision holding that some employer

conduct is so inherently destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive. Counsel goes on to state that:

> "The application of the inherently destructive conduct standard for inferring discriminatory motivation on the part of employer is based on the type of consequences which flow from the conduct and the extent to which those consequences were forseeable." (Respondent's brief, page 8 lines 13-15.)

The facts of the instant situation regarding the termination of Ponce and his crew show Respondent's actions to have had such a devastating impact on the Section 1152 rights of those employees involved that one must find that Martori Bros. has committed an unfair labor practice regardless of "underlying motives" for its actions.[5/]

Steven Martori testified that the make-up of the crews were different -- that Sandoval and Martinez were his regular crews and Ponce was only a replacement. Furthermore, Steven Martori testified and indeed an exhibit was entered (Respondent No. 5) to show that Ponce hired more (Imperial Valley) workers than the other crews during the month of December.

Concomitantly, as previously noted, members of Ponce's crew (Jesse Corona, Heriberto Silva) and the UFW organizers (Mario Pacheco and Alberto Gonzales) further testified that Ponce's crew,

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[5/] I will find, supra, that the direct and circumstantial testimony and evidence offered along with the testimony of all parties lends itself to the inescapable conclusion that the Respondent did act with anti-union animus. In my conclusions above, however, I will assume employer was in fact motivated only by a desire to improve the quality of his lettuce packs.

as opposed to the other two crews, were "made up of California workers and more receptive to the Union." Thus, one is faced with a situation (beginning on the first day of employment, December 8, 1976), where one of the crews is immediately singled out as being "a California crew," a "temporary crew" (Respondent's testimony), and a crew more initially and subsequently receptive to the union -- Ponce's crew.

Edward Martori testified that he spent approximately one hour a day with each of the three crews, and that Steven Martori spent approximately 20 minutes a day with each of the three crews. Likewise, both Steven and Edward Martori testified that they were present in the mornings, but paid little attention to the union organizing efforts.

It is inconceivable that with the time Edward and Steven Martori spent with the crews, and with their observations of those crews in the morning (even if there was no active interference with the organizational meetings) that they could not help but notice the increased union organizational activities revolving around Ponce's crew. Likewise, I find it hard to accept the testimony of Edward Martori that all the crews wore union buttons in equal numbers. The fact that Ponce's crew eventually voted 35 to 2 in favor of the union, would lend corroboration to the testimony of his crew members and union election organizers that almost every member of Ponce's crew wore UFW buttons as opposed to the crews of Martinez and Sandoval. Thus, the logical conclusion to draw it that through their own observations of union organizational activities in the morning revolving around Ponce's crew and their observations of the members

of Ponce's crew wearing union buttons, Respondent (through Steven and Edward Martori) must have been aware that Ponce's crew -- the different crew, the California crew, the temporary crew, the pro-union crew -- was just that, a focal point for the UFW and a crew that would undoubtedly support workers organizational activities.

As stated infra in a direct reading of Section 1152 of the Agricultural Labor Relations Act, there are certain inalienable rights given to workers under the ALRA. When the actions of an employer interferes with employees right of self organization, with their right to form, join or assist labor organizations, to bargain collectively with representatives of their own choosing, or to engage in other consorted activities for the purpose of collective bargaining or other mutual aid or protection, an unfair labor practice has been committed. In this given instance, the pro-union crew, the one crew out of three that was shown to be pro-union, was terminated twenty one days into an organizing drive and eight days before a union election. It would seem prima facie, that to single out pro-union adherents for termination at this critical time would have a "devastating impact" on the workers of Ponce's crew as well as all Martori Bros. workers, and thus under Great Dane Trailers constitute an unfair labor practice.

In explaining the import of NLRB v. Great Dane Trailers, Inc., Professor Robert A. Gorman states,

> "If the employer action has a 'devastating impact' on Section 7 activities (1152), the Board may find that action illegal, without need for proof of anti-union animus. Even if the employer was in fact motivated by a desire to preserve its business, this is not a defense. In general, conduct will be held

> to have a 'devastating impact' if all union activists are treated in a manner inferior to all employees who are not union activists." (Basic Text on Labor Law -Unionization and Collective Bargaining, at p. 338 (1976); emphasis added.)

Respondent states that the "inherently destructive conduct" standard for inferring discriminatory motivation on the part of the employee could not be applied in the instant case as "there were no inescapably forseeable consequences flowing from the crew discharge which carried indicia of an illegal intent on behalf of Respondent. The only truly forseeable consequence flowing from the discharge was the termination of poor quality packs in the lettuce harvest." (Respondent's brief at page 8.)

At the hearing, Steven Martori impressed me as an extremely intelligent individual, a person intimately aware of his business responsibilities and the marketing procedures of his company. While Steven Martori testified that he was "suprised" when a petition for election was filed, it stretches credibility that he did not know that this petition for election was the ultimate objective of the union organization campaign. It flows logically, then, that the termination of an entire crew -- the only demonstrable pro-union crew out of three working crews -- twenty days after employment began and eight days before said election, would lead to the forseeable consequences of not only depriving those terminated employees of the most basic Section 1152 rights afforded them, but would also have a chilling effect on all employees who would be voting in the forthcoming election. One may infer that in fulfilling his obligations to his company, Steven Martori balanced the termination of Ponce and

his crew in relation to "union organization" as opposed to the continued presence of Ponce's crew and the inferior work they were doing, and reached a decision, which he, as an employer, "should" reach -- that Ponce and his crew should be immediately terminated when a substitute crew (Rodriguez) became available. (Again, I am assuming arguendo, that there was no anti-union animus on the part of Steven Martori.)

It is the responsibility of the Board to, however, balance the 1152 rights of the employee against the likewise sacrosanct right of an employer to run his business in a profitable manner. Indeed, as stated previously, in a situation where the rights of the employer are not "inherently destructive" of the rights of his employees, a valid economic justification behind employer's actions coupled with lack of anti-union animus must lead the Board to find that no unfair labor practice has ensued.

In citing Tex Cal Land Management. Inc., 3 ALRB No. 14 (a case in which the Board employed the "inherently destructive" standard in finding an unfair labor practice), Respondent states that in the instant situation, unlike Tex Cal Land Management, "there was no illegal interrogation of employees, there were no threats made to employees concerning the consequences of supporting the union, there were no denials of access, and there were no assaults upon union organizers." I would agree with Respondent that there has been none of the outrageous objective conduct in the instant case as itemized by the ALRB in Tex Cal Land Management, supra; nonetheless, there has been conduct "inherently destructive" of rights guaranteed employees

by the Respondent. While the act of Martori Bros. in firing Ponce's crew may differ quantitatively with those acts cited by Respondent in Tex Gal Land Management, Inc., there nonetheless has been committed such an "inherently destructive" act -- the firing of the only ostensible pro-union crew in the middle of an organizational campaign and eight days before an union election. This one "act" and the effect therefrom had so chilling an effect on Ponce, his crew, and indeed all Martori Bros. workers, that it qualitatively fulfills the standard in being inherently destructive of 1152 rights of employees just as the quantitative nature of the employer's act in Tex Gal Land Management, so too met the inherently destructive standard.

I am well aware of the possibility of one attempting to garnish an extremely dangerous precedence out of this ruling; that is, that an employer would not be allowed to fire "union people" for an economic reason (no anti-union animus being present) in proximity to an election, or in the midst of an organizational campaign. My ruling here should not be given so broad a construction, and must be examined in light of the specific fact circumstances.

Here, Ponce's crew (California, pro-union, buttons) was easily singled out from the two other crews. While employees testified that Steven and Edward Martori did not interfere with the meetings and didn't seem to pay much attention with the organization meetings, it is clear that all employees were aware that their employer knew that an organization campaign was taking place. As to the quality of 'the work of Ponce's crew, Steven Martori stated to Ponce that if he

needed a fourth crew he would hire Ponce back, and thus one must infer that the qualitative standards of Ponce's crew were not utterly abhorent; that Martori wanted Rodriguez's crew because they did better work, not that Ponce's crew was so totally inferior. Lastly, the timing of the discharge, eight days before the election, must have led many workers to feel what Jesse Corona felt, when he said "they fired Ponce's crew because he was pro-union."

I thus find it to be reasonable and compelling to find that given in the special and limited cirucmstances brought before me, the firing of Adolfo Ponce and his crew on December 30, 1976, was a violation of the employees 1152 rights and constituted a violation of Sections 1153(a) and 1153(c) of the Agricultural Labor Relations Act.

B. The Termination of Ponce's Crew Constituted an Unfair Labor Practice Under Sections 1153(a) and 1153(c) of the Code, in "That the Employer's Anti-Union Animus Outweighed Any Economic Justification

1. The lettuce weights

In his lengthly, but well presented brief, counsel for Respondent (in discussing the Martori change of payroll period during the union organization) concludes that it was an "unfortunate coincidence" that such a change should take place at that crucial time. In examining the entire record of evidence presented, I find all too many "unfortunate coincidences" for the Respondent as opposed to demonstrative proof offered by General Counsel and UFW -- proof that is contraverted only by bare testimony of the Respondent.

The primary reason given by Steven and Edward Martori for the termination of Ponce and his crew was the light weight of Ponce's

lettuce packs -- the gross weight of Ponce's lettuce compared to the other crews as well as the wide variance of the weight within Ponce's load. The testimony of the Martoris was amply corroborated by that of Eddie Diorio, the salesman for Martori Bros. In extremely colorful and unforgettable fashion, Mr. Diorio related that approximately 50 or 60 percent of the lettuce sold by the company was above the "mostly market," i.e. Martori Bros. was selling premium lettuce above the price at which most sales are made on a given day. Diorio testified that Martori Bros. lettuce was so outstanding, that approximately 25 percent was sold at the "occasional market price" --a price approximately 50 cents per box above the "mostly market." This testimony relating to the quality of Martori Bros. was confirmed by Jimmy Pascho, a lettuce broker and inspector.

While Pascho could not comment directly on the lettuce from Martori Bros. in the month of December, Diorio testified that the work of Ponce's crew in December was so unsatisfactory that he (Diorio) was forced to renegotiate 12 of the 34 or 36 truck and car loads packed by that crew. Diorio further testified that buyers became aware of the fact that Ponce's crew packed inferior lettuce as to weight and weight variance, and that during December buyers would specifically request lettuce whose carloads were marked with either M or C (Martinez or Camarino) but not those marked with an A (Adolfo Ponce).

A close examination of Eddie Diorio's testimony, however, shows not only some vacillation, but also a true lack of any corroboration. Diorio first stated that "Ponce's crew was always

the lowest in weight," but when confronted with the possibility (under cross examination) that Ponce's crew wasn't always the lowest in weight, Diorio then said that Ponce's crew was not the lightest all of the time, but worst in size and quality and worst in the variance of the weights within the loads. At one point, Diorio stated that he kept records in the lettuce cooler regarding the lettuce quality according to the crew and that there were possibly records containing information relating to the alleged objections of buyers toward Martori lettuce (the A crew). Assuming arguendo, that Diorio was confused in what constitutes "records," it was nonetheless demonstrated by objective evidence that the only records substantiating testimony in this instance were records submitted by General Counsel and UFW to show that Ponce was neither the lightest crew in lettuce weights nor that his lettuce varied no more than any other union crew.

Likewise, Steven Martori testified that he himself was aware of the wide variance in light weights of Ponce's crew in that he would weigh the lettuce packs in the field. According to his brother, Edward Martori, Steven Martori spent only approximately 20 minutes with each crew per day, thus one must question how valid are the weight observations of Steven Martori. Martori, like Diorio, submitted no documentation to back up his testimony.

General Counsel, on the other hand, submitted exhaustive documentation which would seem to counter the allegations of the Martoris, Diorio and other Respondent witnesses as to the problems with Ponce's weight and weight variance. Special attention should

be directed to United Farm Workers Exhibit No. 5 and the truly revealing statistics displayed therein. The exhibit (entered into evidence) demonstrates the average weight per carton per day from December 8, 1976 through December 30, 1976 for the three Martori Bros. crews. Statistics from that exhibit were compiled from the "weight tickets" as the loads of lettuce were weighed on a public scale prior to being taken to the company cooler. As may be seen from an examination of the exhibit, during the 13 working days in question, Ponce's crew was the "lightest" for five days; Martinez's crew was the lightest for five days; and Camarino's crew was the lightest three days. In compiling an average for the weight of the lettuce cartons based on all days which all three crews worked (13 of the 14 working days in question), and using statistics compiled from the weight load as they passed over the public scale, one finds that the average weights for the three crews varied by .5 pounds over the course of that 13 day period -- Ponce's crew averaged 49.01 pounds per box, Camarino's crew averaged 49.21 pounds per box, and Martinez's crew averaged 49.51 pounds per box. This direct statistical evidence quite clearly overcomes the uncorroborated testimony of Respondent, and most certainly corroborates the testimony of General Counsel and UFW witnesses who stated the work of Ponce's crew was certainly no worse than that of the other crews (especially in relation to weights as per the exhibit). It is interesting to note that in the month of January, the crew that replaced Ponce (Rodriguez's crew) compiled an average weight per carton of 50.51 pounds, as compared with the weights of the other crews (51.11 and 5l.61 pounds) and thus in fact was more than one

pound lighter than the best working crew, a discrepancy greater than that of Ponce's in December. Likewise, from February 1 through February 11, the Rodriguez crew was 1.3 pounds lighter than that of the best working crew, and from February 14 through February 25, Ponce's replacement crew (Rodriguez) was again the lightest crew, averaging in fact 1.62 pounds lighter than the heaviest crew's cartons.

Attached to this exhibit are further statistics which examine the other chief complaint of respondent, the range of weights of an average box by a load. In determining this figure, counsel for United Farm Workers took the highest weight reported within a load and the lowest reported in a load, subtracted one from the other to obtain the maximum variance, and divided same by the number of boxes to achieve an average range. In compiling these statistics, UFW did not use combination loads or loads of over 300 in an effort to obtain the utmost accuracy. Approximately close to 90 percent of all loads were 300 cartons so one might say conclusively that these statistics were based on 90 percent of the lettuce harvested by Respondent in December. These statistics show that the range of weight of an average box by load is equally well distributed as the gross weight, and that the testimony of Respondent falls before hard figures. These numbers show that for the 13 working days where all three crews worked, Ponce's crew had the highest weight variance for five days, Camarino's crew had the highest weight variance for five days, and that the crew of Martinez had the highest weight variance for three days. It is interesting to note that over this time period in question, the best crew's variance (Martinez with the widest range on only three days) exceeded the "worst" day

of Ponce on two occasions (Martinez 9.7 pounds and 6.7 pounds variance, compared to Ponce's worst excess of 5.9 pounds variance).

To counter these persuasive statistics, Steve Martori stated that these statistics were not used in determining the weights of lettuce packed by his crews and goes on to repeat that his decision to terminate Ponce was based on his (Martori's) own personal observations. "I don't use weight tickets as far as the crews are concerned. I did not use weight tickets in deciding to layoff Ponce's crew." Steven Martori further testified that in Arizona only 10 to 15 percent of the loads are weighed on public scales as opposed to 90 to 95 percent of the loads used in California, and thus it was natural for him not to rely on weight tickets. While I can readily accept the fact that Respondent does not rely on these weight tickets, I nonetheless cannot overcome what these weight tickets demonstrably show. One must assume that the personal observations of Steven and Edward Martori were tainted by the fact that they knew the pro-union attitude of Ponce's crew, and that this "motivated" their feelings that Ponce was packing the lightest packs with the most variance in weight. One must question how many boxes can be weighed within a load "in the field" to obtain accurate statistics as to the weight variance in a crew -- especially with the amount of time that Steven Martori and/or Edward Martori spent with each crew. I am sure that personal observation is necessary to insure quality, and that some conclusions can be made from personal observation, but without any documentary evidence backing either the weight or weight variance allegations of Respondent, that great preponderance

of evidence lies with General Counsel and UFW, and one must conclude that the discharge was motivated by anti-union animus rather than economic motives.

Respondent has also attempted to illustrate that the quality of Ponce's crew was lower than that of the other crews by reason of the "turn-over" in his crew; Respondent's Exhibit No. 6 shows that during the 16 days in which Ponce's crew was employed, 101 people were hired, as opposed to 88 people for Johnny Martinez and 71 people for Camarino Sandoval. As the evidence shows no real disparity between the weights packed by each crew or the variance of these weights, one must assume that Respondent's own exhibit indeed fortifies the position of General Counsel and UFW in stating that Ponce's crew was made up more of California "pro-union people" as opposed to the "Arizona and anti-union crews" of Martinez and Sandoval. Certainly, more local people were hired by Ponce than the other two crews. Indeed, at one point Steven Martori testified that Ponce had over-hired on some occasions and thus damaged the company. This statement was refuted by Ponce who testified that he would often have to add on and take off people from his crew more than the other crews, and would seem to be verified by UFW Exhibit No. 6 showing the total number of employees working per day, per crew for Respondent in the month of December 1976. That exhibit shows that whereas the crew of Camarino Sandoval varied between 30 and 39 employees throughout the month of December, the crew of Ponce varied from 28 to 44 throughout that time; this variance being at the direction of Steven Martori and Edward Martori in relation to how many trios they would wish working on a specific day.

2. The change in the payroll date

Obviously, there are two interpretations one can give to Martori Bros. decision to change the accounting and pay period of their company on January 1, 1977. It is indisputable that by changing their work week from Saturday to Friday on January 1, 1977, the crew of Adolfo Ponce was disenfranchised from voting in the upcoming election. Either this change was effected to specifically disenfranchise that pro-union crew, or, as Respondent states, it was an "unfortunate coincidence" that Martori made his payroll change at that time.

It seems logical to agree with the testimony of Steven Martori that the time to make a change, in the accounting week of one s company is January 1, 1977, and especially more so when that particular date falls on a Saturday, the date to be the first day of the "new" working week. Likewise, one may agree with Martori that with a work week ending on Friday, the workers would be able to receive their checks sooner, and more in line with the workers' "end of the week." Again, however, the evidence offered both through testimony and documentation, show that this "unfortunate coincidence" appears more to be an ill-conceived plan by Respondent to disenfranchise Ponce's crew rather than altruistically motivated.

As stated supra, Michael Valdez testified that on January 8, 1977, Steven Martori told him that the appropriate payroll period for the upcoming union election would be December 27, 1976 through January 2, 1977, that there were approximately 150 eligible employees who would be voting, and that he (Martori) would not use the

previous Teamster election as a bar to the upcoming UFW election. Perhaps, Steven Martori was only a victim of bad advice from his counsel, Ivan Allen, rather than any deep rooted anti-union feelings of his own, but subsequent events nonetheless show anti-union animus on his part, and also demonstrate the flimsiness of the tenability of a true payroll change. On January 10, 1977, accompanied by Ivan Alien, Steven Martori presented the ALRB agent with an employer response to the petition for election, showing that the payroll period in question was from January 3, 1977 to January 7, 1977, that there were 200 employees to be eligible rather than 150, and that the Teamster election would subsequently be a bar to any UFW election. I can accept Steven Martori's testimony that he had crossed out 150 and written 200 on this response after checking his records, and I can also accept the contention that an employer is allowed to change his mind, and that after discussions with Ivan Allen he (Steven Martori) decided to assert the previous Teamster election as a bar to the upcoming UFW election. What is impossible to swallow, however, is the change in the payroll period.

Steven Martori testified that approximately December 20, 1976, he had made up his mind to change the payroll period, where the Martori Bros. work week would thus begin on January 1, 1977. However, payroll records were introduced into evidence (General Counsel Exhibit No. 14) -- the payroll records of the Respondent -- which show, as had been the case for a number of years previously, that the work week ended Sunday, January 2, 1977, as always. Similarly, payroll checks issued for that week indicated the week

ending Sunday, January 2, 1977, not a new week beginning January 1, 1977 or a week running January 3, 1977 to January 7, 1977 as Martori testified. Likewise, a payroll check of Respondent was introduced into evidence (UFW Exhibit No. 1) which shows that the salary of Heriberto Silva for the second week of January illustrates a pay period ending on Sunday, January 9, 1977, as usual! Either the so-called change of work week had not yet taken place, or at the very least, personnel within Respondent's payroll office itself were ignorant of any change in payroll periods for at least several weeks after this change had allegedly taken place.

Additionally, evidence of this illusorary change of payroll periods can be inferred from lists of crews submitted for purposes of identifying who would be eligible to vote in the upcoming election. The list for Ponce's crew (the list submitted for those crews which worked up until the week ending January 2, 1977) was on a computer print-out (General Counsel Exhibit No. 12a), whereas the list submitted for Rodriguez's crew (the replacement crew with "work week" ending January 7, 1977) was typed out. One must question if the computer had truly been reprogramed to illustrate the new working week as Respondent has testified.

As stated, supra, circumstantial evidence will suffice to show motive of anti-union animus, as often that is all that is available to prove "motive" in any type of case. NLRB v. Putnam Tool Company, 290 F2d 663, 48 LRRM 2263 (6th Cir., 1961). Likewise, the Board may draw reasonable inferences from the evidence before it (Republic Aviation Corps v. NLRB, 324 US 793, 16 LRRM 520 (1945)). In NLRB

v. Byrd Machinery Company, 1961 F2d 589 (1st Cir., 1947), the Court states that "...direct evidence is seldom attainable when seeking a probe in employer's mind to determine the motivating cause of his actions (citations). Moreoever, the weight to be accorded the inferences by the Board (that the discharge was discriminatory) is augmented by the fact that the explanation of the discharges offered by the respondent did not stand up under scrutiny." As stated to this point, scrutiny of the evidence corroborating the testimony and the testimony itself leads to anti-union animus on the part of the Respondent in changing his payroll date to disenfranchise the crew of Ponce, and similarly a lack of economic justification for the employer's action which could outweigh this anti-union animus.

3. Other evidence re weights

In General Counsel's Exhibits Nos. 15, 16 and 17, General Counsel attempts to further verify objectively that the quality of the lettuce picked by the three crews, both weight-wise and quality-wise, was essentially the same. While this evidence seems less dramatic and conclusionary than the weight load evidence heretofore mentioned, it is nonetheless worth commenting on at this point. General Counsel Exhibit No. 16 is a composite of inspections conducted of Martori Bros. fields by Imperial County inspectors throughout the months of December 1976 to February 1977. Throughout the day, a county inspector will go to the fields and view the entire crop; in fact, said county inspectors are required to inspect a company field several times in a day. As seen from the exhibit, the remarks made by the different inspectors on the quality of lettuce

are substantially consistent throughout this period. The quality of lettuce for the month of December 1976 (as evidenced by the remarks of the county inspectors) is basically indistinguishable from the quality of lettuce for the following two months. The county agricultural commissioner is empowered to issue violation notices when the quality of the lettuce does not conform to standards established under the Food and Agricultural Code. These notices are known as "red tags," and were subpoenaed by General Counsel (General Counsel Exhibit No. 15) for the period of December 1976 through February 1977 of Martori Bros. No red tags were issued in the month of December 1976 (when Ponce's crew was working) but there were two red tags issued for Respondent's lettuce in the month of February 1977 for poor crew performance.

Likewise, federal inspections are conducted of lettuce in the cooler which is going to be shipped out of the country (in this case Martori lettuce to Canada). These inspections certify the grade of quality of lettuce, and in undertaking these inspections a federal inspector will take one sample per 100 cartons at random. General Counsel Exhibit No. 17 relates to the Martori federal inspection certificates and field notes, and like the County inspections shows no significant deviations in the grade of lettuce (quality of lettuce) from December 1976 through January and February of 1977. Again, I would state that the above evidence is certainly not conclusive of itself, but is one more attempt of General Counsel and counsel for UFW to corroborate their testimony with documentary evidence. Had Respondent been able to provide any documentary evidence whatsoever

to back up the testimony of Steven Martori, Edward Martori and Eddie Diorio, I may have taken a far different stance in reaching my decision. Based on what was offered, however, the evidence seems overwhelmingly demonstrable that the bare testimony of Respondent will not stand.

4. Other acts of Respondent illustrating anti-union animus

It is undeniable that there is a lack of demonstrable anti-union animus on the part of Steven Martori or Edward Martori with regard to the union organization meetings held in the mornings. On the day of the union election, however, January 1977, both Steven and Edward Martori passed out a leaflet (General Counsel Exhibit No. 5) allegedly comparing what workers currently have and what they would have under the United Farm Workers. Many of the not benefits in that leaflet passed out by the Martoris were benefits available to the field workers of Arena Imperial -- specifically, there were no "medical services in Mexicali," no "vacation benefits," and no "pension benefits." In testimony, Steven Martori stated that he thought the Teamster contract was in effect, and that this was the importance in listing the Teamster benefits mentioned in the leaflet he disseminated. It was pointed out through cross-examination, that no matter who won the ensuing election, the Teamster contract would not continue, and Martori was asked the question of what relevance the Teamster benefits would then have in the election. His reply was "None, I guess." Steven Martori also stated that prior to himself and Edward Martori handing out the pamphlet, he did not check the statements contained therein for accuracy. While

Section 1155 of the Labor Code specifically provides that the expression of views, arguments, or opinions does not constitute evidence of an unfair labor practice where there is no threat of reprisal or force or promise 1of benefit, it would nonetheless seem that the misleading nature of this pamphlet goes further to showing the true feelings held by Steven Martori towards a UFW victory. I would repeat that Steven Martori impressed me not only as an intelligent individual, but one who operated with competency and forethought. I cannot accept his statement that he did not "check out for accuracy" this pamphlet before distributing same.

With the above mention of the alleged "Teamster contract," it is important to note that in discussing same, Steven Martori evidenced virtually no knowledge of the provisions of that contract. In justifying the termination of Ponce, however, Martori relied not only on Ponce's poor performance, but also on the fact that Rodriguez had "seniority" to Ponce according to the Teamster contract. The definition of "seniority" and what it meant to Steven Martori and the relation, if any, that it had under the alleged "Teamster contract" changed quite often throughout the hearing. It appeared as the testimony progressed the basic assertion of Steven Martori was that Ruben Rodriguez himself had more seniority than Ponce, and this was just one other consideration taken into account in the firing of Ponce. In actuality, under the Teamster contract (General Counsel No. 4), a discharge to replace a foreman with another foreman of more seniority would be a violation of that contract. The employer is under a duty to check the seniority list for each of the

employees without regard to the foreman's seniority, and thus, the foreman's seniority alone would not be justification to the replacement of an entire crew.

Steven Martori also testified that throughout the months when Ponce worked in Aguila and later in Imperial Valley for Martori Bros., that he (Martori) had kept in contact with Rodriguez and would have eventually re-employed Ruben Rodriguez. Martori testified that in December in the Imperial Valley he had thought both Ruben Rodriguez and Adolfo Ponce could have worked together but that Rodriguez and Ponce could not agree to share responsibility. While the testimony is somewhat ambiguous, it appears as if Martori was still saying during the hearing that he would have allowed Rodriguez and Ponce to work together, if they could have worked it out, rather than the outright firing of Ponce. If this was truly his intention, it seems that with a word from him to the two foreman, any internal difficulties between these two might have been worked out, and Martori's ends could have been met.

An employer is free to discharge his employees for business reasons even though an incidental effect is the removal of potential union votes in an upcoming election. Winchester Spinning Corp. v. NLRB, 402 F2d 299 (4th Cir., 1969) Given all that I have outlined above, however, there is no other conclusion to draw but that the discharge of Ponce and his crew was motivated by a desire of Respondent to terminate a pro-union, "unknown quantity" crew, with that of a "less union crew" that would be more malleable to employer interests -- that the firing of Ponce and his crew was not "incidental" to the upcoming election and that Respondent actively desired

to influence the outcome of the union election by the termination of Ponce and his crew.

C. Respondent Violated Section 1154.6 of the Labor Code When It Hired Ruben Rodriguez's Crew to Replace That of Ponce

Given my conclusions and the examination of the evidence as set forth in this decision, it follows apriori that the hiring of Ruben Rodriguez's crew -- the Arizona crew -- eight days before the union election coupled with the termination of Ponce's crew, constitutes a violation of 1154.6.

While Steven Martori testified and Ruben Rodriguez corroborated that in their telephone conversations, Martori never asked Rodriguez how he or his crew would vote in the union elections, it is obvious from all the facts heretofore discussed infra, that Martori knew in hiring his "Arizona foreman" he would be achieving a crew less pro-union than that of Ponce's. Indeed, it would seem that virtually any crew that Martori might have hired would have been less pro-union than Ponce's, and Martori had more than ample reason to believe that this might be the case as he knew that Rodriguez had previously worked with Martinez and Sandoval in Arizona (see previous agruments for testimony relating to comparison of California and Arizona crews and their union attitudes).

The fact that Rodriguez's crew eventually voted 24 to 14 in favor of the UFW in the election is not relevant to the purpose behind the hiring of said crew, and once again, it seems evident that given my previous decisions that Martori Bros. committed violations of Section 1153(a) and (c) in the discharge of Ponce's crew, it follows all but automatically that § 1154.6 was violated as

soon as Martori "willfully arranged for persons to become employees for the primary purpose of voting in elections" no matter how those persons eventually voted.

D. Respondent Violated Section 1153(a) of the Act by Discharging The Supervisor Adolfo Ponce

Quite clearly, Adolfo Ponce falls within the term "supervisor" under Section 1140.4(j) of the Act, and therefore does not come under the same protection afforded "employees" under the Agricultural Labor Relations Act.

General Counsel does state a number of cases, however, which have found a violation of Section 8(a)(l) [Section 1153(a)] where the employer has discharged a supervisor because of his union support. Roper Corp., 213 NLRB No. 19 (1974), 87 LRRM 1657; Vadu of Oaklahoma, Inc., 216 NLRB No. 135 (1975), 88 LRRM 6131. This is not the present instance, however, as no testimony was offered that Ponce himself evidenced any support for the United Farm Workers.

Of critical import, however is Talledega Cotten Factory, 106 NLRB 295 (1953), 32 LRRM 1479, enforced 213 F2d 591. In Talledega Cotten Factory, Inc., the employer discharged supervisory personnel immediately after a union victory in an NLRB conducted election. The court held that the "discharges plainly demonstrated to rank and file employees that this action was part of its plan to thwart the self-organizational activities and evidenced a fixed determination not to be frustrated in its efforts by any half hearted or profunctory obedience from its supervisors." (Emphasis added.)

A parallel lies in the case at hand. The firing of Ponce would obviously have a chilling effect upon the rank and file employees which would thus inherently interfere with their right to self organization. Here, the effect was immediate as Ponce's firing was in fact a dismissal of the entire crew.

Indeed, it would be illogical to find any other conclusion, as it was the firing of Ponce that "led" to the discharge of his entire crew -- completely estopping that crew from any and all of their Section 1152 rights.

VI

HERIBERTO SILVA

A. The Discharge of Heriberto Silva

Heriberto Silva first began work in the lettuce over 14 years ago, working variously as a folder, cutter, packer and closer. In the fall of 1976, Silva first began work for Martori Bros. where he worked in Aguila, Arizona in Ponce's crew as a folder.

On December 8, 1976, Silva went with Ponce's crew to the Imperial Valley and continued to work with that crew. Throughout the fall and winter months while working for Martori Bros., Silva did not receive any complaints about his work. To the contrary, in December 1976, Steven Martori wrote a letter to immigration officials on behalf of Silva's wife stating that Silva would have future employment with the company (General Counsel Exhibit No. 9).

Since 1971, Silva has been an active member of the United Farm Workers and has participated in three or four strikes and one boycott. The testimony is upcontroverted that during the period

Silva worked with Respondent in Imperial County, he became one of the leading union activists within the company. Silva would pass out leaflets to the crews, help obtain signatures for authorization cards, speak to other workers about the union, wear union buttons to work, attend organizational meetings each morning, and was personally responsible for obtaining the signatures of many of Ponce's crew on UFW authorization cards. Many of these organizational activities took place in the morning while the crews were waiting for the ice to melt before proceeding with their harvesting, and in the general presence of company supervisors (Edward or Steven Martori).

On Thursday, December 30, 1976, Ponce's crew was told (through Ponce) that they would be laid off for a few days and could begin work again on the following Wednesday. As Silva was in hard financial straights, he asked Steven Martori to transfer him to another crew until the following Wednesday. Steven Martori agreed to let Silva "cut and pack" for a few days with Camarino's crew, and that he could return to his folder position on Wednesday when his own crew came back.

On Wednesday, January 5, 1977, Ruben Rodriguez and a crew made up of many "Arizona workers" came to work for Martori Bros. in place of Ponce's crew. Silva's testimony strongly relfected his belief that the replacement of Ponce's crew was due to the "threat" that Ponce's crew posed to Martori Bros. because of their evident support of the United Farm Workers.

Silva now felt that he rightfully belonged in the folding position of Rodriguez's crew. According to Silva, the position should have been his, as the folder in Rodriguez's crew had not worked for Martori Bros. before, nor had he even worked as a folder. Thus, with some anger over the firing of Ponce's crew, and with resentment over the fact that he had not received the position of folder in the replacement crew, Silva approached Edward Martori, Steven Martori and Camarino Sandoval in the fields on January 6, 1977, to voice his complaints. At this meeting, Silva told the group that he should be folding rather than cutting or packing and that he thought an injustice had been committed both against himself (in not being a folder) and against the members of Ponce's crew (in being fired).

Later that same day, Heriberto Silva had an additional conversation with Steven Martori where Edward Martori was present. Steven Martori asked Heriberto Silva what his problem was and Silva replied that he was angry that Martori was bringing in another crew and another folder, and again repeated that as he had folded with Ponce's crew, he wanted only a folding position, "Right away, today." Steven Martori told Silva he could begin to fold the next day, but perhaps in a crew other than Rodriguez's, and Silva replied, "I said no, because I thought it was unjust as I was the only one working from Ponce's crew. Steven said to take the job the next day or nothing, and then he left. I started yelling 'viva Chavez' and that the worker's wouldn't suffer anymore after Chavez won, Steven was so mad he was pulling his hair out when he left the field."

At the end of work that day, Silva went to the office to see Steven Martori in order to "clear up the situation and find out whay my real position would be the next day." In an emotional and angry tone, Silva asked Steven Martori if he would have the folding job on the following day, and again repeated that he had wanted to fold "not the next day, but today." Steven Martori told Silva, "Eddie, if you get a company you can run it the way you want; if you want the folding job tommorrow, it's yours. This is my company and I am going to run it my way." Silva, then declared, "Does that mean I'm fired? Does that mean I'm fired?" While Martori then replied, "Eddie (Silva), if that is the way you want it, then you are fired."

The next day, Eddie Silva returned to the Martori fields in the presence of the union organizer, Maria Pacheco. Eddie Silva and Maria Pacheco were passing out leaflets, while standing on an approximately four foot wide strip of land parallel to a drainage ditch. It was unclear whether or not that land was physically on Martori Bros. property. As Steven Martori ordered Eddie Silva to leave the company property, Silva replied, "Why don't you come over and make me." A conversation ensued where Martori expressed the opinion that Silva should work for another company in the Imperial Valley, but Silva replied, "My people need me here."

On Friday, January 7, 1977, Silva received his termination check. It is vitally important to note that in relation to the termination of Ponce's crew that this check tendered to Silva reflects the "pay period ending Sunday, January 9th" (UFW Exhibit No. 1).

Later on January 7, 1977, ALRB agents Maria Leslie and David Arizmendi went to Martori Bros. office to further discuss the situation. On January 8, 1977, Silva received a telegram from Respondent with an offer to return to work, and Silva returned to work on January 10,1977.

B. Conclusions of Law: The Discharge of Heriberto Silva Was Not a Violation of Sections 1153(a) or 1153(c) By Martori Bros.

While General Counsel directly points out that presentation of grievances over terms and conditions of employment is certainly a protected activity (NLRB v. Kennamentel Inc., 182 F2d 817, 26 LRRM 2203 (3rd Cir., 1950)), and that likewise an employer cannot lawfully discharge employees out of resentment for the pressing of their rights under the Act (Gullett Gin Co. v. NLRB, 175 F2d 499, 25 LRRM 2340 (5th Cir., 1950)), it nonetheless follows that an employee may be discharged at any time for acts which are not protected by the Act; e.g. where justified anger towards an employer goes beyond the grounds of reason, and where open attempts are made to "goad" the employer into discharge.

Of all of the testimony given at this lengthly hearing, the two individuals spending the greatest time on the witness stand were Steven Martori and Heriberto Silva. While they are coming from two different worlds, one a part owner and head of the lettuce operation of a large agricultural grower, and the other a field worker for 14 years, I found many similarities between the two -- they both are extremely competent in their respective realms, both are convinced of the righteousness of their positions, both are

intelligent and make good witnesses, but perhaps most important of all, both are extremely proud individuals. I believe that more than anything else, it was the pride" of Heriberto Silva, finding himself in a position where he was the only member of Ponce's crew still to be working for Martori Brothers (Silva had stated that he was in bad financial straights and needed the job) but at the same time uncomfortable in this position, that virtually led him into the insubordinate and unwarranted conduct which ultimately caused his discharge.

The discharge of Heriberto Silva on January 6, 1977, was not motivated by anti-union animus. Martori was aware of Silva's union activities when he agreed to let him continue working after December 30, 1976. From testimony offered, it appears that Heriberto Silva was the only member of Ponce's crew to directly ask Steven Martori for a job, and Martori agreed. Martori was put in an uncomfortable position when approached by Silva for employment. To decline to hire Silva would have clearly shown anti-union animus as (unlike Ponce, according to Martori) Silva was admittedly a good worker. Likewise, Martori had previously sent a telegram to Silva's wife stating he could remain in Martori Bros. employ (General Counsel #10)

One can imagine the frustration building up within Silva in the early days of January, knowing that a union election was Imminent and wondering whether or not Ponce's crew would be returning. On January 5, 1977, when Ponce's crew did not return, Silva's anger and frustration reached the boiling point which manifested itself in the conversations held with Steven Martori on January 6, 1977 (supra).

Certainly if Silva's comments had been limited to his request for a folding position and criticism of a firing, I would have no choice but to find at the minimum a violation of Section 1153(a) for his subsequent discharge. Silva did not stop there, however, as he demanded the "folding job now," and told Steven Martori he would take the folding job or nothing. I do not believe that Martori's reply, that "you can have the folding job the next day if you want it, take it or leave it," was unreasonable -- the unreasonable action was that of Silva demanding a folding job "on this day." I believe it was amply made clear to Silva that he was not terminated, but nonetheless Silva continued to ask, "Am I fired? Am I fired?" The firing did indeed take place, but I believe that Steven Martori was left with no other choice at this time.

In this instance, unlike the discharge of Ponce's crew, there was no anti-union animus. As stated previously, I am convinced that Steven Martori was aware that Silva was a union organizer, but here this was not the motivating factor behind the firing of this one individual.

General Counsel cites NLRB v. M & B Headwear Company, Inc., 349 F2d 170, at 174, 59 LREM 2829 at 2832 (4th Cir., 1965) for the holding that an employer cannot provoke an employee to the point where that employee commits an indiscretion and then rely on same to terminate that employment. In M & B Headwear Company, Inc., supra at 174, the Court holds that:

> "We hold that when a layoff is discriminatory a rehiring of the injured employee cannot be avoided by reliance on her later unpremeditated and quite understandable outburst of anger that in no way harms or inconveniences the employer."

Again, I repeat that Silva was justified in anger over the discriminatory layoff of his crew, but that Silva himself missed no working days as he was immediately rehired by Martori. Thus, where comment by Silva in relation to the firing of Ponce's crew would be protected, and where Silva would most certainly be allowed to voice his feelings of his union towards his employer and even his job preference, one must balance the outrage done to Silva himself against the verbal abuse and goading Silva perpetrated upon his employer. With special note that the "discriminatory layoff" of Ponce's crew did not truly injure Silva, the balance must swing towards the employer in this instance in that Silva's anger and goading went beyond his Section 1152 rights and that Silva's termination on January 6, 1977, was justified.

Section 1152 rights -- the bill of rights for agricultural employees -- are absolute in their own frame of reference. They do not prevent an employer, however, from exercising the prerogatives of hiring or firing so long as those employee rights (Section 1152) are not infringed upon. At the risk of being repetitious, let me repeat that in the instant case an examination of the two protagonists and the animosity between them goes far in helping me arrive at this decision. While Steven Martori had no love for Heriberto Silva, Silva's feeling towards Martori was coupled with the outrage Silva felt for the discharge of Ponce's crew, and his own personal outrage at not being allowed to fold. In fact, it would seem that Silva was also voicing his concern over the entire capitalistic system through which grower-employee relationships currently exist.

While this concern, and Silva's actions might in one context be taken as "protected activities under Section 1152," in the context before me I feel they have passed the bounds of reasonableness and went toward the realm of "goading" Martori and insubordination.

As Silva was not engaging in protected rights under Section 1152 of the Labor Code, I find his discharge on January 6, 1977, not to be in violation of either Section 1153(a) or Section 1153(c).

VII

REMEDY

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

Having found Martori Bros. has unlawfully discharged Adolfo Ponce and his crew, I will recommend that Respondent be ordered to make whole Adolfo Ponce and his crew for any losses they may have incurred as a result of their unlawful discriminatory action by payment to Adolfo Ponce and his crew of a sum of money equal to the wages they would have earned from the date of their discharge to the date of the end of the then current lettuce harvesting season at Arena Imperial, said season commencing on December 8, 1976, and that said monies shall be paid, together with interest thereon, at the rate of seven percent (7%) per annum, and that loss of pay and interest be confuted in accordance with the formula used by the

National Labor Relations Board in F, W. Woolworth Company, 90 NLRB 289 (1950), and Isis Plumbing and Heating Company, 138 NLRB 716 (1962).[6/] I will, however, take the unusual step of not ordering reinstatement along with this back pay order. Re-instatement is not a necessary part of a back pay order (Crosett Lumbar Company, 8 NLRB 440 (1938)) and envisioning other appropriate remedies to insure employee knowledge of the unfair labor practices of Respondent, I would grant the employer the latitude of not having to specifically rehire Ponce and his crew. It should be made abundantly clear that the failure to order reinstatement in this case is by no means meant to lessen the responsibilities of Respondent for the commission of his unfair labor practice, or to imply merit in the argument of Respondent.

In deciding not to re-instate Ponce and/or his crew, I am considering a variety of factors. Firstly, I feel that one of the raison d' etres of the Act is not only to preserve the rights of employees [Section 1152], but to remedy employer wrongs in a fashion to insure that the employer will not repeat his violations of the Labor Code. I feel the remedies outlined herein will "make whole" Ponce and his crew for the economic injustice he has suffered as well as (by posting, reading and mailing the notice attached hereto) insuring that Respondent will not lightly repeat his illegal acts.

Evidence was presented that Ponce had previously work as assistant foreman to Rodriguez while employed by Martori Bros., and I do

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[6/] Talledga Gotten Factory, supra, allows a supervisor "back pay' where employer commits a Section 8(a)(l) violation.

feel that in spring of 1976, Rodriguez would have been the first choice of Respondent as foreman if he (Rodriguez) had been available. It is quite possible that in future harvests after the winter 1976 lettuce harvest, Respondent may have hired Rodriguez over Ponce. I think it is fair that Respondent be given this choice in the future, but this decision should in no manner lessen my ruling in the instant case -- that Rodriguez was hired in January of 1977 to influence a union election and to replace a "union crew" rather than solely by "employer preference" or Ponce's alleged inferior work. I have no doubt that but for the union election, Respondent would have waited until after the harvest to make a change in foremen, if any change were to be made at all.

General Counsel has requested a public apology from Respondent to the employer's employees during peak season, a public statement to the employer's laborers during the peak season that the employer will not engage in unfair labor practices, and the posting of the terms of the Board's orders on employer's property as well as mailing of notice to the last known home address of all peak season employees of the terms of the Board's order, with all notices to be in English and Spanish. With all these requests of General Counsel, I concur and and will order.

With the wrongful discharge heretofore mentioned, and the hiring of a crew to influence the election, Respondent has struck at the basic rights (Section 1152) guaranteed all employees. Therefore, it will also be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed employees

through Section 1152 of the Act.

It is further recommended that the allegations of the complaint alleging violations by Respondent of Sections 1153(a) and 1153(c) in relation to Heriberto Silva be dismissed.

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

ORDER

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

1. Cease and desist from:

a) In any manner interfering with, restraining and coercing employees in the exercising of their right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of continued employment as organized in Section 1153(c) of the Act;

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

c) In any manner to willfully arrange for persons to become employees for the primary purpose of voting in elections.

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

a) Make whole Adolfo Ponce and his crew for any losses they may have suffered as a result of their termination, using for guidelines the manner described above in the section entitled "Remedy;"

b) 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, personal records and reports, and other records necessary to analyze the back pay due;

c) Give to each employee hired throughout the 1977 harvest season in the lettuce copies of the notice attached hereto and marked "Appendix A." Copies of this notice, including an approximate Spanish translation, shall be furnished Respondent for distribution by the regional director of the Board for the El Centro office. Respondent is required to explain to each employee at the time the notice is given that it is important that he or she understand its contents and Respondent is further required to offer to read the notice to each employee if he or she so desires;

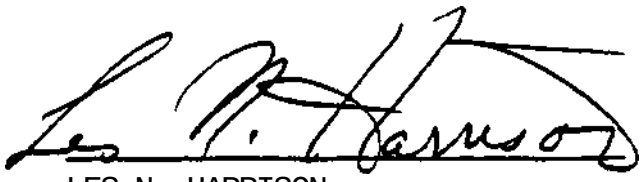
d) Within five (5) days of any lettuce harvest operation by Respondent in Imperial Valley, California, Respondent shall be required to read the attached notice (see Appendix A) to all employees, at such time in the morning when said employees are gathered prior to actual harvesting work.

3. Respondent shall post the terms of the Board's orders in writing in a conspicuous place on employer's property, as well as place said notice (see Appendix A) in a conspicuous place on employer's property.

4. Said notice (see Appendix A) shall be sent to the last known home address of all employees who were discharged through the unfair labor practice of Respondent.

5. Respondent shall notify the regional director in the El Centro regional office within 30 days from receipt of a copy of this decision of steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

DATED: July 5, 1977



LES N. HARRISON
Administrative Law Officer

N O T I C E T O E M P L O Y E E S

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act, and has ordered us to notify all persons coming to work for us in the next lettuce harvest season that we will remedy those violations, and that we will respect the rights of all employees in the future. Therefore, we are now telling each of you:

1. That Adolfo Ponce and his entire crew will be receiving their wages and back pay they lost as a result of our illegal firing of Adolfo Ponce and his crew in the winter lettuce harvest.

2. We will not fire or discharge any employees because of their activities in the United Farm Workers Union or any other union, and we will not give special hiring privileges to any employees simply because we think they are not in favor of a union.

3. All of our employees are free to support, become or remain members of the United Farm Workers of America, or of any other union. Our employees may wear union buttons or pass out and sign union authorization cards or engage in other organizational efforts provided that this is not done at times or in a manner that it interferes with their doing the job for which they were hired. I repeat, that we will not discharge, layoff, or in any other manner interfere with the rights of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

DATED: ———————

MARTORI BROTHERS DISTRIBUTORS

APPENDIX A

LIST OF EXHIBITS

General Counsel No.	la	Amendment and Notice of Hearing and Complaint with Proof of Service, 77-CE-12-E, 77-CE-19-E, 1/21/77: In evidence
General Counsel No.	lb	Notice of Hearing and Complaint and Proof of Service, 1/17/77: In evidence
General Counsel No.	lc	Answer to Complaint with Proof of Service, 1/26/77: In evidence
General Counsel No.	ld	Order Consolidating cases, 1/17/77: In evidence
General Counsel No.	le	Charge Against Employer, 77-CE-19-E, 1/7/77: In evidence
General Counsel No.	lf	Charge Against Employer, 77-CE-12-E, 1/6/77: In evidence
General Counsel No.	lg	Charge Against Employer, 77-CE-33-E: Not in evidence
General Counsel No.	2	Documents submitted by General Counsel --Tally of Ballots & Supplemental Understanding Thereto re 1/14/77 Tally of Ballots: In evidence
General Counsel No.	3	General Counsel letters to Mr. Jacobs, 2/16/77: In evidence
General Counsel No.	4	California Master Agreement 1975-1978: In evidence
General Counsel No.	5	Employer leaflets: In evidence
General Counsel No.	6	English Translation of Declaration of Adolfo Ponce dated 2/7/77: In evidence
General Counsel No.	6a	Declaration of Adolfo Ponce dated 2/7/77: In evidence
General Counsel No.	7	Statement of Flavio Alejo: In evidence
General Counsel No.	8	Declaration of Jesse Corona: In evidence
General Counsel No.	9	Martori Bros. letters to U. S. Consulate re Silva: In evidence

General Counsel No. 10	Telegram to Heriberto Silva from Martori Bros.: In evidence
General Counsel No. 11	Declaration of Heriberto Silva: In evidence
General Counsel No. 12	Typed list of field workers from S. Martori and Alien, 1/1 -1/7/77: In evidence
General Counsel No. 12a	Computer list of field workers, 12/27/76 - 1/2/77: In evidence
General Counsel No. 13	Martori Red Tag: In evidence Martori
General Counsel No. 14	Payroll sheets: In evidence
General Counsel No. 15	Subpoena Duces Tecum re Martori Imperial County Field Inspectors: In evidence
General Counsel No. 16	Compilation of Imperial County Agriculture Commission Daily Activity Reports for Martori Bros.: In evidence
General Counsel No. 17	Martori Federal Inspection Certificates and Field Notices: In evidence
UFW No. 1	Payroll check, employee #2058, Martori Bros.: In evidence
UFW No. 2	Union Authorization Card: In evidence
UFW No. 3	Employers Response and Petition for Certification (ALRB): In evidence
UFW No. 4	Random weight ticket: In evidence
UFW No. 5	Weight Statistics re Martori Bros., December through February: In evidence
UFW No. 6	Employment Statistics re Martori Bros., December 1976: In evidence
Respondent No. 1	Stipulation and Agreement re Ballots: In evidence
Respondent No. 2	Declaration of Steven Martori: In evidence
Respondent No. 3	Chart of weight comparisons, Martori Crews: Withdrawn
Respondent No. 4	Imperial Valley Martori Work Records: In evidence

Respondent No. 5	Martori Work Records, Aguila and Imperial Valley: In evidence