Norwalk, CA.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DESERT AUTOMATED FARMING/ MARSHBURN FARMS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case Nos.	77-CE-191-C 77-CE-193-C 77-CE-194-C 77-CE-196-C
	4 ALRB No. 99	

DECISION AND ORDER

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

On or about June 18, 1978, Administrative Law Officer (ALO) Robert L. Burkett issued the attached Decision in this proceeding, in which he concluded that the General Counsel failed to establish a prima facie case that Respondent had discriminatorily discharged Manuel Frias in violation of Labor Code Section 1153 (c) and (a) , and recommended dismissal of the allegations of the complaint with respect to that discharge. [1/] The ALO further concluded that Respondent violated Section 1153 (c) and (a) by discharging employees Arturo Arias, Rufino Campos, Luis Lopez and Crecencio

[1/]The ALO's conclusion as to Manual Frias is not excepted to by any party and is supported by the record. Accordingly, the complaint in regard to Mr. Frias is dismissed.

Chavez because of their union activities. Thereafter, Respondent and Charging Party, United Farm Workers of America, AFL-CIO (UFW), each filed exceptions and a supporting brief and the General Counsel filed a brief in reply to Respondent's exceptions.

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

Respondent excepted to the ALO's Decision on the sole ground that he erred in failing to find that the layoff of these four individuals was motivated solely by valid business justification. We reject this contention. Although there is some uncertainty in the ALO's Decision as to whether he credited Respondent's testimony that a business justification necessitated the layoff of four workers, and as to whether the layoffs were in accordance with a seniority system, the ALO clearly found that Respondent's choice of these four workers for termination was motivated by knowledge of their union activity. This finding is supported by the record. The signatures of these four workers are included on a list of members of the organizing committee (General Counsel's Exhibit 6) which was turned over to supervisor John Bowen twenty-four to forty-eight hours prior to the first termination. Mr. Bowen testified that he made the decision to lay off these individuals based on his knowledge of their work,

derived in part from conversations with their foreman. However, he was unable to state any specific reasons why these individuals were chosen, and their foreman denied having had any conversations with him concerning lay-offs and terminations.

Because Respondent failed to rebut the General Counsel's prima facie showing that these workers were laid off in retaliation for their support of the union, the ALO correctly concluded that the layoffs violated Section 1153(c) and (a) of the Act. Akitomo Nursery, 3 ALRB No. 73. Respondent correctly points out in its exceptions that twenty-two persons who were also on the list given to Bowen were not terminated, but this fact does not preclude a finding of a violation of the Act as to those incidents charged. Tex-Cal Land Management, Inc., 3 ALRB No. 14.

The UFW excepted to the ALO's failure to include, in his proposed remedial order: (1) a provision for reinstatement and back pay; (2) a provision for the reading of the proposed Notice to employees; (3) a listing of employees' rights in the proposed Notice; and (4) a provision for Respondent's name and signature in the proposed Notice. As we find merit in these exceptions, the ALO's proposed remedial order has been modified accordingly.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Desert Automated Farming, dba Marshburn Farms,

its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against its agricultural employees because of their union membership or union activities, or other concerted activities for mutual aid or protection.

(b) In any other manner interfering with, restraining or coercing its agricultural employees in the exercise of their rights guaranteed under the Act.

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

(a) Immediately offer Arturo Arias, Rufino Campos, Luis Lopez and Crecencio Chavez full reinstatement to their former positions without prejudice to their seniority or other rights and privileges, beginning with the date in 1973 season when the crop activity in which they are qualified commences, and make them whole for any loss of pay and other economic losses they have suffered as a result of Respondent's discrimination, plus interest thereon at 7 percent per annum.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, Social Security payment records, timecards, personnel records, and other records necessary to determine the amount of backpay due and the rights of reinstatement 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 in each language for the purposes set forth hereafter.

(d) Within 30 days from receipt of this Order, mail a copy of the attached Notice in appropriate languages to each of the employees on its payroll during August, 1977, and thereafter provide a copy to each of its employees employed during its 1978 peak season.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the time(s) and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read the Notice, in all appropriate languages, to its employees assembled on company 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 non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director within 30 days from the issuance of this Decision and Order of the

steps it has taken to comply herewith, and continue to report periodically thereafter at the Regional Director's request until full compliance is achieved.

DATED: December 14, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to distribute, mail, and post this Notice.

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

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

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

4. To act together with other workers to try to get a contract or to help or protect one another; and

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

Because this is true, we promise that:

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

Especially:

WE WILL NOT lay off, discharge or otherwise discriminate against any employee because such employee joins or assists the UFW or any other labor organization.

WE WILL offer Arturo Arias, Rufino Campos, Luis Lopez and Crecendio Chavez their old jobs back, and we will pay them any money they may have lost because we discharged them, plus interest thereon computed at seven percent per year.

Desert Automated Farming
doing business as Marshburn
Farms

Dated:_____ By: _____
(Representative) (Title)

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

CASE SUMMARY

Desert Automated Farming, dba Marshburn Farms (UFW)

Cases No. 77-CE-191-C
77-CE-193-C
77-CE-194-C
77-CE-196-C
4 ALRB No. 99

ALO DECISION

The ALO found that the General Counsel failed to establish that the termination of Manual Frias constituted a violation of the Act. He found that Frias was terminated because he failed to take any steps to obtain a driver's license, after being notified that it was a condition of his continued employment.

The ALO concluded that the lay-off or termination of Arturo Arias, Rufino Campos, Luis Lopez and Crecencio Chavez violated Section 1153(c) and (a) of the Act. These workers, who had been employed by Respondent for periods of time ranging from three to eighteen years, began meeting with UFW organizers in June or July of 1977. Three of the four were chosen by their fellow workers as delegates or alternate delegates to the UFW convention held in August 1977. The name of each was included on a list of workers comprising the Union's organizing committee, which list was given to Respondent's General Supervisor on July 29, 1977. The four employees were all terminated within two weeks thereafter, purportedly for lack of work. The ALO found that Respondent failed to establish any basis for the layoff of these four workers other than their union activity.

BOARD DECISION

Respondent's sole exception was that the ALO erred in rejecting its business-justification defense. The Board noted that the person responsible for the lay-off decision testified that he made the decision based on his knowledge of the employees' work performance, derived in part from conversations with their foreman. However, he was unable to state any specific reasons why these individuals were chosen for lay-off, and their foreman denied having had any conversations with him concerning the lay-offs. The Board held that the fact that not all members of the employees' organizing committee were terminated does not preclude a finding of a violation as to the layoff of the individuals involved in this case. Accordingly, the Board affirmed the rulings, findings and conclusions of the ALO and adopted his recommended order with modifications.

REMEDY

The Board ordered Respondent to reinstate the four employees to their previous, or equivalent, positions and to reimburse them for any loss of pay or other economic losses resulting from their layoff, plus interest at seven percent per annum.

* * *

This Case Summary is furnished for information only and is not an official statement of this case, or of the ALRB.

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:

DESERT AUTOMATED FARMING
DBA: MARSHBURN FARMS

Respondents,

and

Case Nos. 77-CE-191-C
77-CE-193-C
77-CE-194-C
77-CE-196-C

UNITED FARM WORKERS OF AMERICA,
AFL-CIO

Charging Party

Alicia Becerril and Jorge Leon, for the
General Counsel

David E. Smith, for the Respondent

Douglas Adair, for the Charging Party

DECISION

STATEMENT OF THE CASE

ROBERT L. BURKETT, Administrative Law Officer: This case was heard before me on November 29, 30, and December 1, 6. and 13, 1977, in Coachella, California; all parties were represented. The complaint alleges that the Respondent, Marshburn Farms, violated Sections 1153(a), 1153(c), and 1140.4(a) of the Agricultural Labor Relations Act (hereafter called the "Act"). This complaint is based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter the "Union"), a copy of which was served on the Respondent. Briefs in support of their respective positions were filed after the hearing by the General Counsel and Respondent.

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

FINDINGS OF FACT

I. Jurisdiction.

Respondent, Desert Automated Farming, DBA Marshburn Farms (hereinafter referred to as Marshburn Farms), is a business engaged in agriculture in California as was admitted to by the Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

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

II. The Alleged Unfair Labor Practices.

The complaint, dated October 1, 1977, and amended on November 3, 1977, November 22, 1977 and at the hearing, alleges that the Respondent violated Sections 1153(a), 1153(c), and 1140.4(a) of the Act by its termination of and refusal to rehire five-named employees because of their concerted activities on behalf of the Union.

Respondent denies any wrongful discharge of the five-named employees and states that all were terminated for valid business reasons. Respondent denies that in any way he violated the Act.

III. The Facts.

A. Background:

Marshburn Farms consists of a number of what are called ranches in the Coachella Valley, and is engaged in a number of farming activities including the growing of carrots. The main foreman of the operation is John Bowen whose official title is the Area Supervisor. He has been the Area Supervisor approximately a year and a half prior to which he was a foreman and supervised a certain amount of the farming. He is responsible for all of the ranches of Marshburn Farms in the Coachella Valley. He has approximately eight foremen working under him with whom he meets almost every day. I find John Bowen to be a supervisor within the meaning of Section 1140.4 (j) of the Act.

The named employees in the complaint are the following: Manuel Frias; Luis Lopez; Arturo Arias; Rufino Campos; and Crecencio Chavez.

The testimony shows that Manuel Frias was discharged on May 9, 1977 while Mr. Lopez, Mr. Arias, Mr. Campos, and Mr. Chavez were all discharged within fifteen days of each other in a period beginning July 30, 1977 and ending August 12, 1977. Additionally all but Mr. Frias worked as tractor drivers; Mr. Frias worked as either an irrigator or a general laborer, the record and exhibits are unclear as to this point. In any case, the pattern of discharge and the differences in the type of work done by Mr. Frias and the other discharged employees make it necessary to view the discharges in this case as two separate series of events.

B. Manuel Frias.

On May 9, 1977 Manuel Frias was terminated, he was told, because he did not have a California Driver's License. The testimony is unambiguous as to the fact that Tomas Gonzalez, Manuel Frias' foreman, had informed Mr. Frias as well as all irrigators that they would have to get their driver's licenses. This was due to a change in company policy that would require the irrigation workers to drive trucks loaded with irrigation pipes. Mr. Frias was warned of the consequences of his not getting a license by Mr. Gonzalez, that is, that if he did not secure a driver's license, he would lose his job. While General Counsel points out in its brief that in fact a number of irrigation workers were permitted to remain working in spite of the fact that they had not secured their license, while Mr. Frias was terminated because he had not secured his license, the testimony demonstrates that at the very least the workers who continued on at Marshburn Farms had made some positive effort to secure their licenses such as obtaining a Learner's Permit or trying to obtain a Learner's Permit. The testimony of Manuel Frias is clear on the fact that he never made any attempt to secure a Learner's Permit or Operator's License. In fact Mr. Frias was told, at the time of his termination, that he would be immediately rehired upon his securing a driver's license. On this matter, all parties' testimony has been the same, and I can find no act of discrimination in the termination of Manuel Frias. While he might have been treated somewhat differently than the other irrigators, it is quite clear that Mr. Frias made absolutely no attempt to comply with the company's new rule on obtaining a driver's license. Nowhere in the record can I find another instance cited where an irrigation worker made absolutely no attempt to comply with this rule, and it was therefore reasonable and fair for Marshburn Farms through its supervisor Tomas Gonzalez to terminate Mr. Frias on May 9 with the proviso that he could return to work immediately upon his securing a California Driver's License.

General Counsel argues in its post-hearing brief that according to the company's records Manuel Frias was not in fact an irrigation worker at all but rather that he was a general laborer and was listed as such in the records of Marshburn Farms, General Counsel's Exhibit 2 at Page 27, and since a general laborer is not required to have an Operator's License, General Counsel argues that Mr. Frias was not terminated for his failure to obtain a license as claimed by Mr. Gonzalez, but rather because of his Union activities.

During the examination of William Shaeck, he explained that when a worker was initially hired, and it was unclear as to what that worker's skills might be, it was common to classify the worker as 101, or General Labor. Once classified, worker's classification number would remain the same during his whole tenure of employment. Mr. Shaeck testified that Manuel Frias was regarded as an irrigator by himself and other management people and to the best of his recollection was paid as an irrigator. Manuel Frias regarded himself as an irrigator as he testified on a number of occasions, and while he also testified that he at times did work that might be construed as that of a general, laborer he still regarded himself as an irrigator and in fact did work that was irrigation work.

Even if I were to have found that Manuel Frias' termination was discriminatory or that he was in fact a general laborer and should not have been required to have a driver's license, the only reference to concerted Union activity that bears relevance to his termination occurred almost one year before when Mr. Frias made a complaint to the Teamster Union office in June of 1976. He complained at that time that the company was failing to provide gloves with which to carry the hot irrigation pipes and was also failing to provide drinking water for the workers. The Teamster representative went to the company to talk to them about these matters. The next day the company provided gloves and drinking water to the workers.

The only other reference with respect to any Union activity on the part of Mr. Frias occurred during his testimony when he stated that he first had contact with the United Farm Workers Union in February 1977. There is no reference in the record to any knowledge on the part of Marshburn Farms that Mr. Frias was in any way involved in United Farm Worker activity, other than one very ambiguous reference to a conversation that Mr. Fries had with Tomas Gonzalez about the Union. The record shows no indication that Mr. Frias disclosed to Mr. Gonzalez that he had engaged in concerted activities and/or participated in protected Union activities under the Act, nor can I make any such inference.

Mr. Frias' testimony that he prepared General Counsel's Exhibit 10 bears no relevance to the matters concerned with in this hearing since he signed the document on June 15 of 1977 approximately one month after his discharge.

C. Luis Lopez, Arturo Arias, Rufino Campos, and Crecencio Chavez

The termination of these workers must be viewed as a whole given the close proximity in time of their layoffs, the commonality of work, and the justification offered by Respondent for the said termination.

On July 30, 1977 Luis Lopez was discharged by the Respondent', on August 1, 1977 Arturo Arias and Rufino Campos were discharged by the Respondent; and on August 12, 1977, Crecencio Chavez was discharged by the Respondent. In all cases the discharge was called a layoff and the workers were told that there was not enough work and that if there were to be more work they would be recalled.

(1) Arturo Arias.

Mr. Arias began working at Marshburn Farms in September, 1974 and worked there until his termination date in July, at which time he was a tractor driver. His first contact with United Farm Workers began in June or July of 1977 according to his testimony.

Mr. Arias was a signatory of General Counsel's Exhibit 6, a letter to Carl Vince and Associates, Marshburn Farms which informed them that the signatories who are employees of Marshburn are active supporters of United Farm Workers of America. The letter is signed by Alicio Melina on the cover page and is signed by approximately 26 individuals on the second page dated July 15, 1977. Ann McDowell a UFW organizer, testified that she took General Counsel's Exhibit 6 to the Respondent's ranch on Friday, July 28 or 29, 1977 and delivered the same to Mr. Bowen. Mr. Arias was terminated or discharged on July 29, 1977.

Evidence was presented that the names of the delegates to the United Farm Workers' convention were posted on a bulletin board at the United Farm Workers office. According to the testimony of Ann McDowell the selection, of delegates and alternates did not take place until the Union meeting of July 21, 1977. She further testified that she believed that the names of the delegates were posted close to that July 21 date. The hearing officer and counsel for Respondent, Intervenor and General Counsel visited the site of the Union office and it is my conclusion that if the names were posted in the manner that was testified to by Ms. McDowell, the names could easily be seen from the street, which apparently is the main street in town. Mr. Arias was an alternate delegate to the UFW convention.

Mr. Arias was informed by Tomas Gonzalez that he was laid off because there was not enough work and that if there was going to be any work he would be recalled.

(2) Rufino Campos.

Mr. Campos began work at Marshburn Farms in April, 1970 and was terminated or laid off on August 1, 1977, while working as a tractor driver.

Mr. Campos was a signatory of the document introduced as General Counsel's Exhibit 6 referred to earlier.

When Mr. Campos was discharged he was told that there was no work and too many people were working. Mr. Gonzalez advised him that if there were any more work he would be called.

(3) Luis Lopez.

Mr. Lopez began work for Marshburn Farms in November or December of 1974 as a tractor driver, and was laid off or terminated on July 30, 1977.

Mr. Lopez was a signatory of General Counsel's Exhibit 6 and was a delegate to the UFW convention discussed above. He also sold Union fund-raising tickets among members of his family. At the time of his termination or layoff he was told by Pablo Gonzalez that he could return to work whenever the company needed him.

(On Page 16 of Respondent's post-hearing brief he states that apparently the cross-examination of Luis Lopez was not reported. It should be noted that there was no cross-examination of Luis Lopez because in the interest of time and economy Mr. Smith agreed along with other counsel to waive said cross-examination.)

(4) Crecencio Chavez.

Mr. Chavez testified that he began work at Marshburn Farms in November of 1959 and continued steadily until July 22, 1977, when he was terminated or laid off. At that time he was working as a tractor driver.

Mr. Chavez was a signatory of General Counsel's Exhibit 6, the organizing committee list, and was also a delegate to the UFW convention in 1977. He was chosen as such the week before he was laid off or terminated. It should be pointed out that Paragraph 9(b) of the first amended complaint alleges that Mr. Chavez was laid off on August 12, 1977. This apparent discrepar might be explained by the fact that Mr. Chavez was told to begin

taking his vacation on July 22, 1977, and would have recommenced working on August 12, 1977 had he not been laid off or terminated.

Mr. Chavez further testified that he had discussed the support of the UFW with Tomas Gonzalez.

IV. Testimony of Witnesses for Respondent.

General Counsel's. Exhibits 3, 4, 5, 11, 12, and 13 are a series of leaflets advising workers in one form or another to vote no Union. It is conceded by Respondent that these leaflets were prepared through the auspices of Desert Automated Farming doing business as Marshburn Farms. There can be no doubt that these leaflets are anti-Union. Foreman Tomas Gonzalez testified that he on occasion passed out a number of leaflets along with workers' paychecks but that he never read the leaflets and in fact had no idea what their content was. I find this testimony in regard to these leaflets to be less than credible. One could hardly glimpse at any of the leaflets presented in evidence during this hearing without knowing the meaning contained therein. In particular General Counsel's Exhibit 3 shows a boxing glove punching what appears to be the UFW symbol of the eagle.

Mr. Bowen testified that the basis that the four tractor drivers were laid off was that they just did not work as well as the other workers--nothing that he could really lay his finger on but rather in his subjective judgement, given the fact that he had too many workers these were the first four that should have been laid off. Mr. Bowen also testified that a number of employees of Vince were put on the Marshburn payroll in 1977 including four tractor drivers. Those tractor drivers remained employed while the four alleged discriminatee tractor drivers were discharged or terminated.

During the testimony of William Shaeck, who is the Director of Industrial Relations for Desert Automated Farming as well as Marshburn Farms, he stated, "I was instructed by Carl Vince to add the four employees to our employees (the Vince employees) without any loss of seniority and which I did so." All during the course of testimony Mr. Bowen indicated that the only time seniority would be of importance would be if all things were equal. Given the testimony of Mr. Shaeck as well as the dictates of logic it is my conclusion that Mr. Bowen's testimony and Mr. Shaeck's later testimony as to weight given to seniority is less than credible. It should further be pointed out that the Vince employees began work on the week of August 25, 1?77 at least that was their first week on the Marshburn payroll shortly after the termination of the four alleged discriminatee tractor drivers.

Respondent introduced a number of exhibits to prove that a change in machinery necessitated the termination or layoff of the alleged discriminatee tractor drivers. This machinery was purchased after the acquisition of Marshburn Farms by Desert Automated Farming and was in most instances larger than that which had been used by Marshburn Farms and consequently was capable of producing greater work output than the former equipment. Respondent also introduced evidence to show that there was a change in the acreage of the land which had formerly been farmed by Marshburn and which were farmed at the time of the discharges in question by Desert Automated Farming. Marshburn farmed approximately 6,000 acres in 1976 and in the month of January, 1977 Desert Automated Farming farmed approximately 3,600 acres. The total acreage which was being farmed by Desert Automated Farming in July of 1977 was approximately 4,012 acres. It should be pointed out that the reduction in acreage apparently occurred several months prior to the layoffs or terminations and that there was testimony that the layoffs or terminations happened at the beginning of the busy season for carrots.

V. Testimony of Jose Arturo Martinez.

The significance of Mr. Martinez' testimony was that prior to the termination or layoff of the four tractor drivers the tractor drivers were driving eight and a half hours per day and five hours on Saturday; subsequently they immediately moved up to nine hours a day and added a half an hour work that had previously been part of the lunch hour. Mr. Martinez was and still is a tractor driver at Marshburn Farms.

CONCLUSIONS

I. Introduction.

Section 1152 of the Act provides, in part, "Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or "protection . . . ." The General Counsel initially contends that Respondent violated Section 1153(a) of the Act, by terminating the five alleged discriminatees because of their concerted Union activities--namely their signatures on General Counsel's Exhibit 6 and the participation of four of the five alleged discriminatees as delegates or alternates to the United Farm Workers' convention. General Counsel further argues that the workers' activities were protected by the Act and should result in no reprisal by Respondent. In addition General Counsel argues that the Respondent is engaging in unfair labor practices within the meaning of Section 1153 (c) of the Act in that the Respondent did discriminate and is discriminating in regard to

hiring, tenure, and/or terms or conditions of employment to discourage Union membership.

Contrary to the General Counsel, Respondent argues that the five alleged discriminatees were not terminated or laid off for their Union activities but rather that Mr. Frias was laid off or terminated for his refusal to apply for a California Driver's License, and that the four tractor drivers were laid off or terminated because of lack of work.

II. Manuel Frias.

In alleging that the discharge of Manuel Frias was discriminatory General Counsel must sustain its burden of establishing the elements which go to prove the discriminatory nature of the discharge. Maggio-Tostado, Inc., 3 ALRB No. 33 (1977) , citing NLRB v. Winter Garden Citrus Products Cooperative, 260 (5th Circuit 1958). The test which is to be applied is whether the events, whether direct or circumstantial, establish by their preponderance that the employees were discharged for their views, activities or support for a labor organization. Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

Assuming that there has been a prima facie case shown by the General Counsel, the burden then shifts to the Respondent to demonstrate that the discharge of the employees in question was motivated by legitimate business objectives. Maggio-Tostado, Inc., supra, relying on NLRB v. Great Dane Trailers, Inc., 338 U.S. 26, 65 L.R.R.M. 2465 (1967). The Agricultural Labor Relations Board has clearly established the principle that an employer is given the right to terminate his employees for any reason whatsoever so long as he does" not do so because of Union activity. In Sunnyside Nurseries, Inc., supra, the Board stated,

> "It is (then) open to the employer to rebut the presumption (of anti-Union motivation) by coming forward with a plausible, adequate, and convincing explanation demonstrating that the action taken with respect to each affected employee the timing of such action, was based solely upon nondiscriminatory considerations. In the last analysis, determination must turn on which is the more persuasive, the inference of discrimination drawn from the circumstances ... or the explanations offered to refute it . . . ." (Citing Syracuse Tank and Manufacturing Company, Inc., 133 NLRB F.525 (1961).)

It is my conclusion that General Counsel has failed to establish a prima facie case on behalf of Mr. Frias, and even if I had determined that a prima facie case had been established the Respondent has clearly sustained its burden of proof in demonstrating that termination of Mr. Frias was solely because Mr. Frias did not have a driver's license and was, therefore, unqualified to perform the duties of an irrigator on behalf of the Respondent.

III. Arturo Arias, Rufino Campos, Luis Lopez, and Crecencio Chavez.

While it is true that Respondent may layoff or discharge any employee for any reason or for no reason so long as the discharge is not related to activities protected by the Act, such discharge must be made in the absence of a showing of anti-Union motivation. Luette Farms, Inc., 3 ALRB No. 38 (1977). There can be no doubt of the anti-Union position taken by Desert Automated Farming doing business as Marshburn Farms, as demonstrated by the leaflets marked General Counsel's Exhibits 4, 5, 11, 12, and 13. There is also no question that Respondent had knowledge of Union activities on the part of the above tractor drivers, at least insofar as Mr. Bowen receiving General Counsel's Exhibit 6 on Friday, July 29, 1977. In addition, Ms. McDowell testified that the posting of the Union delegates and alternates began sometime around the 21st of July in the Union office. There was additional evidence of anti-UFW animus on the part of Respondent: at least from testimony of Crecencio Chavez which stated that Respondent's foreman Tomas Gonzalez often questioned him about the Union and on one occasion remarked about killing an eagle when he was handing out General Counsel's Exhibit 12. Luis Lopez testified that Respondent's foreman, Pablo Gonzalez stated on July 30, the day after Mr. Bowen had received General Counsel's Exhibit 6, that Respondent was "getting rid" of some good workers who had signed the list.

As Respondent pointed out in its brief an indispensable element of anti-Union motivation which General Counsel must prove is an employer's knowledge of the activity alleged to be the reason for the discharge. Unless it has been established that Respondent had knowledge that the alleged discriminatee engaged in concerted activities and/or participated in protected Union activities and that the termination was not motivated by some legitimate reason, it cannot be concluded that there was anti-Union motivation for the terminations. See e.g., Westpoint Mfg. Co., Wellington Mill Division v. NLRB, 330 F.2d 579 (4th Cir. 1964), cert, denied, 379 U.S. 882 (1964), Schwob Mfg. Co. v. NLRB, 297 Fed. 2d 864 (5th Cir. 1962). While such knowledge may be established by inference from surrounding circumstances where direct proof is unavailable, no such inferences can be drawn without substantial evidentiary support. Indiana Metal Products Corp. v. NLRB, 202 Fed. 2d 613 (7th Cir. 1953); NLRB v. Smith Transport Co., 193 F.2d 142(5th Cir. 1951). It is my conclusion that General Counsel's

Exhibit 6 at the very least established that Respondent had knowledge of the Union activities of the four alleged discriminatees. While I do not rely upon Respondent's knowledge of the delegates and alternates to the UFW convention referred to above, it is my conclusion that, given the small size of the city in which the UFW office is located, the frequency of traffic on the street in front of the UFW office, and the testimony as to the prominence of the bulletin board listing the names of the delegates and alternates, and given the anti-UFW animus on the part of Respondent as demonstrated by the exhibits presented as General Counsel's No. 4, No. 5, No. 11, No. 12, and No. 13, it may be well inferred that Respondent had knowledge of these Union activities as well.

I am in accord with the statement made in General Counsel's brief that the reasons given by Respondent for termination of the alleged discriminatees here are not supported by the evidence presented at the hearing. Most importantly it is not required that the dominant motive for termination be Union activity; if Union activities of the employee played any part whatsoever in the termination, the law has been violated. As-H-Ne Farms, 3 ALRB No. 53 (1977), S.A. Healy Co., 435 F.2d 314, 76 LRRM 2117 (1970), NLRB v. Whitfield Pickle, 374 F.2d 576, 64 LRRM 2656 (1967).

Respondent's defense of economic justification based upon testimony and exhibits that were presented to show that fewer acres were under cultivation than were the preceeding year and that new and larger machinery had been purchased which reduced the number of man-hours required for its operation becomes impaired by a number of facts. The reduction in acreage occurred several months prior to the layoffs or terminations and in fact some testimony was offered that the layoffs or terminations began at the commencement of the busiest season for carrots. In addition it seems uncontroverted that the employees who continued working after the layoffs or terminations had their hours of work increased. These factors in part undermine the contention of Respondent that it had economic justification for the termination of these four tractor drivers.

It is my conclusion that it is more than mere coincidence that all four of the terminated tractor drivers were signers of General Counsel's Exhibit 6, and that three of the four tractor drivers were delegates or alternates to the UFW convention. It is obvious that the Respondent wished to add the former employees of Vines to the payroll of Marshburn Farms and in making a determination as to which if any employees would be terminated chose those known to be Union adherents. Mr. Bowen during the course of his testimony was unable to give any specific reasons that these four individuals were terminated; rather he pointed to some abstract measurement that he used in his mind to make such a determination. I am of the conclusion that the abstract measurement

used by Mr. Bowen was the Union activity of these four tractor drivers.

The numerous denials on the part of Mr. Shaeck and Mr. Bowen that there existed a seniority system at Marshburn Farms was severely undermined by Mr. Shaeck's testimony that on August 25, 1977 he was instructed by Carl Vince to add the four tractor drivers that had previously been employed by Vince Farms to the payroll of Marshburn Farms without any loss of seniority. This was stated under direct examination by the attorney for Respondent. While efforts were made at a later date to explain that seniority did not really mean seniority but rather meant seniority when all things were equal, I find the latter explanation to be less than credible. Under examination from the hearing officer Mr. Shaeck was asked, "You were directed to hire these men with seniority, full seniority. If you were not concerned with seniority in the fields why were you directed that?" The witness: "Because the owner told me to do it."

I find that the discharges of Arturo Arias, Rufino Campos, Luis Lopez, and Crecencio Chavez per as the result of their protected activities, and as such are in violation of Sections 1153(a) and 1153(c) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153(a) and (c) of the Act I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The unfair labor practices committed by Respondent strike at the heart of the rights guaranteed to employees by Section 1152 of the Act. The inference is warranted that Respondent maintains an attitude of opposition to the purpose of the Act with respect to protection of employees in general. It will be accordingly recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

As a result of these findings, reinstatement, with back pay and full seniority in other rights will be given to Arturo Arias, Rufino Campos, Luis Lopez, and Crecencio Chavez, as of the dates of their termination.

Notice of the violations and remedies and of the rights of the employees protected by law will be posted, mailed, and read to the employees of the Respondent.

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

ORDER

Respondents, their officers, their agents, and representatives, shall:

1. Cease and desist from:

a. Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by unlawfully refusing to rehire employees, or demoting employees, or by terminating employees, or by discharging employees, or in any other manner discriminating against individuals in regard to their higher tenure of employment or any term or condition of employment, except as authorized in Section 1153 (c) of the Act.

b. In any other manner interfering with, restraining and coercing employees in the exercise of their right of self-organization, to form, join, or assist labor organizations, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

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

a. Post in conspicuous places, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix." Copies of said notice shall be posted by Respondent immediately upon receipt thereto and shall be signed by Respondent's representative. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material. Said notice shall be posted for a period of 60 days and shall be in English and Spanish.

b. Mail to each employee a copy of said notices in Spanish and in English.

c. Notify the Regional Director or the Executive Secretary of the Board's main office in Sacramento, within 20 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.

Robert L. Burkett, Administrative Law Officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act. In order to remedy such conduct, we are required to post this notice and to mail copies of this notice to our employees. We intend to comply with this requirement, and to abide by the following commitments:

1. We will not terminate workers nor refuse to rehire them for engaging in Union activity.

2. We will not demote workers for engaging in Union activity.

3. We will rehire Arturo Arias, Rufino Campos, Luis Lopez, and Crecencio Chavez, with back pay and full seniority.

4. All our workers/employees are free to support, become or remain members of the United Farm Workers of America, AFL-CIO, or of any other union. We will not in any manner interfere with the right of our employees to engage in these and other activities, or to refrain from engaging in such activities, which are guaranteed them by the Agricultural Labor Relations Act.