STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GEORGE ARAKELIAN FARMS , INC . , Respondent, and UNITED FARM WORKERS OF AMERICA, INC., AFL-CIO, Charging party.	)	Case Nos. 76-CE-115-E 77-CE-116-E 77-CE-117-E 77-CE-150-E 77-CE-163-E 5 ALRB No. 10

DECISION AND ORDER

On May 22 , 1978, Administrative Law Officer (ALO) Mark E. Merin issued the attached Decision in this proceeding. Thereafter, Respondent, Charging Party, and the General Counsel each filed timely exceptions and a supporting brief; Respondent filed an answering brief to the General Counsel's exceptions, and the Charging Party filed an answering brief to Respondent's exceptions.

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

The Board has considered the record and the ALO's Decision in the light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO to the extent consistent with this opinion, and to adopt his recommended order as modified herein. [1/]

[1/] Respondent's motion to strike the General Counsel's exceptions to the decision of the ALO for noncompliance with ALRB Regulation 20282 is denied as no material prejudice to Respondent has been demonstrated.

Respondent excepts to the ALO's finding that Respondent violated Section 1153(a) of the Agricultural Labor Relations Act (Act) by terminating the employees in Gilberto Pena's cantaloupe crew on June 11, 1977, for engaging in protected concerted activities. As noted by the ALO, if the testimony of the crew members is credited, their request for increased wages clearly falls within the ambit of "concerted activities for the purpose of ... mutual aid or protection" protected by Section 1152 of the Act. The ALO did so credit the crew members' testimony. We have carefully examined the record in this case and find that the ALO's credibility resolutions are supported by the record as a whole.

Respondent also excepts to the ALO's remedial order that all members of the Gilberto Pena cantaloupe-harvesting crew employed by Respondent on June 11, including five members of the crew who were not at the work site on that day, be made whole, i.e., be granted back pay from the date of their illegal termination. The record evidence establishes that the five crew members who were absent on June 11 regularly worked as part of the Gilberto Pena crew before that date but did not work for Respondent after June 11. In Super Tire Corp., 227 NLRB No. 132, 95 LRRM 1386 (1977) , an entire work crew was terminated because of the concerted activities of seven members of the crew, at a time when other crew members were absent from work. The NLRB ordered reinstatement of the entire crew. We uphold the ALO's comparable remedy, providing back pay to all members of the Gilberto Pena crew.

Charging Party and the General Counsel except to the ALO's conclusion that the September 28, 1977, layoff of six irrigators who supported the UFW was not an illegal discrimination because it was not shown to have been motivated by anti-union animus. The ALO reasoned that, because evidence was not presented as to the pro-union or anti-union sentiments of workers hired to replace the laid-off irrigators, he could not determine whether the layoff was influenced by a desire to eliminate union supporters. We do not think the attitudes of the replacement workers are relevant to the issue. In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967), the United States Supreme Court set forth the following principles regarding discriminatory acts by an employer which adversely effect employees in the exercise of their statutory rights:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. 388 U.S. 26, 34; 65 LRRM 2465, 2469.

Here, Respondent laid off six employees known to be among the most active union supporters in its employ, refused to rehire

them when they applied for reinstatement, and replaced them with new workers. No business justification was adduced for this action. We conclude that the six irrigators were laid off in violation of Section 1153(c) and (a) of the Act, and that they are entitled to back pay from September 28, 1977, to the date of reinstatement or offer thereof.

Charging Party and the General Counsel also except to the ALO's finding that Jose Luis Meneses was neither discriminatorily assigned to more arduous work in order to discourage his participation in union activity nor constructively discharged by virtue of such assignment. The ALO credited Mr. Meneses' description of unfavorable changes in his work assignment. He found, however, insufficient evidence of anti-union motivation on Respondent's part to support the alleged violations. We disagree. The record contains numerous anti-union remarks by Respondent's supervisory personnel, amply indicative of animus toward the union. We find that whatever business justifications existed for the unfavorable assignments given to Mr. Meneses, these assignments would not have been made but for Respondent's desire to inhibit the exercise of rights protected by Section 1152. See S. Kuramura, Inc., 3 ALRB No. 49 (1977).

However, not every discriminatory assignment to more onerous work followed by the employee's resignation constitutes a constructive discharge. In previous cases where we have found constructive discharges, the affected workers were subjected to such abuses as death threats, Merzoian Bros., et al, 3 ALRB No. 62 (1977); harassment, surveillance, assaults, and threats of

violence, Frudden Produce, Inc., 4 ALRB No, 17 (1978); the offer of lower-paying work which would be injurious to the employee's health, Adam Dairy, 4 ALRB No. 24 (1978); and changes in work which appeared likely to lead to lower earnings/ together with a demotion from crew boss to worker, Bacchus Farms, 4 ALRB No. 26 (1978). Cases where the NLRB has found constructive discharges ordinarily involve assignments to work so difficult or unpleasant that they manifest an employer's intention to cause an employee to quit. See, e.g., J. P. Stevens and Co., Inc., v NLRB, 461 F.2d 490, 494 (4th Cir. 1972), 80 LRRM 2609; Pre-Cast Mfg. Co., 200 NLRB 135, 82 LRRM 1336 (1972). Here, the changed working conditions to which Mr. Meneses testified do not reach such a level of difficulty or unpleasantness. Therefore we find that Mr. Meneses' working conditions were discriminatorily altered in violation of Section 1153(c) and (a), but that he was not constructively discharged.

Accordingly, in order to remedy the effects of Respondent's unlawful conduct, we modify the ALO's recommended remedial order as follows:

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that Respondent George Arakelian Farms, Inc., its officers, agents, representatives, successors, and assigns shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, or coercing employees in the exercise of their right to self

organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own 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 or all of 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 Agricultural Labor Relations Act; and

(b) Discriminating in regard to the hiring or re-hiring of employees, or any term or condition of their employment, including work assignments, to encourage or discourage membership in or activity on behalf of any labor organization.

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

(a) Offer to reinstate the following members of the Gilberto Pena cantaloupe harvesting crew and any others who were employed as regular members of that crew as of June 11, 1977, and make them whole for any losses in pay and other economic losses they may have suffered as a result of Respondent's illegal termination of said crew;

Bartolo Conchas	Alfredo Estrella
Matilde Lugo	Justino Perez
Antonio Guzman	Abelardo Perez
John Whiteside	Jose E. Conchas
Ramiro Santoy	Felipe C. Rodriguez
Secendino Pena	Daniel Alvarado

Miguel Ortega	Juan Lopez
Raul Cecena	Gerrardo Lopez Jaime
Santos Montano	Victor De La Torre
Guillermo Garcia	Jose Gonzalez
Allejo Arrison	Catarino Jamique
Salvador Nava	Salvador Pena

The amount to be paid to each crew member will be the sum he or she would have earned from June 11 to the date he or she is offered reinstatement to the same or a substantially equivalent position, less his or her net earnings during the interim, together with interest on the total award, computed at seven percent per annum. Employees who were regular members of the Gilberto Pena cantaloupe harvesting crew prior to June 11, 1977, and had a reasonable expectation of continuing that employment after that date, shall be considered to have been employed by Respondent on June 11 whether or not they were working or present at the work-site on that date;

(b) Offer to reinstate Andres Luna, Roberto Escobedo, Sr., Roberto Escobedo, Jr., Jose Torres, Fermin Moore, and Macario Villareal and make them whole for any losses in pay and other economic losses they may have suffered as a result of their discriminatory layoff on September 28, 1977;

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records and reports, and other records necessary to determine the amount necessary to make whole the employees named in paragraphs 2(a) and 2(b) above;

(d) Post the attached Notice in English and Spanish in a conspicuous place on its property for a period of 60 consecutive days during the 1979 peak employment period, at times and places to be determined by the Regional Director. Respondent shall promptly replace all Notices which have been altered, defaced, covered, or removed;

(e) Arrange for a representative of Respondent or a Board Agent to read the attached Notice to Respondent's assembled employees in English and Spanish. The Notice shall be read on Company time to each crew of Respondent's employees employed during the 1979 peak period of employment. The Board Agent shall be given a reasonable amount of time after each reading, outside the presence of Respondent's agents and supervisors, to answer questions which employees may have about the substance of the Notice and their rights under the Act. Piece-rate workers shall receive compensation for time lost at a rate computed by taking the average hourly pay earned during the remainder of the day and applying that to the time consumed during the reading of the Notice and the question-and-answer period;

(f) Inform the Regional Director in writing within 30 days of the receipt of this Order and thereafter

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upon the Regional Director's request report in writing on the steps Respondent has taken to comply with this Order.

Dated: February 14, 1979

GERALD A. BROWN, Chairman

RONALD.L. RUIZ, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

After a hearing where each side had an opportunity to present evidence, the Agricultural Labor Relations Board found that we violated the rights of the Gilberto Pena cantaloupe harvesting crew which included Bartolo Conchas, Matilde Lugo, Antonio Guzman, John Whiteside, Ramiro Santoy, Secendino Pena, Alfredo Estrella, Justino Perez, Abelar Perez, Jose E. Conchas, Felipe C. Rodriguez, Daniel Alvarado, Miguel Ortega, Raul Cecena, Santos Montano, Guillermo Garcia, Allejo Arrison, Salvador Nava, Juan Lopez, Gerrardo Lopez Jaime, Victor De La Torre, Jose Gonzalez, Catarino Jamique, and Salvador Pena, and discriminated against them when we terminated them on June 11, 1977, for asking for a wage increase - a protected concerted activity; that we violated the rights of Jose Luis Meneses when we assigned him to less favorable work on account of his pro-union sentiments; and that we violated the rights of Roberto Escobedo, Sr., Roberto Escobedo, Jr., Andres Luna, Fermin Moore, Jose Torres, and Macario Villareal when we laid them off, failed to reinstate them and hired other workers in their place on account of their pro-union sentiments. The Board has told us to post this Notice so that all of our employees may understand their rights.

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

1. To form, join, or help unions;

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

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

4. To decide not to do any of the above things.

Because it is true that you have these rights, 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;

WE WILL NOT fire you or lay you off because you exercise any of your rights;

WE WILL offer to all of the members of Gilberto Pena's cantaloupe harvesting crew who were employed by the Company on June 11, 1977, and to the six irrigators named above whom we laid off, their old jobs back if they want them and we will pay each of them any money they lost because we discharged them.

GEORGE ARAKELIAN FARMS, INC.

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

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

George Arakelian Farms, Inc.

5 ALRB No.10
Case Nos.76-CE-115-E
77-CE-116-E
77-CE-117-E
77-CE-150-E
77-CE-163-E

ALO DECISION

The ALO found that Respondent violated Labor Code Section 1153(c) and (a) by terminating a cantaloupe harvesting crew for engaging in the protected concerted activity of asking for an increase in pay. The ALO dismissed charges that Respondent committed unfair labor practices by laying off and failing to rehire six union adherents as irrigators, by assigning one irrigator who was a union adherent to more onerous work and by reducing the hours of another irrigator who was also a union adherent. The ALO's reasons for dismissing the charges respecting the layoff of the six irrigators included a lack of evidence regarding the union sentiments of workers hired to replace them. His reasons for dismissing the charges regarding unfavorably changed work assignments of one irrigator included a lack of evidence as to anti-union animus on Respondent's part. The ALO found that the charge of discriminatorily reduced working hours for another irrigator was not supported by evidence of an actual reduction in hours worked.

BOARD DECISION

The Board affirmed the ALO's finding that Respondent violated Section 1153 (c) and (a) by terminating a cantaloupe harvesting crew for engaging in protected concerted activity, finding that the ALO's credibility resolution as to the veracity of the Charging Party's witnesses was supported by the record as a whole. The ALO's suggested remedy requiring that the entire crew be offered reinstatement and made whole was adopted by the Board. The Board found a violation of Section 1153(c) and (a) in Respondent's laying off and failing to rehire six irrigators, on the ground that Respondent failed to adduce any business justification for this act "inherently destructive of employee rights." Pro-union or anti-union sentiments of replacement workers were held to be irrelevant to the issue. To remedy this violation the Board ordered that the six irrigators be offered reinstatement and made whole. The Board found in the record sufficient evidence of anti-union animus on the part of Respondent's managerial and supervisory personnel to support an inference that the unfavorable work assignments given to one irrigator resulted from anti-union motivation and were therefore in violation of Section 1153(c) and (a). The Board ordered that Respondent cease and desist from discriminatory activity of this sort. No exceptions having been filed as to the ALO's dismissal of charges regarding discriminatorily shortened work hours of another irrigator, the Board did not review said dismissal.

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STATE OF CALIFORNIA, AGRICULTURE LABOR RELATIONS BOARD

In the Matter of

GEORGE ARAKELIAN FARMS, INC.

Respondent,

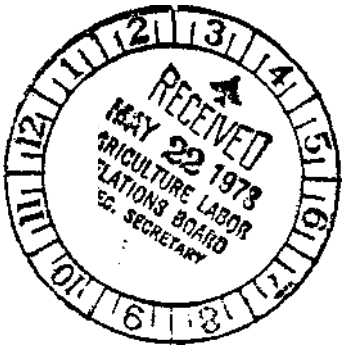
and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Charging Party.
_____/

Case No's. 76-CE-115-E
77-CE-116-E
77-CE-117-E
77-CE-150-E
77-CE-163-E

DECISION OF THE ADMINISTRATIVE LAW OFFICER



Appearances:

Michael T. Auclair-Valdez
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444 South 8th Street
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For the Respondent

Anita Morgan
United Farm Workers of America, AFL-CIO
P.O. Box 1940
Calexico, CA 92231 For the
Charging Party

MARK E. MERIN, ADMINISTRATIVE LAW OFFICER:

This case was heard before me on November 29, 30, December 1, 2, 7, and 8, 1977, in Blythe, California. By order dated November 22, 1977, the six above-referenced cases were consolidated for hearing, The First Amended Complaint, dated November 22, 1977, was served on respondent together with the order consolidating case 77-CE-163-E with the other five cases then set for hearing on November 29, and respondent's motion for severence of case

77-CE-163-E was referred to the Administrative Law Officer for ruling. After hearing arguments I denied respondent's motion for severence of case 77-CE-163-E and indicated that ameliorative orders, including a short continuance, might be made if prejudice to respondent were shown. With no showing made, the hearing proceeded.

The First Amended Complaint, orally amended on the first day of the hearing, charged that respondent committed certain unfair labor practices in violation of sections 1153(a) and (c) of the Agricultural Labor Relations Act. Respondent filed its Answer denying therein that it had committed the alleged unfair labor practices.

At the conclusion of the General Counsel's case, Respondent moved to dismiss portions of the Complaint. No evidence had been presented in support of the allegation contained in Paragraph 6(a) of the Complaint to the effect that Jose Alfredo Carrillo had been constructively discharged in February, 1977, for engaging in Union activities and Respondent moved to dismiss that allegation on that basis. Neither the General Counsel nor the Charging Party objected and I granted the motion.

Paragraphs 6(e) and (f) alleged that Alfonso Martinez was demoted from the position of irrigator on May 24, 1977, and discharged on June 7, 1977, for engaging in Union activities. The evidence presented by the General Counsel showed that Martinez' Union activity, to the extent that it existed, was covert and the Company's awareness of Martinez' support for the Union non-existent. Instead of supporting the General Counsel's allegations of a lay-off or involuntary termination, Martinez' testimony was that he had been assigned work but was unable to find the crew to which he was assigned so he left, feeling like a drowned man. Concluding that the General Counsel failed to establish a prima facia case that Mr. Martinez was discriminated against for Union activities, I dismissed paragraphs 6(e) and (f) of the Complaint.

Briefs in support of their respective positions were timely filed by General Counsel and Respondent.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, George Arakelian Farms, Inc., (hereinafter sometimes referred to as "Arakelian Farms," "the

Company" or "the employer") is a California corporation engaged in agriculture in California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (hereinafter sometimes referred to as "the Act").

Charging Party, the United Farm Workers of America, AFL-CIO, is a labor organization within the meaning of Section 1140.4(£) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Complaint alleges that Respondent violated Sections 1153 (a) and (c) of the Act by reducing working hours, constructively discharging employees, making discriminatory assignments, demoting employees, and discharging employees for engaging in Union activities or in order to discourage participation in such activities. The Complaint further alleges that Respondent discharged an entire cantaloupe harvesting crew for engaging in protected concerted activities and thereby violated Section 1153(a) of the Act.

Respondent denied discriminating against any workers either by reducing working hours, assigning them to more arduous work, demoting or discharging them and affirmatively asserted that its decisions relating to work assignments and layoffs were motivated solely by legitimate business requirements. Respondent denied that it discharged the entire cantaloupe harvesting crew, as alleged in the Complaint, for engaging in concerted activities or for any other reasons.

III. STATEMENT OF FACTS

A. The Company

George Arakelian Farms, Inc., grows, harvests, and markets agricultural commodities, such as alfalfa, cotton, cantaloupes and lettuce in the Blythe area which encompasses portions of both Riverside and Imperial counties. At peak it employs over one hundred fifty (150) workers.

B. Change in Working Conditions of the Irrigators

There were allegations that the working conditions of Company irrigators were changed after the union representation election at the Company on December 15, 1976.

Considerable testimony described how the fields are irrigated and the number of men usually employed in the irrigation process. Most of the Company's fields are approximately forty (40) acres and, when planted in rows, are irrigated from a single irrigation ditch filled from a canal. Some fields, however, depending upon their terrain and soil composition, may require more than* one ditch for successful irrigation.

An irrigator must siphon the water from the ditch onto the field, but must also regulate the flow down the rows by establishing or eliminating "contras" which are impediments to the water flow, build up rows where necessary by using his shovel, and stop the water when enough has been applied to the field.

Usually a one ditch forty acre field is managed by one irrigator from start to finish. An average shift for an irrigator is approximately one hundred (100) hours, varying depending upon the crop irrigated. Almost constant attention is required so irrigators remain at the fields around the clock and are paid for twenty-two hours out of every twenty four hour period. Two hours are allotted for meals and other non-work activities for which they are not compensated. Hourly pay for irrigators at Arakelian Farms in February, 1977, was $2.73 an hour.

When a field has more than one irrigation ditch, two irrigators are usually assigned to that field, although, on occasion, before the election at Respondent's ranch, one man was assigned to irrigate a field with two ditches. When not irrigating, irrigators may be assigned to do shovel work at which they earn more per hour (approximately $2.95) then they do irrigating but they usually work fewer hours.

1. Jose Luis Meneses

In Paragraph 6(b) the General Counsel alleges that irrigator Jose Luis Meneses was discriminatorily assigned by his supervisor, Diego Loureiro, to more arduous work in February, 1977, in order to discourage his participation in Union activity. Paragraph 6(c) of the Complaint, alleges that such treatment constituted a constructive discharge.

Meneses' testified that he had worked for Arakelian for four years beginning in February, 1972. After a lapse of approximately a year, Meneses was re-employed at Respondent's ranch in January of 1977. He left Respondent's employ in February, 1977 after about a month and

a half on the job. Throughout the entire time he worked with Respondent, Meneses was employed as an irrigator, the line of work he had pursued for at least seventeen years. Meneses was not present before or during the representation election which was held at Respondent's Company on December 15, 1976. The tally of ballots for the election showed the United Farm Workers to be the choice of an overwhelming majority of Arakelian's workers with 139 of 169 votes cast for the union, 12 for no union, and 17 ballots challenged. According to Meneses he supported the union and his foreman, Diego Loureiro, knew of his support.

Meneses testified that sometime in February he was irrigating with another employee, Augustin, on the east side of the Colorado River. The field was served by three irrigation ditches. Meneses was assigned to irrigate the portion of the field served by two irrigation ditches while Augustin was responsible for irrigating part of the field from one ditch. Loureiro checked Meneses and Augustin's work in the morning, gave instructions for the water to be switched to the fields on the other side of the ditches and left instructions that Meneses should go home at 1:00 or 2:00 o'clock in the afternoon when everything was alright. He was to return on Monday for an additional assignment unless he was called by Loureiro on Sunday to come in to irrigate. Augustin was to stay with the field and watch the water.

Meneses left at about 1:30 that day but told Augustin that he did not intend to return because he felt he had been treated unfairly since he had already done the hard work of putting the water on the field and had the easy work remaining, watching the field as it filled with water, when he was told to leave. In the past, he testified, the Company allowed an irrigator who started a field to continue with it until the field was completed. Because he was given more hard work to do than Augustin and was then deprived of the easier work, he did not want to continue working with the Company. He attributed the Company's unfair treatment of him to its anti-union animus.

Loureiro testified that he had been an irrigator at the Company before he became a foreman in December, 1976, and that it was not uncommon for him to assign one irrigator to irrigate fields which had more than one ditch. He indicated that Meneses was a good worker, that he did not intend to increase his work load and that he expected Meneses to return to work for re-assignment the following Monday morning.

I credit Meneses evaluation of the changes in his own work load. A man with as much practical irrigation

experience as he had must be aware of the usual practices and is to be believed when he describes an increase in his own work load. Variations in work load are not illegal under the ALRA unless they are changes in working conditions which are discriminatory as relating to membership in a labor organization.

By having Meneses do more work than he was accustomed to doing and then depriving him of the full irrigation shift he expected, Loureiro was actively discriminating against Meneses in that he was treating him differently from the way other irrigators had usually been treated. That discrimination was justified by Loureiro on several basis. The field Meneses was working in was, in fact, slightly smaller than the usual forty acre fields; and it was not unusual for him to make assignments such as he did to Meneses. The Respondent's evidence showed that Loureiro was a comparatively new irrigation foreman and the implication was that he was merely putting his own policies into effect when he made the decisions relating to Meneses.

Loureiro's own testimony established that he regarded Meneses as a competent irrigator and that he even attempted to contact Meneses and to give him additional assignments, The fact that he had Meneses check in his possession when he met him the following week was explained as a common occurrence that is he often carried the checks of his irrigators so that he could pass them along when he saw them.

If no explanation had been offered to explain the treatment that Meneses received, the inference that the decisions relating to him were affected by the Company's knowledge of his Union activities (if shown) and its antipathy for the Union (if shown) would permit the inference that the treatment of Meneses was motivated by the Company's anti-union animus.

As a general rule, the more egregious the discrimination and the more decided the Company's anti union animus, the stronger is the inference of illegality and the greater is the burden on the Company to prove fication for its actions.

Here the discrimination against Meneses was comparatively slight, especially given the testimony from others that there was a general speed up at the Company, and the evidence of the Company's anti-union sentiments almost absent. It was only because an inference of illegality could yet be drawn under such circumstances

that the Company's motion to dismiss the allegations of violations of Sections 1153 (a) and (c) of the Act were denied. The Company's evidence, however, established multiple explanations for Loureiro's treatment of Meneses and thereby negated the inference of illegality. I find, therefore, that there was no violation and I shall recommend that the allegations of discrimination' against Meneses be dismissed.

Since Loureiro's treatment of Meneses was not shown to be motivated, even in part, by the Company's anti-union animus, the allegation that Meneses was constructively discharged must also fall.The General Counsel did not present the type of evidence which led the Board in Merzoian Brothers Farm Management Company, Inc. (3 ALRB No 62)to find a constructive discharge exists where the "employer creates or imposes such onerous conditions on the employee's continued employment because of Union activities or membership that the employee leaves."

2. Roberto Escobedo, Sr.

Paragraph 6(d) of the Complaint alleges that the hours of employee Roberto Escobedo, Sr., were discriminatorily reduced in February, 1977, because of his Union activities. Escobedo has been an irrigator for more than twenty years and worked with Respondent since 1970, at first on a seasonal basis, and then for three years ending in September, 1977, as a permanent employee. Escobedo was active in the Union's organizing drive at Arakelian Farms in November and December, 1976. As part of his responsibilities he passed out Union information, buttons and bumper stickers before the election, engaging in such activities at the Company's shop where irrigators gathered in the morning to receive their assignments. He wore a Union button before the election but does not know if either Roman Mendoza or Diego Loureiro, his supervisors, saw him passing out leaflets.

In support of the allegations in the Complaint that he was discriminated against on or about February, 1977, Escobedo testified that after the election Loureiro tried to give him eighty acres to irrigate by himself but that he refused the assignment and told Loureiro that it could not be done by one man. Before the election he had rarely been assigned to irrigate fields with more then one ditch. At the time he was so assigned, he normally had a helper. After the election Loureiro assigned him to do a two ditch field but Escobedo refused and three other men who were assigned, seriatim, were unable to do the work properly.

He also noticed that after the election the Company started "putting in new people . . .[who] were working more hours than I was in irrigation." Escobedo also indicated that during the time from January through September, 1977, he noticed differences in work assignments as compared to the previous year "because my job was irrigator the year before and I made $14,418 and right now I know I* haven't that much money earned and we are already hitting December."

The Company's records, stipulated to be accurate and admitted into evidence, do not show a discrepancy between Escobedo's working hours and those of other irrigators. General Counsel, in its brief, apparently accepts the absence of objective signs of discrimination saying that "when comparing the hours Escobedo worked to other irrigators worked during the same time period, there is not the strongest showing, of an actual reduction in hours worked."

Loureiro testified that he tried to spread the available irrigation work out so that the irrigators would all get the same opportunities but he admitted his system was a little rough. He denied any attempt to discriminate against Escobedo.

Even though there was no convincing evidence that Escobedo was discriminated against in relation to other irrigators following the election, I do credit his description of some unusual assignments and his statements that he was earning less this year as an irrigator than he did the previous year and that his shifts were being reduced because the work was being shared with new employees. That type of discrimination taking work otherwise done by older employees and giving it to new ones, although perceived as unfair by the older workers, is not a violation of the Agricultural Labor Relations Act unless that decision is motivated in part by the Company's anti-union animus. When work is re-assigned in such a way as to diminish the earnings of a group of people, that group is discriminated against. The evidence was not sufficient for me, however, to compare the number of irrigators year to year and the number of hours Escobedo worked as compared to other irrigators. Such a gap in the evidence, taken together with the absence of any evidence that the new workers were less active supporters of the Union or that the membership in the Union was adversely affected, made the inference of illegal activity which might have been drawn from such facts extremely weak. That weak inference, as earlier described, was amply negated by the Company's explanations of the basis for its irrigation assignments - an attempt by Loureiro to spread the available work over the existing number of irrigators and shovelers.

Therefore I shall recommend that the allegations

of discrimination against Roberto Escobedo, Sr. be dismissed.

C. September Lay-Offs

In Paragraph 6(h) of the Complaint, General Counsel alleges that on or about September 27, 1977, Respondent discriminatorily laid off six irrigators and shovelers for engaging in Union activities. In support of its allegations, General Counsel offered testimony from the six alleged discriminates. Roberto Escobedo, Sr. testified that he was laid off by Diego Loureiro, foreman of irrigators, on September 28, 1977. At the time of the lay-off Loureiro told him that he was keeping only three irrigators for a few days but hoped to call Escobedo back to work around October 10. Approximately ten other irrigators and shovelers were also laid off on the same day. Escobedo knew the irrigators who were kept on and testified that they, like himself, were Union supporters. The Company was aware of Escobedo's Union affiliation since it had received a notice that Escobedo would be attending the Union convention on August 27, as a delegate, but Escobedo could not say what further knowledge the Company had a-bout his Union activities.

Andres Luna, a shoveler who assisted irrigators since starting with the Company on January 15, 1977, testified that Loureiro laid him off on September 28, 1977, and told him that they would be stopped for about a month, and that he would contact Luna to let him know "what was happening." Loureiro told him the lay off order came from George Arakelian. Luna supported the Union and the fact that he was selected as an alternate to attend the Union's convention was known to the Company. Loureiro, in fact, had asked Luna if he intended to go to the Union's convention in Fresno in August to which Luna replied that he did. Loureiro, however, never interferred with Luna's Union activities.

Jose Torres started work with the Company in July, 1976, as a shoveler and before the election in December, handed out Union leaflets and buttons and wore a Union button daily. He also was elected an alternate delegate to attend the Union's convention in August, a . fact known by Loureiro whom he so informed. Torres reported that on November 16, when he was irrigating in the lettuce field Diego Loureiro engaged him in a conversation and said that if the Union lost the Company would fire "them" and if they won, the Company would cut hours and days. Torres recalled answering that it would be no problem for him since he, as a Seventh Day Adventist,

worked only five days while the rest of the crew worked a sixth day as well.

On Sept. 27, Torres was laid off by his foreman, Francisco Madrona, who told him the lay-off order came from Diego Loureiro because work was very slow. He was told he would be notified to return to work but up to the time of the hearing he had not been so notified.

Roberto Escobedo, Jr. testified that he had been a permanent shoveler for the Company for the last two years and before that, since 1972, worked seasonally thinning and weeding lettuce. He was an active United Farm Worker supporter, involved in the election campaign and was seen by Company supervisors handing out leaflets and wearing a pro-Union button.

He was laid off by Diego Loureiro on September 27, when Diego came to his house, gave him his final check and told him "there was no more work but that he would call him in about a month. Loureiro never did call him back to work.

Fermin Moore, a farm worker for thirty-four years, worked seasonally for Arakelian Farms since 1968 and permanently for the Company for the last two or three years. Although he was not present during the Union election campaign, when he returned to work in January, 1977, after an illness, he did display for two or three weeks a Union button which he got from Macario Villarreal.

Moore was informed by Francisco Madrona on September 28 that he was being laid off and was told that it was because the Company was going broke. In the previous two or three years he had never been laid off for more than one or two days. He has never been contacted about possibly returning to work although he did approach Roman Mendoza about a month after his lay-off to find out if a return to work was possible. He then learned that there were four persons working and that they were all Mendoza needed.

Macario Villarreal testified that he worked with Arakelian Farms since 1958 or 1959 and has done all kinds of irrigation work in the Blythe area. He started as a permanent worker with the Company in April or May,- 1975. Beginning in November, 1976, Villarreal participated in Union organizing activities, Signing and helping others to complete authorization cards, wearing and passing out buttons, and displaying a Union bumper sticker on his car. At one time he asked Diego Loureiro to sign a Union authorization card but was told that it was "not convenient for him to sign it." On another occasion, Loureiro with whom Villarreal had been good friends, told Villarreal he must be crazy for joining the Union, that Villarreal

would lose many things, Loureiro also pointed out that he could fire Villarreal and that because Villarreal was so involved with the Union it would not be possible for Loureiro to talk with him very much anymore.

On September 28, Loureiro sought Villarreal out at his brother-in-law's house and told him that he had "bad news," that he had given a rest to the shovelers and tractor drivers and that Villarreal was also being laid off. He has not been recalled. Responding to allegations that the layoffs on September 27 and 28, were discriminating the Company offered evidence of business justification. Company records show that the number of irrigators and shovelers gradually declined from June 3 through October from a high of thirty-two to a low of five and that the six alleged discriminates were among the last employed by the Company at the end of September. The Company denied discriminating against any employees on the basis of their Union affiliations and pointed out that virtually all of the irrigators and shovelers supported the Union and that any layoff would have to have affected Union supporters. Furthermore, the Company has no seniority system and no Union contract and its hires, re-hires and call-backs are not based on any seniority system.

A lay-off is inherently discriminatory when it reaches only a portion of the work force. Like many other changes in the employment relationship or conditions of employment, layoffs are only illegal if motivated by the employer's anti-union animus.

In some cases anti-union animus is express and in others may be implied from the circumstances. Where a lay-off selectively hits known Union adherents or violates accepted seniority systems or customary practice there is a strong indication that it is influenced by an illegal motive and the burden is on the Company to justify by substantial and convincing evidence that it was not motivated, even in part, by its anti-union sentiment.

During the month of September 1977, Arakelian Farms employed twenty shovelers and irrigators, with the actual work force varying from a high on any one day of twenty to a low of four. In the following month the Company employed fourteen shovelers and irrigators, again with the high on any one day being ten and the low one. Nine of those who worked during October also worked for the Company in September, but five were either new employees or worked prior to September. In November the Company employed a total , of eighteen shovelers and irrigators, nine of whom also worked for the Company in September, three of whom worked for the Company in October, but not September, and six of

whom were new employees. Since neither Jose Torres, Fermin Moore, nor Roberto Escobedo, Jr. appear on the exhibits stipulated to be accurate by both parties (C-14 through C-16) the usefulness of the exhibits is open to some question. Nevertheless, since no evidence was introduced as to the Union sentiments of those workers employed in the months of October and November who were also employed in September; and since there was no evidence of the Union sentiments of those workers who, although employed in October and November, were not employed in September it is impossible to determine if the Company's lay-off and re-hire activities were influenced by a desire to eliminate Union supporters and to replace them with workers without such sentiments.

The Company offered evidence through Diego Loureiro that the layoffs were motivated by business reasons (decline in work available, changes in weather, crop losses); that the individuals laid off were selected by Loureiro although the decision to reduce the work force was made by George Arakelian; that Loureiro attempted to spread the work out as it diminished from June through September and that since the Company had no seniority system, Loureiro's selection of employees in October and November was justifiable.

Although there were some evidence of expressions of anti-union sentiment by supervisors such as Diego Loureiro and Roman Mandoza and the Company's president George Arakelian, the remarks were not of such character as to suggest the Company was motivated by anti-union animus in effecting the juggling of its work force to meet its employment needs.

The absence of substantial evidence of selective layoffs based on Union support, and a weak showing of the Company's anti-union sentiments lead me to conclude that the allegation of discrimination contained in Paragraph 6(h) of the Complaint do not have merit. Accordingly, I shall recommend that such allegations be dismissed.

D. Gilberto Pena's Cantaloupe Harvesting Crew

On June 11, 1977, the cantaloupe harvesting crew supervised by Gilberto Pena arrived at the field they were to harvest at approximately 5:30 a.m. The crew was to work the field with a melon harvesting machine but when they arrived the machine was not operating. In the early stages of a melon harvest, melons are harvested by hand, selectively, As more melons ripen, harvesting machines are employed with

the workers sorting the melons and transferring them to waiting trucks. When picking melons by hand, the crew is paid on an hourly basis; when picking by machine, the crew receives a piece rate based on the number of feet (in height in the truck) of melons it picks.

On June 11, after a delay of approximately one hour, the melon harvesting machine was repaired and the crew worked with it a short while when it again broke down. While the crew was waiting for the machine to be repaired, Roman Mendoza, the general foreman, visited the field and told the crew, through Gilberto Pena, that when the machine was repaired they were to work until they finished the field.

Later that morning, after another machine breakdown, Mendoza returned to the field and asked Pena what had happened. The crew, meanwhile, had been discussing their pay rate. According to Raul Cecena, the crew wanted a raise and selected Matilde Lugo, a crew member, to speak for them. Lupo approached Mendoza and within hearing of the entire crew, asked Mendoza for a pay increase for the crew. Mendoza responded that he did not think the Company could give an increase, that there were people from Calexico who would work for $2.95 an hour. Innocencio Nava, another worker, told Mendoza that he had heard that in Yuma, Arizona, the pay was $5 per foot and $7 per foot on weekends. Mendoza respondend, "only if you are in a Union" and asked why the workers weren't over there? The conversation ended with Mendoza saying he would try to see what he could fix up for the crew and, since the machine was then fixed, the crew returned to work and worked until the lunch break.

After lunch as the crew was. returning to the machine, Mendoza's assistant, Manuel Soto arrived in a Company pickup truck. He spoke with Pena and told him to gather up the sacks (used for hand harvesting) that the crew no longer had work. Gilberto Pena repeated Soto's message to the entire crew and informed them that their checks would arrive around 3:00 o'clock that afternoon. Members of the crew received their checks around 5:30 that evening.

Santos Montano testified corroborating Raul Cecena's version in most respects. Montano additionally recalled that their spokesperson, Lugo, asked Mendoza either for an increase or for the crew to be switched to another field where they could earn more money. Mendoza responded that he could bring people to work at $2.95 an hour and all he would have to do was to call a labor contractor from El Centro. According to Montano, Mendoza left saying he would see what he could do. Instead of an increase, the crew was

told by Manuel Soto, Mendoza's assistant, that it had no more work at the Company. Abelardo Perez-Pino also testified convincingly to having heard the same conversation.

For this hearing the Company prepared a list which showed that the Gilberto Pena 1977 melon harvest crew was composed of 27 workers, excluding Gilberto Pena. Starting dates for the crew members range from June 6 to June 9, with one member working on June 11 only. Five of the twenty-seven did not work on June 11 or thereafter. Nineteen crew members ended their employment with the Company on June 11 and only three of the crew members were employed by the Company after June 11.

Respondent's witnesses disputed the testimony of representative members of the Pena cantaloupe harvesting crew. Roman Mendoza testified that he had requested the crew to work a full day on June 11 to ensure that all ripe melons were picked. According to Mendoza, he neither hires nor fires the harvesting crews. By checking the tickets on the trucks early in the morning on June 11, he computed it was costing the Company approximately $14 per foot for the Pena crew's harvesting efforts. He visited the field where Pena's crew was supposed to be working and noticed they were not picking. He recalled that as he was leaving someone from the crew called out that in Arizona pickers earned more and that he responded, before leaving, that Arizona has always paid less than California. He denied firing anyone, telling anyone there was no more work, or ordering Pena to stop his crew.

Manuel Soto testified that he visited the Pena crew's field on June 11, observed them sitting around while the machine was broken down, but denies stopping the crew, firing them, or telling them there was no more work. To the contrary, he stated that he told Gilberto Pena to talk with his people and to tell them they had to pick the melons as soon as the machines were fixed. He did not hear what Pena communicated to the crew but he knows the crew did not work after lunch.

IV. ANALYSIS AND CONCLUSIONS

Agricultural employees have the right "to engage in concerted activities for the purpose of ... mutual aid or protection . . ." (Section 1152 of the Act). Interference, restraint or coercion in the exercise of this right is an unfair labor practice under section 1153(a).

Where employees who engage in protected concerted

activities are discriminated against in relation to their employment tenure, section 1153(c) of the Act is also violated since concerted activities are one aspect of Union membership and discrimination for engaging in such activities is just "a step removed from discrimination for the purpose of discouraging Union membership." Morris, The Developing Labor Law, p. 123; NLRB v Erie Resistor Corp. 373 U.S. 221, 233; 53 LRRN 2121 (1963) . Work stoppages and strikes which do not violate a collective bargaining agreement are protected concerted activities. There is no question but that a group request to the employer for a wage increase, even if punctuated by a threat of, or an actual interruption of work, is protected concerted activity for which participating workers may not be legally disciplined.

If the workers in Gilberto Pena's cantaloupe harvesting crew who testified at the hearing are credited, their group action of requesting a wage increase falls well within the ambit of protected concerted activity. Since the Company denies terminating the crew, a finding on the allegation of the violation of the right of the crew to engage in protected concerted activities rests almost wholly on a determination of the credibility of the respective witnesses.

In addition to the consistency of the testimony of crew members who overheard the relevant conversations on June 11, the version of such witnesses is supported both by logic and permissible and reasonable inferences.

Recall of specific details of the conversation -references to wage scales in Arizona, discussions about the machine break-down, and what other crews working for the company were earning - gives added weight to the crew's version that a request for increased wages was made by a representative designated by Gilberto Pena's crew. The fact that the crew ceased working at noon and that twenty-four of them did not again work for the Company that season, in the absence of another plausible explanation for such an occurrence, substantiates the representations of those who testified that the crew was terminated.

On the other hand, the Company's version of the critical events of June 11, lacks convincing force. Although Roman Mendoza denied having a conversation relating to wages with a representative from Pena's harvesting crew, he testified recalling that someone did raise a question of the rate being paid to harvesters in Arizona. The Company's supervisors described the importance of moving forward with harvest of ripe melons, but denied giving any order to the crew to harvest the field by hand while the

machine was down. The crew's cessation at noon, the delivery of their paychecks that evening, and the fact that only a few members of the crew worked for the Company after June 11 are all facts which taken together are convincing circumstantial evidence of a termination which was denied by the Company. In view of the facts supporting the workers' testimony that the entire crew was terminated, the Company's surmise that the crew left voluntarily because the members felt they could earn better wages in Arizona is not persuasive. Accordingly, I conclude the Company violated Sections 1153(a) and (c) of the Act by terminating the Gilberto Pena cantaloupe harvesting crew for engaging in protected concerted activities on June 11, 1977.

V. REMEDY

Having found that the Company committed an unfair labor practice by terminating the Gilberto Pena cantaloupe crew for engaging in protected concerted activities, I find the following remedies to be appropriate measures to effectuate the purposes of the act:

1. All members of the Gilberto Pena cantaloupe harvesting crew who worked on June 11 and were terminated that day as well as all members who worked previous to June 11 and who expected to, but did not work that season at the Company following the termination of the harvesting crew shall be offered reinstatement to their former positions and compensated for time lost in accordance with the Board's formula prescribed in Sunnyside Nurseries, Inc., 3 ALRB 41, for the period beginning with the termination of the crew and ending when they are offered reinstatement.

I have included members of the crew who were not working on June 11 since they were penalized by virtue of the concerted activity of the crew of which they were a part. Naturally, individuals who were not so penalized and did continue to work following June 11 would receive compensation only for the time they would otherwise have worked had the Gilberto Pena harvesting crew not been terminated.

Accordingly, upon the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160 3 of the Act, I hereby issue the following recommended:

ORDER

A. Respondent George Arakelian Farms, Inc., its officers, agents, representatives, successors and assigns shall:

1. Cease and desist from:

   a. In any manner interferring with, restraining or coercing employees in the exercise of their right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own 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 or all of 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 sub-division (c) of Section 1153 of the Act; and

   b. Discriminating in regard to the hiring or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization.

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

   a. Make whole those members of the Gilberto Pena cantaloupe harvesting crew employed by Respondent on June 11 for any losses in pay they may have suffered as a result of Respondent's illegal termination of said crew. Employees who, while not present at the Company on June 11 but who, nonetheless, were members of the Gilberto Pena cantaloupe harvesting crew with expectation of continuing that employment following June 11, shall be considered to have been employed by Respondent on June 11;

   b. Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records and reports, and other records necessary to determine the amount necessary to make whole employees for the loss of pay they may have suffered as a result of Respondent's illegal termination of Gilberto Pena's cantaloupe harvesting crew;

   c. Post the attached notice in English and Spanish

in a conspicuous place on its property for a period of sixty (60) consecutive days during the 1978 peak employment period. Respondent shall promptly replace all notices which have been altered, defaced or removed;

d. Respondent or a representative from the Board shall read the attached notice to Respondent's assembled employees in English and Spanish. The notice shall be read on Company time to each crew of Respondent's employees employed during the 1978 peak period of employment. The Board agent shall be given a reasonable amount of time at each reading to answer questions which employees may have about the substance of the notice and their rights under the Act. Piece rate workers shall receive compensation for time lost at a rate computed by taking the average hourly pay earned during the remainder of the day and applying that to the time consumed by the meeting including the question and answer period;

e. Respondent shall inform the regional director in writing, within thirty (30) days of the receipt of this Order and thereafter shall report every thirty (30) days, in writing, on the steps taken to comply with this Order.

IT IS FURTHER ORDERED that all other allegations contained in the Complaint not specifically found to be a violation of the Act be, and hereby are, dismissed.

Dated:

MARK E. MERIN, Administrative Law Officer

APPENDIX

NOTICE TO WORKERS

After a hearing where each side had an opportunity to present evidence, the Agricultural Labor Relations Board found that we violated the rights of the Gilberto Pena cantaloupe harvesting crew and discriminated against them when we terminated them on June 11, 1977, for asking for a wage increase - a protected concerted activity. The Board has told us to post this notice so that all of our employees may understand their rights.

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

1. To form, join, or help unions;

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

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

4. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

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

2. We will not fire you or lay you off because you exercise any of your rights;

3. We will offer to all of the members of Gilberto Pena's cantaloupe harvesting crew who were employed by the Company on June 11, 1977, their old jobs back if they want them and we will pay each of them any money they lost because we discharged the crew.

Dated:

GEORGE ARAKELIAN FARMS, INC.

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BY: