

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TEX-CAL LAND MANAGEMENT, INC.,)	
)	
Respondent,)	Case Nos. 77-CE-121-D
)	77-CE-121-1-D
)	77-CE-121-2-D
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	5 ALRB No. 29
)	
)	
Charging Party.)	

DECISION AND ORDER

On April 13, 1978, Administrative Law Officer (ALO) Norman I. Lustig issued the attached Decision in this case. Thereafter, General Counsel timely filed exceptions with a supporting brief and Respondent timely filed exceptions with a supporting brief and cross-exceptions to General Counsel's brief in support of 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 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, with modifications.

General Counsel excepts to the ALO's conclusion that Atilano Rivera's transfer from tractor driving was not in violation of the Act. We find that this exception is without

merit. The record supports the finding that Respondent removed Rivera from tractor driving because of the prior incidents of vehicle damage which Respondent had attributed to Rivera and not because of his union activity. Although we generally adopt the ALO's findings as to Rivera's reassignment, we consider that Howard Rose Company, 3 ALRB No. 86 (1977), relied upon by the ALO, is inapposite.

We find merit in Respondent's exception to the ALO's conclusion that Respondent violated Section 1153(a) of the Act by assigning Rivera to clean toilets. Rivera served as a collective bargaining representative for the UFW. At one point in the course of negotiations, in response to a misunderstanding about Rivera's seniority status, Rivera called one of Respondent's representatives a "liar." The next day, Rivera asked his supervisor, Roberto Dominguez, whether to continue his previous assignment, shoveling grass. Dominguez referred the question to superintendent Randy Steele, and Steele directed that Rivera clean the portable toilets. Rivera refused to clean the toilets. Dominguez then checked the toilets, discovered that they were already clean, and told Rivera to continue his usual work, shoveling grass. Respondent did not require Rivera to clean the toilets once it was discovered that they were already clean, and Respondent did not institute any disciplinary action following Rivera's refusal to obey Steele's order. Dominguez testified without contradiction that other employees, tractor drivers, had been asked to clean the toilets in the past.

Although the timing and sequence of the aforementioned

events might raise a suspicion of unlawful harassment or interference, a suspicion alone is insufficient to establish a violation. Rod McLellan Co., 3 ALRB No, 71 (1977). We conclude that this record does not support a finding that Respondent's telling Rivera to clean toilets had any connection with his union activity.

We find merit in Respondent's exception to the ALO's finding that Respondent, through its supervisor Bill Pritchett, directed hunters to shoot Rivera's pigeons for the purpose of harassing Rivera because of his union activities.

Rivera resided in company housing adjacent to Respondent's fields. Rivera raised pigeons which he kept in a coop in his yard. The pigeons were not confined to the coop, but flew in and out of it at will, and they sometimes roosted on a nearby water tower. Respondent's witnesses testified that unpenned pigeons posed a health hazard inasmuch as grapes were dried on trays in the fields. The ALO made no determination whether Respondent had warned Rivera to keep his pigeons penned as its witnesses testified.

On September 11, 1977, two hunters shot and killed numerous pigeons which were roosting on the water tower, some of which were wild pigeons and some of which belonged to Rivera. Pritchett had given the hunters permission to hunt on Respondent's property, and he had directed them to the water tower.

Even if, as the ALO found, Pritchett knew that Rivera's pigeons would be shot when he directed the hunters to the water tower, which is not altogether clear, we still would not find a

violation of the Act, as General Counsel failed to establish a connection between the shooting of Rivera's pigeons and Rivera's union activity.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Tex-Cal Land Management, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Reducing any of its employees' work hours

because of his/her support or membership in the UFW or any other union.

(b) In any other 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, or 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 such activities.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Make Atilano Rivera whole for any loss in pay and other economic losses he may have suffered as a result of Respondent's illegal reduction of his daily work hours plus interest thereon at seven percent per annum, in accordance with the formula set forth in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

(b) Restore Atilano Rivera to a normal work day of not less than ten hours, to continue so long as a majority of the hourly-paid employees at the Poso Ranch are customarily employed for ten hours or more per day, or to a lesser maximum if a majority of such employees are reduced to a maximum below ten hours.

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to ascertain the backpay due.

(d) Sign the attached Notice to Employees and, after it has been translated by a Board Agent into all appropriate languages, reproduce sufficient copies in each language for the purposes hereinafter set forth.

(e) Post copies of the attached Notice on its premises at times and places to be determined by the Regional Director, such Notices to remain posted for a period of 60 consecutive days. Respondent shall promptly replace any Notice which are altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed by Respondent since September 16, 1977.

(g) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on

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

Dated: April 24, 1979

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present its side of the story, the Agricultural Labor Relations Board has found that we interfered with the rights of our employees. The Board has ordered us to post this Notice and to take other actions.

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

1. To organize themselves;
2. To form, join, or help unions;
3. To bargain as a group and to choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help and protect one another; and
5. To decide not to do any of these things.

Because this is true, we promise that:

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

Especially:

WE WILL NOT reduce any employee's work hours because he is a member or supporter of the UFW or any other union.

TEX-CAL LAND MANAGEMENT, 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

Tex-Cal Land Management, Inc. (UFW)

Case Nos. 77-CE-121
77-CE-121-1-D
77-CE-121-2-D

5 ALRB NO. 29

ALO DECISION

The ALO concluded that Respondent did not reassign Atilano Rivera from tractor driving because of his union activity, having found no causal relationship between Rivera's union activity and his removal from tractor driving. The ALO also concluded that Respondent did not violate the Act by assigning Rivera to hoe Johnson grass, as he found that that assignment did not impair Rivera's opportunity to contact other employees and that the evidence established no more than a suspicion of a violation. The ALO recommended dismissal of the allegation that Respondent caused the destruction of Rivera's garden, as he found that this incident was unrelated to Rivera's union activity.

The ALO concluded that Respondent violated Section 1153(a) of the Act by permitting hunters to shoot pigeons, some of which belonged to Rivera, on its premises. The supervisor who told the hunters where to find the pigeons was aware of Rivera's union sympathies and that Rivera's pigeons contaminated the trays in which raisins were dried, the ALO found Respondent's conduct inconsistent with its professed concern for protecting its raisins from contamination by live pigeons.

The ALO concluded that Respondent violated Section 1153(a) of the Act by assigning Rivera to clean toilets, finding the following to be circumstantial evidence of a violation: the toilets which Rivera had been ordered to clean were already clean; the order to clean the toilets occurred shortly after Rivera's bargaining activity; and Rivera had never before been asked to clean toilets.

The ALO concluded that Respondent violated Section 1153(c) of the Act by reducing Rivera's daily work hours as no substantial business justification existed for the reduction in hours.

The ALO recommended dismissal of the 1153(d) allegations in the complaint for lack of evidence.

BOARD DECISION

The Board affirmed the ALO's finding that Respondent removed Rivera from tractor driving because of damage to vehicles which he had driven, and not because of his union activity.

The Board reversing the ALO, concluded that Respondent did not violate the Act by assigning Rivera to clean the toilets, finding

5 ALRB NO. 29

that the record did not establish any connection between that assignment and Rivera's union activity.

The Board also reversed the ALO's conclusion that Respondent violated Section 1153(a) of the Act by permitting hunters to shoot Rivera's pigeons. The Board held that even if Respondent's supervisor was aware that Rivera's pigeons would be among those which would be shot, which was not altogether clear, General Counsel failed to establish a connection between the shooting of Rivera's pigeons and Rivera's union activity.

REMEDIAL ORDER

The Board issue a cease and desist order, and ordered the reading, posting, distribution, and mailing of remedial Notice to Employees. The Board also ordered Respondent to make whole Atilano Rivera for its discriminatory reduction of his work hours and to restore him to a full work schedule.

* * *

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

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

TEX-CAL LAND MANAGEMENT, INC.,)	
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Respondent,)	CASE NOS. 77-CE-121-D
)	77-CE-121-1-D
and)	77-CE-121-2-D
)	
UNITED FARM WORKERS OF AMERICA,)	
(AFL-CIO,))	
)	
Charging Party)	
)	

Appearances:

Casimiro U. Tolentino, Esq., of Fresno,
California, for the General Counsel

Stacy D. Shartin, Esq., of Seyfarth, Shaw,
Fairweather & Geraldson,
Los Angeles, California, for the Respondent

Debbie Miller and Graciela Morales, of
Delano, California, for the Charging Party

DECISION

STATEMENT OF THE CASE

NORMAN I. LUSTIG, Administrative Law Officer:

These cases, consolidated for hearing with three other cases, were heard before me in Delano, California, on August 22, 24-26, October 3-5, 25-28, 31, November 1-2, 15-18, and December 5-7, 1977. The Order consolidating cases and the complaint were issued on July 25, 1977. The consolidated complaint was amended to include the captioned cases on September 23, 1977. The amended complaint alleges violations of Sections 1153(a), 1153(c), and 1153(d) of the Agricultural Labor Relations Act (Labor Code §51140 et seq.), hereinafter

called "the Act", by Tex-Cal Land Management, Inc., hereinafter called "Tex-Cal". The amended complaint is based on charges filed on August 19, September 12, and September 19, 1977, by the United Farm Workers of America, AFL-CIO, hereinafter called "the UFW". The sole complainant in each of the three cases is Atilano Rivera, an agricultural employee, within the meaning of §1140.2(b) of the Act, of Tex-Cal at all relevant times and at the time of the hearing. Copies of the charges were duly served upon Tex-Cal.

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

Upon the entire record, including my observation of the demeanor of the witnesses, detailed examination of the physical evidence, and after consideration of the briefs filed by the General Counsel and Tex-Cal, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

Tex-Cal, the Respondent, operates a number of ranches in Tulare and Kern Counties, upon which grapes, kiwis, almonds, cotton, and alfalfa are variously grown. Tex-Cal is an agricultural employee within §1140.4(c) of the Act. Tex-Cal Land Management, Inc. 3 ALRB 14 (1977). The UFW is a labor organization within §1140.4(f).

II. The Alleged Unfair Labor Practices.

The amended complaint alleges that Tex-Cal violated §51153U 1153(c) and 1153(d) of the Act by virtue of three sets of circumstances:

-- Since July 1977, threatening, harassing, and intimidating Atilano Rivera because of his support of and activities on behalf of the UFW,

-- On or about September 11, 1977, intimidating, threatening physical harm and destroying the property of Atilano Rivera because of his filing of an unfair labor practice charge against the employer and of his support of activities on behalf of the UFW.

-- On or about September 6, 1977, discriminatorily changing the work conditions of Atilano Rivera because of his filing of an unfair labor practice charge and his support of and activities on behalf of the UFW.

Tex-Cal denies an violation of the above sections of the Act, and offers alternative and exculpatory explanations of the specific events complained of. There is no conflict as to whether the basic events occurred, but there is substantial disagreement over details of the events and the interpretations to be placed on the events.

A. Tex-Cal Operations

As indicated, Tex-Cal operates a number of ranches in the Southern San Joaquin Valley. Both mechanical and hand agricultural activities are performed by Tex-Cal employees on the ranches, depending, inter alia, upon the particular crop, trees, or vines; the age of the crop (e.g., when the growing tips of grapevines near the ground or near harvest, herbicides are disfavored); the prospective use of the crop (e.g., table grapes are hand picked, wine grapes are

machine picked), availability of equipment, and employee assignments. Although the hourly pay may not differ, some agricultural activities are clearly preferred by most employees over other activities (e.g., tractor driving over hand-weeding).

There is a continuity of worker job assignments from year to year among long-time and/or year-around Tex-Cal employees, and worker job assignments among those employees tend to be specialized (e.g., tractor driving, irrigating) unless unusual circumstances occur (e.g., tractor driver sent to repair trellises during a period of slack tractor work as an alternative to layoff).

Grapevines are grown in long rows, with sufficient space between rows for mechanical implements to pass. Each grapevine grows up and over a "T"-shaped trellis. The trellises are wired together the length of the row, and mechanical implements cannot freely pass between the vines in a single row. The vineyards are cultivated, irrigated, fertilized, sprayed and otherwise maintained throughout most of the year. Segments of the agricultural work in the vineyard are performed wholly or in part (e.g., shaping of irrigation channels) by tractor drawn implements driven down the spaces between the rows by a single driver. A major part of tractor work consists of "disking", an operation in which a tractor-pulled multiple disc implement turns the soil.

Many of the cultural practices in the vineyards are related to weed control, which may be chemical, mechanical, or hand. One persistent weed problem is Johnson grass, a tough woody grass of great persistence and regenerative power, which can grow higher than the grapevines.

Tex-Cal's administrative organization consists of high ranking company officers who primarily work in and out of the company headquarters in Delano, "ranch superintendents" (Tex-Cal usage) in charge of one or more Tex-Cal ranches, other "supervisors" (Tex-Cal usage) below the superintendents, and "foremen" (Tex-Cal usage) who direct the work crews. There is some seasonal interchange between foremen and worker status.

At all times relevant to this matter, Bill Pritchett was ranch superintendent of ranches which included the vineyards near Cecil Avenue, and Driver Road, east of Delano; D.R. "Randy" Steele, the son of Tex-Cal president, D.S. "Buddy" Steele, was ranch superintendent of a ranch south of Delano known as the Poso Ranch; and Robert "Roberto" Dominguez was a tractor crew foreman on the Poso Ranch. All were supervisor within the Act.

Don Thomas was employed by Tex-Cal as a mechanic at the Poso Ranch during all material times prior to October 15, 1977, and lived on the Tex-Cal ranch near Cecil and Driver Road prior to August 15, 1977. Atilano "Tilano" Rivera, the complainant, worked at the Poso Ranch and lived on the Tex-Cal ranch at Cecil and Driver through the time of the hearing herein.

B. Rivera's Employment With Tex-Cal Prior To 1977.

Atilano Rivera has been employed by Tex-Cal since 1967 and has been employed by Tex-Cal at the Poso Ranch since 1971. At the time of the incidents complained of, Rivera was a steady year around employee of Tex-Cal. Other than an altercation with a supervisor in 1971, which resulted in Rivera's working at the Poso Ranc.

thereafter, Tex-Cal has had no significant complaints about Mr. Rivera's work prior to 1977.

Through most of his employment with Tex-Cal, Rivera and his family have lived in Tex-Cal owned or controlled housing, without separate payment of rent to Tex-Cal. For the last several years, the Rivera family has lived in one of three fairly substantial house clustered in an enclave among the grape vineyards on Driver Road g near Cecil Avenue, east of Delano. The houses are located on a ranch managed by Tex-Cal for absentee owners, and Tex-Cal has effective control over the use of the houses. One of the other two houses was lived in by Bill Pritchett in the past when the Rivera's, were present, and was used after Pritchett by Don Thomas, the Poso Ranch mechanic, and Thomas' family. There was substantial bad feeling between the Rivera and Thomas families during at least the ,c latter portion of the time that both families lived in the enclave, revolving about the actions of children and dogs. The Thomas' move from the enclave in August, 1977; the Rivera's still lived there at the time of the hearing.

Throughout his employment at the Poso Ranch, until the events complained of, Rivera's primary work assignment was tractor driving in the grape vineyards. His work prior to 1977 was rated a least satisfactory by all of his superiors, and highly by Randy Steele. The few complaints voiced at the hearing about his tractor driving prior to 1977 related to skill in the use of tractor implements (e.g., leaving a perfectly level surface after disking so the irrigation water would flow evenly) and not to skill in drivind

the tractor itself or in the limited maintenance required of tractor drivers. Prior to 1977, Mr. Rivera primarily drove a John Deere Model 4020 wheeled diesel tractor, a model commonly used in the Poso Ranch vineyards. Prior to 1977, the only substantial mechanical; problem in equipment operated by Mr. Rivera at Poso Ranch was an unexplained fire in a tractor pulled sulfuring rig.

C. Rivera's Involvement With the UFW.

Mr. Rivera has been a supporter, in a general sense, of the UFW for one or more years prior to 1977. He did not take part in a 1975 strike against Tex-Cal. During June, 1977, the UFW was certified as the bargaining representative for Tex-Cal agricultural employees. Mr. Rivera testified that he often passed out UFW; leaflets prior to work before the representative election, but neither the time of the election nor the time that Mr. Rivera passed out leaflets was established with any precision.

Mr. Rivera could not recall any occasion on which he was observed by supervisors as he passed out leaflets, or any specific event prior to July 21, 1977, which demonstrated supervisor knowledge that Rivera was a UFW adherant. Among the Tex-Cal supervisors, only Robert Dominguez testified that he was aware, prior to July 21, that Mr. Rivera was a UFW adherant, and Dominguez' testimony was that he had known for years that Rivera was an UFW supporter. No evidence was adduced by the General Counsel to demonstrate that any supervisor other than Dominguez was aware of Rivera's allegiance, or; that Dominguez' knowledge was other than general, or related to any ' event prior to July 21, 1977.

On or about July 21, 1977, Mr. Rivera was concurrently elected a member of the UFW bargaining committee at Tex-Cal, and a delegate to the August, 1977, UFW convention in Fresno. By mid-August, at the latest, Mr. Rivera was facing Tex-Cal representatives at the bargaining sessions.

D. The Tractor Incidents

In 1977, every piece of mechanical equipment to which Rivera was assigned broke down, sometimes catastrophically, and he was eventually assigned to the removal of weeds, including grass, by shovel. Shoveling weeds is far less desirable work than is driving a tractor. Mr. Rivera received the same hourly pay for weeding as he had received for tractor driving.

Rivera was first assigned in 1977, in February, to an Oliver Model 1650 wheeled diesel tractor, one of several Oliver 1650's owned by Tex-Cal, but the only one assigned (and for the first time) to the Poso Ranch. The Oliver tractor transmission differs substantially from the transmission on the more common John Deere 4020. At the time of the hearing in this matter, neither tractor foreman Dominguez nor ranch superintendent Randy Steele could clearly recall how to shift the Oliver tractor.

On May 19, 1977, the diesel engine in the Oliver tractor froze while the tractor was being operated by Mr. Rivera. Repair of

* Mr. Rivera's verbal participation in the bargaining sessions was minimal. Except for one incident covered below, Mr. Rivera testified that he said nothing to the Tex-Cal representatives. Dolores Huerta spoke for the UFW representatives. Of course, Mr. Rivera's presence was the important point, and he undoubtedly participated in caucuses.

the engine would have required a full overhaul, including new pistons and a new head, at an approximate cost for parts alone of \$3,000.00. The Oliver tractor remained unrepaired at the time of the hearing because of the unavailability of parts. There was no showing at the hearing that any particular union-related event occurred in 1977 prior to May 19. With minor exceptions, Rivera was the only driver of the Oliver in 1977.

Thereafter, Rivera was assigned to a John Deere 4020 tractor which earlier was driven by another employee at Poso Ranch, and the other employee was assigned to irrigate. The other employee normally split his work time between irrigation and tractor driving, unlike Mr. Rivera who drove exclusively. The other employee had had no substantial mechanical problems in 1977 with the tractor. On or about July 6, 1977, the John Deere tractor broke down with damage similar to that of the Oliver, at a cost for parts of approximately \$2,200.00. The John Deere was quickly repaired and was assigned to the other employee. The UFW was certified during the time that Mr. Rivera drove the John Deere.

During the period between July 7 and July 19, Mr. Rivera was assigned to drive a watering truck and a jeep equipped with a mounted, sulfuring rig. Rivera sometimes drove both pieces of equipment in the same day. Both pieces of equipment were substantially work worn, and both broke down frequently while Rivera drove them. Rivera last drove mechanical equipment for Tex-Cal on July 19, and was assigned to weed in the kiwi vineyard the next day. During the time period that Mr. Rivera drove the jeep and the watering truck after July 7,

the mechanic, Thomas, was required to make multiple trips to the fields, often in single days, to restart and/or repair the vehicles. On July 20, ranch superintendent Randy Steele ordered that Mr. Rivera, be assigned to hand labor because of Mr. Rivera's 1977 history of mechanical breakdowns. As noted above, Mr. Rivera was elected a member of the bargaining committee on July 21, the day after his reassignment.

At some time prior to May, mechanic Thomas began to complain to Dominguez and to Randy Steele that Rivera was abusing the Oliver 10 tractor by poor driving and maintenance techniques, including slowing on turns by depressing the clutch. Thomas' criticisms extended throughout Rivera's driving assignments in 1977. Both Dominguez and Randy Steele observed Rivera's driving after the complaints began, and could observe no irregularities. Both Dominguez and Randy Steele testified that their entire knowledge of Rivera's mechanical problems and misuse of equipment came from mechanic Thomas' reports, and that their first hand knowledge was limited to their observations that the tractors had in fact broken down. Randy Steele testified that he was mystified as to why Rivera had so many problems after a very good record in previous years, but that by July 20, the Poso Ranch, was running out of equipment for Rivera to drive, and that something was clearly wrong with Mr. Rivera's use of equipment.

At the hearing, Rivera attributed the breakdown of the Oliver tractor to his having been ordered to pull a caterpillar tractor "chisel" which differs from a wheeled tractor chisel in being too large for the wheeled tractor. All company witnesses denied that

Rivera had ever used a caterpillar chisel on the Oliver, and testified that Rivera was pulling a disc, not a chisel, when the Oliver broke down. Mechanic Thomas attributed the breakdown to Rivera's having tampered with the governor control on the Oliver tractor. The change of the governor control setting allowed the Oliver tractor to exceed safe RPM limits. In order to change the governor control, an individual was required to loosen a locknut, screw out the control, and retighten the locknut. Rivera testified before Thomas and was not questioned about the Oliver tractor governor, but Randy Steele and Dominguez, both experienced tractor drivers, disclaimed any knowledge of how to adjust a governor.

Rivera testified that the John Deere 4020 had been making some unusual noise prior to the day on which it broke down, that he called the noise to Dominguez' attention, and that Dominguez told him to continue to run the tractor. Dominguez denied that the tractor sounded unusual prior to the day on which it broke down. Rivera further testified that on the day of the breakdown, Dominguez set Rivera's disc attachment to bite too deeply into the earth, causing too much drag on the tractor. Rivera also testified that Dominguez customarily set the disc attachment too low, and that the tractor drivers customarily raised the attachment as soon as they were out of Dominguez' sight. On the day of the breakdown, Rivera left the disc at the depth at which Dominguez set it, for reasons which were never clarified. Rivera testified that the tractor began making a great deal of noise suddenly, on the day of the breakdown, and that he immediately turned it off and called for his supervisor.

Both Dominguez and Thomas testified that the diesel head had a visible 1-1/2 inch hole in it, which could only have been caused by continuous running after the engine began making loud noises, prior to the initial shut down by Rivera. All witnesses essentially agreed that the tractor was restarted so that it could be driven out of the field to be towed, and was kept running while under tow so that the cower steering would operate. Mr. Rivera and the company witnesses differed as to whether the final driving and towing were significant factors in the damage.

Mechanic Thomas testified that the damage to the John Deere tractor was caused by Mr. Rivera's "lugging" the tractor. Both, Dominguez and Randy Steele were unfamiliar with the term "lugging" as applied to tractors, and agreed with Rivera that a John Deere 4020 tractor is not shifted while moving. Both Dominguez and Randy Steele testified that a tractor driver normally raises the discs slightly with controls on the tractor if the tractor loses speed while disking. Rivera did not testify on this point. Rivera did testify that he always ran the tractor in the lowest appropriate 18 gear while disking.

As indicated, during the two-week period that Mr. Rivera drove the jeep and water truck after the John Deere tractor broke down, Mechanic Thomas made numerous trips to the fields to restart and/or repair the two vehicles. Rivera attributed the breakdowns to the poor condition of the vehicles; Thomas attributed the breakdowns to misuse and/or sabotage by Rivera. On July 20, 1977, Mr. Rivera was assigned to manual agricultural activities, which assignment

continued through the time of the hearing in this matter.

There was no conflict in the evidence that substantial damage occurred to two expensive diesel tractors driven by Mr. Rivera. Based upon the evidence, the likelihood of two such breakdowns resulting from chance factors was small, given the reliability and durability of diesel tractor engines. There was also no conflict that the jeep and water truck frequently became inoperable during the, period of time that Mr. Rivera drove those vehicles in July, 1977.

To the extent that the assessment may be relevant to this decision, assessment of the responsibility for the breakdown of the tractors is difficult. Mechanic Thomas testified that the equipment had been overhauled prior to the 1977 season, and that the breakdowns were caused by misuse of the equipment by Rivera. However, it was apparent that Mr. Thomas' allegedly contemporaneous (with the breakdowns) tractor repair records were of much more recent creation, probably not predating the hearing in this matter. In view of the contrived repair records, the total reliance by the company upon Mr. Thomas' reports of the cause of the mechanical problems in equipment driven by Mr. Rivera, and the conflicts between the Thomas and Rivera families, the Administrative Law Officer views the testimony of Thomas as to the reasons for Mr. Rivera's equipment problems with great mistrust, especially with respect to the Oliver tractor, the jeep and the water truck. The Administrative Law Officer finds that the record is equally supportive of the finding that Mr. Thomas deliberately sabotaged that equipment, as it is of negligence by, Rivera. However, I do not believe that Mr. Rivera was ordered to

pull a caterpillar chisel. The preponderance of the evidence is that! Mr. Rivera was negligent in his operation of the John Deere tractor.

E. The Johnson Grass.

On July 20, 1977, Mr. Rivera was reassigned from driving mechanical equipment. Contemporaneous time records indicate that "Ir. Rivera was assigned to hoe weeds in the kiwis on that date, and continued to work in the kiwis through July 24.** Hoeing weeds in the kiwis, although also hand labor, is less physically demanding than is pulling Johnson grass exclusively.

On July 21, elections for the positions of delegate to the UFW convention, and member of the UFW contract negotiating committee were held among workers at Tex-Cal. Mr. Rivera was elected to both positions. On July 25, Mr. Rivera was reassigned from the kiwi

* When confronted with internal inconsistencies in the allegedly contemporaneous records, Mr. Thomas finally testified that the original records were ruined in a rain in September or October, 1977, and that the inconsistencies were the result of his attempt to copy the blurred original records. The "reconstructed" records were also misdated by months from the actual dates of the tractor breakdowns. The Administrative Law Officer found Mr. Thomas' explanations of the reconstruction of the records totally unbelievable, and does not believe that any contemporaneous records of the tractor breakdowns were made by Tex-Cal. The Administrative Law Officer also doubts that Mr. Thomas took it upon himself to fabricate the tractor repair records in September or October, 1977, without prompting. Interestingly, Mr. Thomas' long employment with Tex-Cal terminated on October 15, 1977, prior to his testimony at the hearing.

** The weeds in the kiwis included bermuda grass, small amounts of Johnson grass, and other weeds. To establish these work dates and other work dates throughout this opinion, the Administrative Law Officer has depended heavily upon the daily employee-signed record of work hours, which records were used as code sheets for key-punch pay records for the weekly checks, and which appear to be reliable. Unfortunately, neither side introduced the records until close to the end of the hearing, after much vague and inaccurate testimony as to the time and sequence of events that went into the record.

vineyard to dig Johnson grass alone in an isolated grape vineyard on Poso Ranch. He continued in that assignment until September 20, when he was returned to weeding in the kiwis. Digging the Johnson grass was hard physical labor, especially since the grass that Mr. Rivera was assigned to dig was grass growing under the trellises and the wires. Grass in the rows was dug by tractor pulled implements.

There was no evidence introduced by the General Counsel or the Intervenor that work which Mr. Rivera could perform, other than tractor driving or digging Johnson grass, existed at the time that Mr. Rivera was assigned to dig Johnson grass in the grape vineyard. The work records introduced into evidence indicate that the other employees at the Poso Ranch, at the time that Mr. Rivera dug Johnson; grass, primarily either drove tractors or irrigated. No evidence was introduced that Mr. Rivera was qualified to irrigate.

Company representatives testified that weed removal was a necessary agricultural practice in the grape vineyards. Randy Steele testified that hand digging was necessary at the time that Mr. Rivera was sent to the Johnson grass, and that Mr. Rivera was sent to that task both because it was undesirable to allow him to continue to on drive mechanical equipment and because he was a good worker who could be depended upon properly to complete the work of digging the grass.

There was no conflicting evidence that the Johnson grass did not have to be removed at some time during 1977. Mr. Rivera's specific objections to his grass-removal assignment, aside from his complaint concerning his relief from tractor-driving, related to agricultural practices followed by Tex-Cal with respect to the

Johnson grass: if the Company had used different cultivation practice beginning in April, hand digging would not have been necessary in July-September; and he should not have been required to do the hard work of digging Johnson grass all by himself. Rivera conceded that as of the time that he was sent to dig the Johnson grass, the grass was required to be dug by hand in order to remove the roots. Mr. Rivera's tour of digging Johnson grass ended at an appropriate point in the agricultural process, rather than arbitrarily.

F. Wearing A UFW Button.

Mr. Rivera testified that he began wearing a UFW button to work every day, a few days before he was transferred from driving to hand labor. All other witnesses queried, including Mrs. Rivera, testified that Mr. Rivera did not begin wearing the button until after he was assigned to dig Johnson grass. I find that Mr. Rivera did not wear the button before the transfer, and that the button is not an issue in this case

G. The UFW Clinic Visits.

The General Counsel presented evidence that Tex-Cal, through its supervisors, had denied Mr. Rivera a "piece of paper" so that he could obtain the medical attention of his choice at the UFW, clinic near Delano, for blisters caused by his work in the Johnson grass. The exact function of the piece of paper was never explained. What was clear, however, was the apparent inability of the UFW to mesh its clinic program with the procedural dictates of the State Compensation Insurance Fund, Tex-Cal's worker's compensation carrier so that the UFW clinic could serve as Fund-compensated alternative to the Fund's designated local physician. The local physician was

disliked by some Tex-Cal workers, including Rivera. When Mr. Rive asked for the piece of paper, he was told by supervisors that he did not need anything in order to go to see the Fund-designated physician an appropriate answer under the circumstances. There was no evidence: adduced that Tex-Cal attempted to prevent Rivera from going to the UFW clinic (which he did do), or that Tex-Cal attempted to prevent the UFW clinic from obtaining reimbursement from the Fund for treatment of Tex-Cal employees with work related injury or illness.

H. The Toilet Incident.

As indicated above, the UFW was certified as the bargaining representative for Tex-Cal employees in June, 1977. Beginning no later than August, and extending to the time of the hearing in this matter, Tex-Cal and UFW representatives engaged in negotiations 14 for a prospective bargaining agreement. Mr. Rivera was a representative, albeit an almost silent one, throughout the negotiations. However, in the course of discussion of a seniority provision in the prospective agreement, Mr. Rivera's reassignment from tractor driving was used by Dolores Huerta as an example of Tex-Cal's alleged failure to honor seniority. Tex-Cal's representative, a vice president, responded that Mr. Rivera was not a good example of a senior employee: because Mr. Rivera had quit in 1971, before he came to the Poso Ranch. * Mr. Rivera heatedly retorted that the vice president was a liar and that the vice president's informants were liars.

* Mr. Rivera left a northern Tex-Cal ranch after a physical altercation with a supervisor, and began to work at the Poso Ranch immediately thereafter, at Tex-Cal's direction. Mr. Rivera apparently regarded the change as a transfer.

The next work day, Rivera asked Dominguez if he was to continue working in the Johnson grass. Dominguez checked with Randy Steele, who told Dominguez to tell Rivera to clean the portable toilets. Dominguez so told Rivera, who refused to do so. Dominguez then checked the toilets, found that they had already been cleaned, and told Rivera to perform his usual work (digging Johnson grass). Both Rivera and Dominguez gave substantially the same account of this incident. There was no explanation of why Rivera was told to clean toilets which were already clean. Rivera had never been asked to clean toilets before, and individuals who worked alone, such as tractor drivers and Rivera, rarely used the toilets. The toilets were used primarily by crews.

I. The Pigeon Incident.

Mr. Rivera raises domestic pigeons at the Tex-Cal controlled House in which his family lives at Driver Road. * Rivera has also raised pigeons at two previous Tex-Cal houses in which his family lived. Tex-Cal supervisors, including Bill Pritchett, were aware that Rivera raised domestic pigeons.

Rivera constructed a ramshackle coop for his pigeons near

* The Administrative Law Officer and counsel observed Mr. Rivera's pigeons and a flock of wild pigeons represented by Tex-Cal's counsel as being typical of the wild pigeons in the fields around Delano. Despite Mr. Rivera's verbal differentiation, the Administrative Law Officer concluded that Mr. Rivera's pigeons were generally indistinguishable physically from the wild pigeons, at least to non-pigeon fanciers. However, the demeanor of the two flocks of pigeons was strikingly different, Rivera's pigeons remaining relatively calm when strangers approached their coop, while the wild pigeons maintained a substantial distance and/or a roof peak between themselves and strangers at all times, a prudent measure in view of the shotgun shells covering the ground at the place at which the wild pigeons were found.

his house. The coop has an opening in the roof through which the pigeons can come and go at will. The coop also contains chickens. The pigeons frequently flew between the coop and an unused water tower approximately 160 feet from his house, but much closer to the house formerly occupied by Pritchett and Thomas.

Various company witnesses, including president Buddy Steele, testified that loose pigeons were a health hazard with respect to table grapes and to raisins drying on raisin trays laid on the ground between the grape vineyard rows, because of physical contact and droppings. Company witnesses also testified that Mr. Rivera had been told to keep his fowl penned up. Rivera denied having been so warned. The time(s) of the warning(s) were not established.

On or about September 11, during the time of the contract negotiations, two hunters came to Bill Pritchett to request permission to hunt on Tex-Cal land. Pritchett directed them to the water tower and specified that they should shoot the pigeons that were there. Pritchett was aware that Rivera claimed at least some of the pigeons which frequented the tower, but his stated view was that any uncaged pigeon was to be treated as wild.

Early on the morning of Sunday, September 11, the two hunters accompanied by a Tex-Cal supervisor, began shooting at the pigeons roosting in the tower, and at pigeons in the nearby fields. Although Mr. and Mrs. Rivera went outside to see what was happening, neither asked the hunters to stop because they felt that the hunters had company sanction to shoot their pigeons. Mr. Rivera attempted to contact the police but a deputy sheriff did not, arrive, in response;

to a call from the UFW, until after the hunters left. Approximately; 80 pigeons were killed, of which Mr. Rivera claimed approximately 40 were his domestic pigeons (Mrs. Rivera claimed that all 80 were domestic pigeons). A photograph of Mr. Rivera and the dead pigeons, introduced into evidence, appears to show about 40 pigeons. The hunters did not pick up the downed pigeons, nor were they instructed by Tex-Cal to do so despite the drying raisins on the trays between the rows. Some of the pigeons fell between the rows, dead or injured.

J. The Reduction In Rivera's Daily Work Hours.

During 1977, the daily work hour mode for employees in the same crew as Mr. Rivera, was ten hours on days which an employee worked. Those employees functioned chiefly as tractor drivers and/or irrigators. Mr. Rivera continued working ten hours per day after his reassignment away from driving duties until September 16, the day after a negotiating session between Tex-Cal and the UFW. On that day, in the middle of the workweek, Mr. Rivera's maximum hours were cut to 8, at which level they remained through the time of the hearing. No other member of Mr. Rivera's crew was reduced in maximum hours from 10, but the other crew members were tractor driving and/or irrigating, rather than weeding. Approximately two weeks later, new employees were added and assigned in part to weeding in the kiwis. The new employees were given maximum weeding days of 8 hours, although they sometimes performed other duties on which they worked for more than 8 hours per day. No substantial reason was advanced as to why only Mr. Rivera at the Poso Ranch was cut to 8

hours per day on September 16. All employees, including Rivera, sometimes worked less than their respective maximums on a given day.

K. Grape Gondola Pulling.

During the wine grape harvest years prior to 1977, Rivera had been assigned each September to drive a tractor pulling a picking gondola, at night. Gondola driving is an easy, high daily hours assignment. In 1977, Rivera was not assigned to drive a gondola because Randy Steele did not want him to drive tractors after the breakdowns. New Tex-Cal employees who were hired for kiwi weeding in September were also assigned to drive gondolas and earned pay for more than 10 hours per day while do so, whereas, Mr. Rivera was paid for a maximum 8 hours for weeding.

L. Impaired Contact With Other Employees.

While he worked as a tractor driver, Rivera would meet with all other Poso Ranch employees at the ranch shop at the beginning of the work day, and thereafter pass a solitary work day, alone on his tractor, absent breakdowns. After assignment to the Johnson grass, Rivera had substantially the same pattern of contact with other employees: he met them at the shop in the morning, and he worked alone during the day. No factual distinction in contact with other employees was demonstrated by the General Counsel.

M. The Destruction of Mr. Rivera 's Garden.

Mr. Rivera's garden, in the enclave near the water tower, was apparently trampled sometime during the period between July 2 and August 23. Mr. Rivera claimed that it had been done by Don Thomas' children at Tex-Cal instigation, and an unfair labor practice

charge, not specifically included in this hearing, was apparently filed as a result. That charge apparently pre-dated any of the charges specifically included in this hearing.

In the course of verbal exchanges when Rivera complained to Tex-Cal supervisors about the destruction of the garden, Rivera claimed, at the hearing, to have overhead Randy Steele refer to him as a "striker" and claimed that Steele said that he would have to move from the company house, all of which was denied by Steele. The conversations during which the remarks were allegedly made, were; prompted by Rivera's attempt to have Tex-Cal police the Thomases. Steele allegedly spoke in English; Rivera used an interpreter at the hearing in this matter and his spoken English was very broken.

III. Discussion Of The Issues, Conclusions, and Findings.

Post-hearing study of the daily work records introduced (unfortunately) close to the end of the hearing has served to clarify the dates and sequences of the critical events herein, to render irrelevant most of the testimony adduced with respect to the tractor incidents, and to narrow the issues considerably.

A. The Tractor Incidents.

The daily work records indicate that Mr. Rivera last drove the Oliver 1650 tractor on May 19, 1977; last drove a John Deere 4020 tractor on July 6, 1977; and last drove the sulfur spraying jeep and the water truck on July 19, 1977. All such dates were

* "Apparently" is used because all evidence of the filing of, and the content of the charge was indirect. The General Counsel never put the charge into evidence as the basis for the retaliation allegation, or for any other purpose.

unclear through the course of the hearing, and witnesses for both sides often were two months or more inaccurate in their placement of the events. Since these dates come from worker-signed daily time sheets which were used as input for the preparation of weekly pay checks, I regard them as being necessarily of great accuracy. The General Counsel did not challenge the accuracy of the time sheets.

On July 20, Mr. Rivera was assigned to hoe weeds in the kiwi vineyard. On the next day, July 21, Mr. Rivera was elected a union negotiator. That election, which occurred after Mr. Rivera was assigned away from driving duties, is the earliest date in time demonstrated by the General Counsel on which Tex-Cal is reasonably chargeable with knowledge of Rivera's union activities. I find that; the evidence of prior union activity by Rivera is too nebulous as to time and extent to support any finding of an unfair labor practice in connection with the transfer from tractor driving. In particular, any such union activity by Rivera may well have pre-dated his initial assignment to tractor driving in 1977; I cannot determine from the evidence whether it did or not. I also find that Mr. Dominguez' long knowledge of Rivera's union adherence, without more, cannot be the basis for an unfair labor practice. See Howard Rose Company, 3 ALRB 86 (1977). Dominguez' knowledge pre-dated Rivera' s assignment to tractor driving in 1977, yet he was so assigned.

Accordingly, since the record demonstrates that Mr. Rivera I was removed from driving duties and assigned to hand labor prior to his election as a union negotiator, and since the record does not show any company knowledge of his union support and activities pri

to July 21 (other than by Dominguez), I find that no causal relationship has been demonstrated by a preponderance of the evidence between Mr. Rivera's support of and activities on behalf of the UFW, and his removal from driving assignments in 1977. Such driving assignments include the tractor-pulled gondolas, since it is my finding that the gondola non-assignment dependently resulted from the earlier removal from tractor driving. I note that the Oliver broke down on May 19, even before the UFW was certified as the bargaining representative at Tex-Cal.

In the event that the Board shall disagree with the foregoing finding on causation, and in the interest of expediting the resolution of this matter if such occurs, I make the following further findings of fact and conclusions of law:

1. There was no seniority system, formal or informal, in effect at the Poso Ranch in 1977, which would have insulated Mr. Rivera from removal from tractor driving as a consequence of the damage to the two tractors. Of course, even under a contractual seniority system, just cause will support a disciplinary action against an individual.

2. I find that the two tractors were, in fact, severely damaged. With respect to all vehicles other than the John Deere 4020, I find substantial doubt as to whether Mr. Rivera was negligent or reckless in view of the discredited testimony and repair records of Don Thomas, his animosity toward Mr. Rivera, and the total or reliance of the Tex-Cal administrative personnel upon Mr. Thomas' assessments of the causes of the equipment failures. On the record

before me, I find that the equipment failures, except with respect to the John Deere, were as likely to have been the result of negligence or sabotage by Don Thomas, based both upon the sophisticated nature of the alleged sabotage and upon Thomas' unbelievable testimony, as they were to have been the result of negligence or sabotage by Rivera. I further find that the General Counsel has not, however demonstrated, by a preponderance of the evidence, that someone other than Rivera was responsible for any or all of the breakdowns, particularly that of the John Deere 4020.

3. I find that Don Thomas was not a supervisor at the time of the equipment breakdowns, that his supervision of other workers in equipment repairs was routine and of the type that experienced workers commonly exercise over inexperienced workers, Toy Workers, Local 18 v. NLRB (7th Cir. 1966) 369 F.2d 266, and that: his reports, recommendations and views of the remedial action to be taken with respect to Mr. Rivera's damaged equipment were routine and entirely of the nature to be expected from a mechanic who is doing his job well (in the abstract). Baptist Memorial Hospital, 93 LRRM 1455, 225 NLRB No. 165 (1976). Accordingly, even though Thomas' recommendations resulted, after adoption by Randy Steele, in Rivera's removal from driving, I do not regard them as a determinant of supervisory status. (See §1140.4 (of the Act.) I make no finding as to Thomas' supervisory status at the time of the gondola picking, since it occurred two months after the last equipment breakdown. There was no testimony that Thomas worked with the gondolas in previous years.

4. I find that Tex-Cal supervisors acted in good faith in removing Mr. Rivera from driving assignments after his mechanical difficulties in 1977. In particular, there has been no convincing evidence that Tex-Cal intentionally sabotaged two of its own \$20,000 tractors at a parts cost alone in excess of \$5,000 merely to create a pretext for the assignment of Mr. Rivera to hand labor. Even if Rivera was not responsible for the damage, I find that Randy Steele made a permissible reassignment decision based on the information available to Steele.

Finally, I find that Mr. Rivera did not wear his UFW button prior to his reassignment to hand labor. Accordingly, the button could not have been a factor in his reassignment.

I recommend that those parts of the charges based on the tractor incidents be dismissed.

B. The Johnson Grass.

As indicated above, on July 20, Mr. Rivera was assigned to hoe weeds, including lesser amounts of Johnson grass, in the kiwis. Thereafter, on July 21, Mr. Rivera was elected as a union bargaining representative. On July 25, Mr. Rivera was reassigned to the job of shoveling out the extensive stand of Johnson grass in a raisin and table grape vineyard, by himself. The task of shoveling the Johnson grass lasted until September 20, when Rivera was returned to the Kiwi vineyard following completion of his task in the Johnson grass.

I consider Rivera's reassignment from the Kiwi vineyard to the more arduous task of removing Johnson grass in the grape vineyard to be suspect, since it occurred only four days after Rivera's

election as a negotiator. However, the General Counsel advanced no evidence whatever concerning the bona fides of that move, with respect to the then state of weeds in the kiwis or otherwise, and circumstances which merely raise a suspicion do not establish a violation. Rod McLellan Co., 3 ALRB 71 (1977). In the absence of such evidence I cannot speculate as to the reasons. The basic right of management to manage cannot be questioned. Hanson Farms 3 ALRB 43 (1977).

There was substantial testimony and cross-examination of witnesses concerning the necessity of digging the Johnson grass by hand during the period between July and September in the grape vineyard. I consider the most telling evidence adduced to be Mr. Rivera's concessions on cross-examination that Tex-Cal would have had to begin a different course of mechanical or chemical agricultural activity in the relevant grape vineyard as early as April, in order to arrive at the same point of grass clearance by machine in September, which Mr. Rivera arrived by hand at the latter month. Mr. Rivera strongly criticized Tex-Cal's choice of agricultural techniques and he may well be correct, but the important point is that Mr. Rivera conceded that Tex-Cal had no mechanical or chemical alternatives to hand labor as of July. As of July, some person or persons had to work on the Johnson grass by hand. In April, even the first of Mr. Rivera's two tractors had not broken down and I can find no evidence that Tex-Cal intentionally did not begin mechanical grass removal in April as part of a plot which included the subsequent breakdown of two tractors, all to obtain a pretense for assigning Rivera to

arduous labor in July.

I find it inherently suspicious, as did the General Counsel (and Mr. Rivera) that Tex-Cal assigned a single individual by himself to dig the Johnson grass for an unbroken two-month period. However, the General Counsel did not demonstrate either that there were alter-native jobs (to driving and grass pulling) that Rivera could have performed and to which he would have been assigned in the absence of discrimination and/or harassment, or that the assignment of a single person rather than a crew to digging the Johnson grass or similar work constituted a break with normal Tex-Cal work practices. Since I have previously found that Mr. Rivera's removal from tractor driving did not constitute an unfair labor practice, the General Counsel did not demonstrate by a preponderance of the evidence that ; Mr. Rivera was discriminated against or coerced by his assignment to! the Johnson grass digging for two months. Rod McLellan Co., supra; Hansen Farms, supra.

I recommend that those parts of the charges based on Mr. in Rivera's assignment to dig Johnson grass be dismissed.

C. The Destruction of Mr. Rivera's Garden.

Mr. Rivera's garden, in the enclave, was apparently destroyed sometime during the period between July 25 and August 28. As indicated above, Mr. Thomas was not functioning as a supervisor at the time of the destruction, and the connection of his children 24 to Tex-Cal is obscure. Upon factual consideration of the surrounding circumstances, I find that the General Counsel has not established by a preponderance of the evidence that this incident,

assuming that it was in fact perpetuated by the Thomas children, constituted anything more damning than part of unfortunate continuing friction between neighboring families, including rock throwing, noise complaints, and dog complaints. Since I do not consider this incident to be of any significance to the Act, I do not decide the conflicting testimony as to whether Randy Steele did or did not call Mr. Rivera a striker and did or did not tell Rivera to move during conversations prompted by Rivera's complaints about the garden.

D. The Pigeon Incident.

I find that Bill Pritchett directed the hunters to pigeons owned by Mr. Rivera for the purpose of harassing Mr. Rivera because of Mr. Rivera's exercise of rights guaranteed in Section 1152 of the Act. The Company is responsible for the acts of its supervisors unless grossly outside his authority. J.S. Abercrombie, 33 NLRB 524, 24 LRRM 1115 (1949). Accordingly, I recommend a finding that Section 1153(a) of the Act has been violated by Tex-Cal in connection with the pigeon incident. Pritchett, by his testimony and demeanor, was then aware of the protected activities of Mr. Rivera, specifically including Rivera's membership on the union bargaining committee. Despite the great concern of various Tex-Cal officials with pigeon droppings and the scratching of pigeons on raisin trays, Tex-Cal authorized hunters who shot at least 40 pigeons and left the pigeons laying where they fell or fluttered, including in the vineyard among the raisin trays. In the normal course of events, the dead pigeons would lie in the vineyard for days until they were disked under by the tractors, after the raisin trays were

picked up. Supervisor Pritchett was well aware that the pigeons which would be shot by the hunters-almost certainly would include pigeons owned by Mr. Rivera.

The similarity in appearance between Mr. Rivera's pigeons and wild pigeons is immaterial since Pritchett was aware of Rivera's ownership when he directed the hunters to Rivera's pigeons.

E. The Toilet Incident

Based upon the facts as set forth above, I recommend a finding that Tex-Cal violated Section 1153(a) of the Act in connection with the toilet incident. There is often only circumstantial evidence of intent. S. Kuramura, Inc., 3 ALRB 49 (1977). In this situation, Tex-Cal failed to explain why Mr. Rivera was ordered to clean toilets which were already clean; the relationship in time of the order to Mr. Rivera's bargaining activities was substantial; and Rivera had never been asked to clean toilets before. While the Administrative Law Officer does not contest that under normal circumstances Tex-Cal has the management right to require that such work be performed, the existence of independent grounds for the order does not preclude a finding that motivation in part stemmed from anti-union animus. Tex-Cal Land Management, Inc., 3 ALRB 14 (1977).

Tex-Cal argues in its brief that the matter is moot because Mr. Rivera did not in fact clean the toilets. I do not agree. In D'Arrigo Brothers 3 ALRB 31 (1977), a threat to call the sheriff was held to be a violation of employee rights whether or not carried out. I see no distinction here. Placing the employee in the position of

refusing an unlawful order of the employer at the possible risk of his employment is coercion of a high order.

G. The Salary Reduction.

As indicated, on September 16, in the middle of a work week, the day after a bargaining meeting, Rivera's maximum daily work hours were reduced to 3 from 10. Although employees hired for weeding duties later were also assigned a maximum of 3 hours when they weeded (many drove gondolas in excess of ten hours per. day), Rivera was the only Tex-Cal employee at Poso reduced in hours at that time. No substantial reason was advanced for Rivera's reduction; which resulted in a daily salary saving of less than \$7 to Tex-Cal. Lack of work could not have been the reason, since additional weeder were hired only two weeks later, and Rivera continued thereafter as the 8 hour level.

I recommend a finding that the reduction of Mr. Rivera's work hours from 10 to 8 was discriminatory and violated Section 1153(c) of the Act, Akitomo Nursery, 3 ALRB 73 (1977), in that no substantial business justification existed and that the reduction, perpetrated upon a union negotiator, was inherently destructive of important employee rights. NLRB v. Great Dane Trailers, Inc., 388 US 26, 34 (1967).

H. Other Matters.

Finally, I recommend a finding that the General Counsel has not demonstrated, by a preponderance of the evidence, any causal relationship between the filing of the first charge of uncertain contents, or an uncertain date, and the events complained of here

I accordingly recommend dismissal of those parts of the complaint relating to violations of Section 1153 (d) of the Act. I also recommend dismissal of any alleged violations of Section 1153 (a) and 1153(c) not specifically discussed herein.

IV. The Remedy.

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153 (a) and 1153(c) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain actions designed to effectuate the policies of the Act.

I still recommend that the Respondent be ordered to reimburse Rivers for the reasonable replacement cost of 40 domestic pigeons of like quality to those killed on September 11, 1977;

I shall recommend that the Respondent be ordered to make Mr. Rivera whole by paying him for ten hours of work for each day subsequent to September 15, 1977, on which Mr. Rivera worked at least 8 but less than 10 hours, and that Mr. Rivera be restored to a normal maximum work day of not less than 10 hours in the future, to continue as long as the majority of hourly paid agricultural employees at the Poso Ranch are customarily employed for ten or more hours per day, or to a lesser maximum if the majority of said employees are reduced to a maximum below 10 hours.

I shall recommend that the Respondent be ordered to cease and desist from harassing, coercing and/or discriminating against employees who hold positions within the UFW, including but not limited to the Position of negotiator, by any means, specifically including

but not limited to changes in terms and conditions of employment, and destruction of personal property.

I shall recommend that the Respondent be ordered to cease and desist from in any other manner interfering with, restraining, or coercing employees in the exercise of self-organization, to form, join, or assist labor organizations, to bargain collectively through a representative of their own choosing, and to engage in' other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be 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;

I shall recommend that the attached notice be widely disseminated in order to remedy fully the respondent's unlawful conduct.

I specifically decline to recommend an award of attorney's fees and costs. I find the Respondent's defense not to be frivolous. Zaninovich & Sons, Inc., 3 ALRB 57 (1977).

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

ORDER

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

1. Cease and desist from:

a. Harassing, coercing, and/or discriminating against employees who hold positions within the UFW or are otherwise active in the UFW, by any means, specifically including but not limited to changes in terms and conditions of employment, and destruction of personal property.

b. In any other manner interfering with, restraining, or coercing employees in the exercise of self-organization, to form, join or assist labor organizations, to bargain collectively through 9 representatives of their own choosing, and to engage in other concerted activities for the purpose of collection bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such rights 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 policy of the Act.

a. Make Atilano Rivera whole by paying him for ten hours in of work for each day subsequent to September 15, 1977, on which Mr. Rivera worked at least 8 but less than 10 hours, calculating such backpay and interest in accordance with Sunnyside Nurseries, Inc. 3 ALRB 42 (1977).

b. Restore Atilano Rivera to a normal maximum work day of not less than 10 hours in the future, to continue as long as the majority of the hourly-paid agricultural employees at the Poso Ranch are customarily employed for ten hours or more per day, or to

such lesser maximum if the majority of said employees are reduced to a maximum below 10 hours.

c. Reimburse Mr. Rivera for the reasonable replacement cost of 40 domestic pigeons of like quality to those killed on September 11, 1977.

d. Preserve and make available to the ALRB or its agents upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to ascertain the back pay due.

e. Mail copies of the attached notice in Spanish and English, within 20 days from receipt of this order, to all persons employed by Tex-Cal as hourly agricultural employees at all Tex-Cal ranches in Kern and Tulare Counties, since January 1, 1977, at the last know addresses on file with Respondent or ac any more current address furnished Respondent by the General Counsel or Charging Party

f. Post copies of the attached notice at times and places to be determined by the regional director. Copies of the notice shall be furnished by the regional director in Spanish and English. The Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

g. A representative of the Respondent or a Board agent shall read the attached notice in Spanish and English to the assembled hourly paid agricultural employees of the Respondent on company time. The reading or readings shall be at such times and places as are specified by the regional director, relieving the reading, the Board agent shall be given the opportunity, outside.

presence of supervisors and management, to answer any questions employees may have concerning the notice or their rights under the act.

h. Notify the regional director in the Fresno Regional Office within twenty (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.

i. Copies of the notice attached hereto shall be furnished Respondent for distribution by the regional director for the Fresno Regional Office.

It is further ordered that the allegations of the amended complaint relating to violations of Section 1153(d) of the Act are dismissed.

Dated:
April 3, 1978

AGRICULTURAL LABOR RELATIONS BOARD

: Norman I. Lustig
By:

NORMAN I. LUSTIG
Administrative Law Officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing, during which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has ordered us to notify all persons employed by us since January 1, 1977, that we will remedy those violations, and that we will respect the rights of all our employees in the future. Therefore, we are now telling each of you:

(1) We will reinstate Atilano Rivera to a ten hour normal work day and give him back pay and interest for any losses that he had while he was assigned an eight-hour maximum work day.

(2) We will reimburse Atilano Rivera for his pigeons which were killed by persons hunting with our permission on September 11, 1977.

(3) We will not harass or discriminate against our employees who work for, hold positions in, or support the United Farm Workers of America.

(4) Each of our employees is free to support, become or remain a member of the United Farm Workers of America. Our employees may wear union buttons, passing out literature or talk to their fellow employees about the UFW provided this is not done at times or in a manner which interferes with the employee doing the job for which he has been hired. We will not discharge, lay off, change the working conditions of or in any other manner

interfere with the right of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

We will comply with the Board's Order.

Signed:

TEX-CAL LAND MANAGEMENT, INC.

By: _____
 (Name) (Title)

DATED:

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL
LABOR RELATIONS BOARD -- DO NOT REMOVE OR MUTILATE.