Napa, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

C. MONDAVI & SONS dba CHARLES KRUG WINERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 76-CE-8-S 76-CE-8-1-S 77-CE-22-S 77-CE-22-1-S [1/] 5 ALRB No. 53

DECISION AND ORDER

On June 26, 1978, Administrative Law Officer (ALO) Kenneth Cloke issued the attached Decision in this proceeding. Thereafter, Respondent, the United Farm Workers of America, AFL-CIO (UFW), and the General Counsel each filed exceptions, [2/] a supporting brief, and a reply brief.

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

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to

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[1/] Charge number 75-CE-39-S was not included in the above captioned matter. Rather, that charge was dismissed on January 5, 1978, pursuant to a settlement agreement. Moreover, the charge was filed by the UFW and not by Miguel Ochoa Bautista as stated in the ALO's Decision.

[2/] The UFW and the General Counsel each filed a motion to dismiss Respondent's exceptions on the grounds that Respondent failed to cite pertinent portions in the record. We deny the UFW's and the General Counsel's motion.

affirm the rulings, findings, [3/] and conclusions of the ALO as modified herein, and to adopt his recommended Order with modifications to the extent consistent herewith.

The ALO concluded that Respondent violated Section 1153(a) by creating an impression of surveillance when California Winegrowers Foundation President Rafael Rodriguez held a tape recorder over his head and announced to the assembled employees that they should be careful about what they said, because their statements might be used later. This announcement was made during a meeting, one week before the representation election in October 1975, of representatives of Respondent, the California Winegrowers Foundation as agent for Respondent, the UFW, and Respondent's employees. Respondent excepts to the ALO's finding that the above-described conduct was fully litigated.

When an incident not alleged in the complaint as a violation has been fully litigated by the parties and is related to the subject matter of the complaint, we are not precluded from determining whether the conduct violates the Act. Anderson Farms Company, 3 ALRB No. 67 (1977), fn. 6. In the present case, the ALO made his conclusion based on the testimony of one witness. Although several other witnesses gave testimony regarding the meeting, no witness was asked to either corroborate or refute

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[3/] Respondent excepts to the ALO's credibility resolutions. In the absence of clear error, we will not disturb such credibility resolutions. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978); Standard Dry Wall Products, Inc., 91 NLRB 544 (1950). We have reviewed the record and find that the ALO's resolutions are supported by the record as a whole. The ALO incorrectly uses the date November 1976, rather than September 1976, in his sub-heading on p. 19 of his Decision; this error is hereby corrected.

whether Rodriguez ever made such a statement. We note that the General Counsel did not amend the complaint to allege this conduct as a violation and did not argue, either at the hearing or in her post-hearing brief, that the conduct should be found as an independent violation of Section 1153(a) of the Act. As we find that this matter was not fully litigated, we make no conclusion as to whether it constituted a violation of the Act.

General Counsel and the UFW except to the ALO's conclusion that Respondent's refusal to hire discriminatees Alejandro Bautista and Gonzalo Bautista in January 1976, was not a violation of Section 1153(c) of the Act. Although Respondent had knowledge of the Bautista family members' union sympathies, there is no evidence that Respondent's action at that time was related to union considerations. Rather, the evidence suggests no more than a mutual misunderstanding: the brothers testified that supervisor Bianco told them to report the next day, whereas Bianco testified that he merely told them to check for work at the labor camp on the following day. Accordingly, this allegation of the complaint is hereby dismissed.

Respondent excepts to the ALO's finding that supervisor Bianco's statement to members of the Ochoa family in February 1976, in which he refused to rehire them, also included a threat of loss of future employment. We find that this exception is without merit. Although the threat was not specifically alleged in the Complaint, it is clearly related to the allegation and the ALO' s conclusion, that Respondent refused to rehire members of the Ochoa family because of their union activity and was fully

litigated at the hearing.

The ALO makes no findings of fact with regard to conduct alleged to have occurred on November 21, 1977. As our examination of the record convinces us that the General Counsel has not established that Respondent acted discriminatorily in refusing to rehire the complainants on that occasion, that allegation is hereby dismissed.

Respondent excepts to the conclusion that it violated Section 1153(d) and (a) of the Act by its refusal to rehire the discriminatees on or about December 5, 1977. At the hearing, Respondent asserts that the discriminatees had not been rehired because they had not lived in the requisite labor camp. However, at the time of the refusal to rehire, Respondent's supervisor revealed what we find to be the underlying motivation for its action: supervisor Bianco stated that Respondent was not hiring people because too many charges had been filed. Accordingly, we affirm the ALO's conclusion that Respondent violated Section 1153(d) and (a) of the Act by refusing to rehire Miguel Ochoa Bautista, Miguel Ochoa Zamora, Alberto Ochoa Zamora, Alejandro Ochoa Samora, and Gonzalo Ochoa Zamora.

The Remedy

We shall order the Respondent to reinstate Miguel Ochoa Bautista, Miguel Ochoa Zamora, Jr., Alejandro Ochoa Zamora, Alberto Ochoa Zamora, and Gonzalo Ochoa Zamora to the same or substantially equivalent positions in which they would have been employed absent the discrimination against them.

We shall also order that the Respondent make whole Miguel Ochoa Bautista, Miguel Ochoa Zamora, Jr., Alejandro Ochoa Zamora, Alberto Ochoa Zamora, and Gonzalo Ochoa Zamora for any loss of earnings and other economic losses suffered by them as a result of the discrimination against them by payment to each of them of a sum of money equal to what they would have earned from the date(s), after the discriminatory refusals to rehire on February 10, 1976 and December 5, 1977, when a job for which they were qualified became available, until the date(s) of the offers of reinstatement, less their net earnings during the period. Interest at the rate of 7 percent per annum shall be added to all back pay provided for in this proceeding.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, C. Mondavi & Sons, dba Charles Krug, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Discouraging membership of any employees in the United Farm Workers Union (UFW), or any other labor organization, by refusing to hire or rehire, or in any other manner discriminating against employees in regard to their hire or tenure of employment, or any term or condition of employment, because of their union membership activity or because they file charges under the Act.

b. In any other manner threatening, interfering with, restraining or coercing employees in the exercise of their

rights under Section 1152 of the Act,

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

a. Offer to reinstate Miguel Ochoa Bautista, Miguel Ochoa Zamora, Jr., Alejandro Ochoa Zamora, Alberto Ochoa Zamora, and Gonzalo Ochoa Zamora to the same or substantially equivalent positions in which they would have been employed had they not been discriminated against, without prejudice to any seniority or other rights and privileges they might have acquired, the right of the above-named employees to employment to be determined as provided in the section of the Decision entitled "The Remedy" and make the above-named employees whole for any loss of pay and other economic losses they may have suffered as a result of the discrimination against them as provided in the section of the Decision entitled "The Remedy."

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

c. Sign the Notice to Employees attached hereto. After its translation by a Board Agent into appropriate languages, Respondent shall produce sufficient copies in each language for the purposes hereinafter set forth.

d. Within 30 days after issuance of this Order, mail a copy of the attached Notice in appropriate languages to each of the employees on its payroll during the payroll periods

immediately preceding February 10, 1976 and December 5, 1977.

e. Provide a copy of the Notice to each employee hired by Respondent during the six-month period following the issuance of this Decision.

f. Post copies of the attached Notice in all appropriate languages for 60 consecutive days in conspicuous places on its property, the period of posting and placement of the Notices to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

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

h. Notify the Regional Director within 30 days after the issuance *of* this Order of the steps it has taken to comply herewith, and continue to report periodically thereafter

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at the Regional Director's request until full compliance is achieved.

Dated: August 14, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

JOHN P. McCARTHY, 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 have 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:

1. We will not refuse to rehire or otherwise discriminate against any employee because he or she exercised any of these rights.

2. We will offer Miguel Ochoa Bautista, Alejandro Ochoa Zamora, Miguel Ochoa Zamora, Jr., Alberto Ochoa Zamora, or Gonzalo Ochoa Zamora, their jobs back and we will pay each of them for any losses they have suffered as a result of our illegal refusal to rehire them.

3. We will not threaten employees with discharge in order to discourage union activity.

4. We will not refuse to hire or rehire, or otherwise discriminate against any employee for filing charges with the ALRB

Dated: C. MONDAVT & SONS dba
CHARLES KRUG WINERY

By: _____

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

C. Mondavi & Sons dba
Charles Krug Winery

5 ALRB No. 53
Case Nos, 76-CE-8-S
76-CE-8-1-S
77-CE-22-S
77-CE-22-1-S

ALO DECISION

The ALO concluded that Respondent violated Section 1153(c) and (a) of the Act in February 1976, by its refusal to rehire members of the Ochoa family who were known to be UFW supporters. Respondent's defense was that no work was available. The ALO concluded that Respondent's anti-union statements made at the time of the employees' request for work constituted a threat of loss of future employment and established that their application for work was not considered in a non-discriminatory manner. As these statements also made further applications for employment appear futile, a violation was established without the necessity of showing that work was available at the time.

The ALO concluded that Respondent violated Section 1153(d) and (a) of the Act in December 1977, by its refusal to rehire Ochoa family members, finding that Respondent explicitly stated it would not rehire them because "too many charges" were filed.

The ALO concluded that the Respondent violated Section 1153(a) by creating an impression of surveillance when Respondent's agent announced to assembled employees that their statements might be used later.

The ALO recommended dismissal of the remaining allegations of discriminatory refusal to rehire, finding that there was no work available and that there was no evidence that Respondent's action was based on union considerations.

The ALO also recommended dismissal of an allegation that Respondent violated Section 1153(a) by misrepresenting the results of an employee's medical examination, thereby delaying his rehire. The ALO found that Respondent acted pursuant to a legitimate interest in requiring a physical examination and was not responsible for the misunderstanding resulting from a defect in the medical questionnaire.

BOARD DECISION

The Board affirmed the ALO's conclusions that: (1) Respondent violated Section 1153(c) and (a) by refusing to rehire Ochoa family members in February 1976; (2) that Respondent violated Section 1153(d) and (a) by refusing to rehire Ochoa Family members in December 1977; (3) that Respondent did not violate Section (c) and (a) by refusing to rehire Ochoa family members in January 1976 and November 1977; and (4) that Respondent did not violate Section 1153(a) by misrepresenting the results of an employee's physical examination.

The Board rejected the ALO's conclusion that Respondent violated Section 1153(a) by creating an impression of surveillance, finding that the issue was not fully litigated at the hearing,

REMEDY

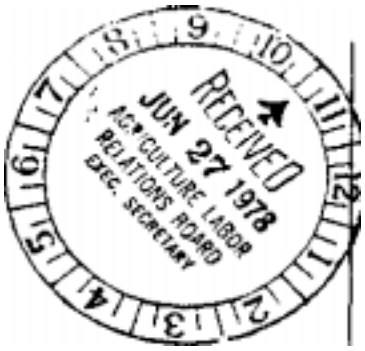
The Board ordered Respondent to cease and desist from its unlawful discriminatory conduct, to offer to reinstate employees who were discriminatorily refused rehire, to make them whole for any loss of back pay and other economic losses, and to read, post, and distribute an appropriate remedial Notice to Employees.

* * *

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	) Case Nos,	76-CE-8-S
	)	76-CE-8-1-S
C. MONDAVI & SONS dba	)	77-CE-22-S
CHARLES KRUG WINERY,	)	77-CE-22-1-S
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF	)	
AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

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D E C I S I O N

STATEMENT OF THE CASE

KENNETH CLOKE, Administrative Law Officer:

This case was heard before me in Napa, California, on January 20, February 6-8 and 28, and March 1-2, 8-10, 16-17 and 20-22, 1978. The Notice of Hearing and Complaint were duly filed and

served, alleging violations of §1153(a), (c), and (d) of the Agricultural Labor Relations Act, herein referred to as the ALRA, or the Act, by C. Mondavi & Sons, d.b.a. C. Krug Winery, herein referred to as Respondent. The Complaint is based on several charges filed against Respondent: 75-CE-39-S, filed on 11/10/75 (RX-1); 76-CE-8-S, filed on 2/23/76 (GCX-1H); 76-CE-8-1-S, filed on 11/22/77 (GCX-1G); 77-CE-22-S, filed on 12/8/77; (GCX-1C) and 77-CE-22-1-S, filed on 1/11/78 (GCX-1B). These were consolidated and served on January 13, 1978 on Respondent and the United Farm Workers of America, AFL-CIO (UFW), herein referred to as the Union. Respondent, through its counsel, filed and served an Answer admitting the allegations contained in Paragraphs 1-6 of the Complaint and denying the rest.

All parties were given full opportunity to participate in the hearing, to call and examine witnesses, examine and present documentary evidence, and argue their positions, and following the close thereof, all parties submitted briefs in support of their respective positions. Several motions were made by Respondents, which decisions were reserved by me and incorporated herein.

Upon the entire record, including exhibits, briefs, judicial notice, testimony, and my personal observation of the demeanor of the witnesses, and after careful consideration of the briefs filed by the parties and independent research and reflection, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

I. Jurisdiction

Respondent, is a company engaged in agricultural in Napa,

California, and is an agricultural employer within the meaning of §1140.4 (c) of the Act. The Union, as charging party, is a labor organization within the meaning of §1140.4(f) of the Act.

Alex Bianco is admitted to be a supervisor within the meaning of §1140.4(j) of the Act, and for reasons which are developed more fully herein, I find that Peter Nissen, Ernesto Merga and Pete Mondavi are also supervisors within the meaning of §1140.4(j) of the Act. I also find that the California Winegrowers Foundation, at all times material herein, was a representative or agent of Respondent acting directly and indirectly in its interests within the meaning of §1140.4(c) and (e) of the Act. The discriminatees are all agricultural employees within the meaning of §1140.4(b) of the Act, and at all times material herein were under the direct supervision of one or more of the aforementioned supervisors.

II. Unfair Labor Practices

A. Allegations:

The Complaint alleges that Respondents violated §1153 (a), (c), and (d) of the Act, in that it interfered with, restrained and coerced its employees in the exercise of the rights guaranteed to them in Section 1152 of the Act, by the following acts and conduct:

> "a. On or about January 26, 1976 and continuing thereafter, Respondent, by and through its agents and supervisors, Alex Bianco and Ernesto Merga, refused to rehire Alejandro Ochoa Zamora.
>
> b. On or about January 26, 1976 and continuing thereafter, Respondent, by and through its agents and supervisors, Alex Bianco and Ernesto Merga, refused to hire Gonzalo Ochoa Zamora.
>
> c. On or about February 10, 1976 and continuing there-

after, Respondent, by and through its agents and supervisors, Alex Bianco and Ernesto Merga, refused to rehire Miguel Ochoa Bautista, Miguel Ochoa Zamora, and Alberto Ochoa Zamora.

d. On or about September 27, 1977, Respondent, by and through its agent and supervisor, Alex Bianco, misrepresented the results of Miguel Ochoa Bautista's medical examination because of his support for the UFW.

e. On or about November 21, 1977 and December 5, 1977, Respondent, by and through its agent and supervisor, Alex Bianco, refused to rehire Miguel Ochoa Bautista, Miguel Ochoa Zamora, Alberto Ochoa Zamora, Alejandro Ochoa Zamora, and Gonzalo Ochoa Zamora.

f. On or about December 5, 1977, Respondent, by and through its agent and supervisor, Alex Bianco, refused to rehire Miguel Ochoa Bautista, Miguel Ochoa Zamora, Alberto Ochoa Zamora, Alejandro Ochoa Zamora, and Gonzalo Ochoa Zamora because they had filed charges."

With the exception of paragraph (d) of the complaint, each allegation is charged as a violation not only of §1153(a) of the Act, but §1153(c) as well. Paragraph (f) is cited also as a violation of §1153(d) of the Act.

B. General Findings:

Respondent raises grapes and operates a refinery in Napa, California, although the two operations are distinct and separate. The principal supervisor for Respondent is its Ranch Manager, Alex Bianco. Under him are a group of foremen, including Ernesto Merga and Pete Nissen. Beneath these are "crew-pushers".

The discriminatees are all members of the same immediate family, headed by Miguel Ochoa Bautista, and including his sons Miguel Jr., Ruben, Alberto, Alejandro and Gonzalo. All, with the exception of Gonzalo, who did not arrive from Mexico until 1976, were shown to have been active union supporters. They are

a close-knit family and work together, in part because they have only one car. With the exception of Ruben, they all live together in a single house. A translator was used throughout their testimony.

No simple credibility resolution criteria, no shifting eyes, evasive answers, nervous gestures, or profuse perspiration suffice here to weight more heavily either assertion or rejoinder, with the exception of the testimony of Mr. Merga, who satisfied all these indicia of untrustworthy demeanor, and more besides.

Mr. Merga gave a textbook description of the criteria for discrediting testimony: he fidgeted, shook, perspired, stuttered, tapped his feet, the table, the microphone and himself. He was defensive, frightened, self-serving and occasionally incoherent. His denials were impassioned, his admissions begrudging, and when confronted with an inconsistency, he was stubbornly evasive. His efforts to protect his job and serve his employer were obvious to all and provoked humor even from his own counsel. He was defensive in the extreme, and is to be discredited entirely insofar as he is self-serving. Mr. Merga may be commiserated with, but he is not to be believed.

On all important points, the testimony of the Ochoa family and Alex Bianco is in conflict. With respect to each element of the charge, with the exception of proof that the Ochoa's were active union supporters and sympathizers, and the occasional exception of incidents which go to the existence of company knowledge, one affirms and the other denies.

Miguel Ochoa Bautista began working for C. Mondavi & Sons in 1971. He had worked under Alex Bianco at Louis Martini Vineyards, and when Bianco was hired by Respondent, Bautista, together with his sons Ruben, Miguel Jr. and Alberto, worked under him, at his request. For a time in 1972, Bautista worked as what he called a foreman, but what Bianco and others referred to as a "crew-pusher." He stated his duties had been those of "giving orders" to people and "keeping times."

While considerable testimony was elicited concerning periodic trips to Mexico in expectation of a defense of just cause for refusal to re-hire, no such defense was offered. The probative significance of these trips may thus be confined to the testimony by General Counsel's witnesses that on each occasion, an inquiry was made to Mr. Bianco as to whether work would be available on their return, and that in each response, Mr. Bianco stated that work would be available. Bianco denied making any such statements. Respondent never claimed, however, on any occasion on which Mr. Bautista or any members of his family returned from Mexico before 1976, that work was not available. On the contrary, their defense, aside from a denial that anti-union acts or statements took place, was simply that no openings occurred at the specific time when a request for re-employment was made. The Bautista family were conceded to be good workers, and no basis for a defense of cause or economic justification, other than a lack of work, may be found in the record.

There was, however, a pattern and practice at C.K. Mondavi & Sons, of seasonal work and annual trips by the Ochoa's

to Mexico to see their family, and a promise of re-employment on their return. On his arrival in Napa, Miguel Bautista would approach his supervisor, Alex Bianco, and ask for employment, and from 1971 until 1976 employment was always available. While work may have been seasonal, for the Bautista's, re-employment was not, and work was steady, except at the end of harvest, and occasional brief lay-off periods during the year.

Counsel for the Union, in her brief (at p. 35), cites additional evidence from Respondent's employment records for the proposition that Miguel Ochoa Bautista and his family were considered special employees and not subjected to the requirements for re-employment faced by others, until they began to engage in union activity:

> Even if the reason had truly been lack of work, it seems unusually coincidental to suggest that in the years between 1971 and 1976, Miguel Sr. never appeared on a day when there was no work available. In 1976 (GCX 15B) thirty (30) workers were laid off between 6/24/75 and 6/28/75-- within a week of the time that Miguel Sr., and Miguel Jr. were hired. In 1974 (GCX 14B) Miguel Sr. was hired at the beginning of the pay period. During the 10 days preceeding Miguel's date of hire, 19 workers were laid off. In 1973, (GCX 13) Miguel Sr. was the only person hired during the pay period in which 3/9/73, falls, but fourteen workers were laid off on the following day, 3/10/73.

With respect to the subjective state of mind of the discriminatees, the expectation, based on past practice and oral guarantee, of prospective employment, and its subsequent denial, helps to explain their subsequent behavior, and failure to persevere in pursuit of re-employment, and for this reason their

credibility is accepted.

In 1975, the Ochoa family members living in Napa, according to uncontradicted testimony, became the first employees at Mondavi to sign union authorization cards, and were, of all Respondent's employees, the most active union supporters. They passed out authorization cards, met with employees in Respondent's labor camp, spoke in defense of the union at a meeting called by Respondent (within hearing range of company supervisors and agents), they explained union benefits, passed out leaflets, wore union buttons, attended at least two union meetings at the home of Felix Gonzales, the principal UFW organizer in charge of Respondent's ranch, attended a union convention as delegate, and served as alternate from Mondavi properties. Miguel Ochoa Bautista was a union observer at an ALRB supervised election on October 17, 1975, and after a union victory, openly shouted "Viva Chavez" in front of Respondents supervisors and agents. He was then elected President of the union's Ranch Committee the principal collective bargaining, grievance handling and general, administrative organization of the union at Respondent's ranch.

While General Counsel's witnesses did not know whether the company had knowledge of some of their activities, the discriminatees were sufficiently public to support an inference that Respondent was aware of the Ochoa's support for the UFW, and company representatives were present on at least two occasions when their union sympathies were made graphically clear.

In addition to the events of election day, a meeting was held at

Respondent's labor camp in Oakville prior to the election, with representatives of Respondent, including Alex Bianco, the California Winegrowers Foundation (CWF) as agent for the Respondent, the UFW, and Respondent's employees. Not only did Miguel Ochoa Bautista complain of the inadequate representation of the CWF in such a way as to indicate his support for the UFW within earshot of Mr. Bianco, but his son Alberto told a CWF representative to "shut up" and let the union speak. Uncontradicted testimony established that the same meeting saw California Winegrowers' Foundation President Raphael Rodriguez hold a tape recorder over his head and announce to the assembled employees that they should be careful what they said, since their statements might be used later.

Alberto testified he attended the union's August, 1977, Convention as a delegate from C. Mondavi & Sons, and on his return sang union songs while working in the fields, in the presence and hearing range of Mr. Merga and Mr. Nissen, neither of whom denied this allegation.

While Merga and Nissen were not shown to speak Spanish, Mr. Zamora sang a portion of the songs at the hearing, and it was clear to a reasonable non-Spanish-speaking person, both from the use of certain common words such as "union" "Chavez", and from the inspirational tempo of the songs, that they were union-related.

It is clear from these incidents that the Respondent knew the Ochoa family members were active union supporters prior to the occurence of the incidents in question.

While Respondent denies knowledge of the union activities of Mr. Bautista's sons, Mr. Bianco testified that at least on one

occasion, Caetano Garibay, an employee, informed him of events which had taken place at a union meeting and given the names of Respondent's employees who had been elected to leadership positions on the union's Ranch Committee, indicating that Respondent was not entirely uninformed concerning the activities of union leadership at meetings which it had not attended.

Furthermore, General Counsel's witnesses gave considerable testimony concerning a custom at Respondent's ranches of hiring on the basis of family membership. On numerous occasions, family members were hired, even sight-unseen and without personal application, at the request of some family representative. Under such circumstances it can be inferred that knowledge by the company of union activities on the part of a family representative is the practical equivalent of knowledge with respect to its other members. Against this evidence, Respondent offered only a simple denial, failing to establish or allege either that such a custom did not exist, or that the -discriminatees were an exception to it. The repetition of family names in exhibits and testimony further supports this inference.

The only individual to whom this inference may not apply is Ruben, who not only worked apart from the rest of his family, but had an independent employment history and expressly did not share their degree of union commitment. Ruben became friendly with a company supervisor, and concerned that his future prospects might be jeopardized precisely through association with his family's union activism in the eyes of the company. His efforts to secure employment as a tractor driver and work in the

harvest independent of the rest of his family likewise prove the exception as well as the rule. Ruben's admission that he endeavored to keep his union affiliations and activities secret, together with the absence of any other indicia of company knowledge, lead to the conclusion that his union support was unknown to Respondent, while his family's was not.

I therefore find, that except for Ruben, General Counsel has met its burden of proving company knowledge by a preponderance of the evidence.

C. The Events of January, 1976;

In 1975 Miguel Ochoa Bautista continued working after the harvest and did not go to Mexico at the usual time because his son was about to be married. He informed Alex Bianco of this fact at the end of harvest, and Bianco agreed. He worked another month until December, during which he filed an unfair labor practice charge against Respondent with the Sacramento Regional Office of the ALRB. He then requested permission to go to Mexico, Bianco wished him a good trip, asked him to say hello to his family, and stated "when you return your job will be here."

On his return, he spoke to his sons Alejandro and Gonzalo, who informed him the company had refused them jobs, and would likely not hire their father either.

They testified that they had gone to Bianco, who had told them, by their account, to report for work the next day. Bianco stated they had come to his home on a Sunday and he told them to check at the labor camp the following day. Failing to find Ernesto Merga at the camp, the brothers located him in the

fields - accounts of what transpired differ, but all agree on two points: the Ochoas were not given work, and no one made remarks indicating the existence of anti-union animus. Certainly, there is in this account no clear indication of a discriminatory refusal to rehire and it cannot be said that General Counsel has established the requisite degree of disriminatory intent from this conversation alone.

D. The Events of February, 1976;

Miguel Ochoa Bautista testified he visited Bianco shortly after his return from Mexico in February, 1976, stated he was ready to work as always, and that Bianco replied:

> "yes, Miguel, but now things have changed and because Chavez wanted to come in here and because he didn't have any money, the boss says for all those who want Chavez to go ask Chavez for money, and the boss said he was going to pull out the vines. Before you would have your job back, but. now you want Chavez and there is no job." [1/]

Alex Bianco denied having said anything of the sort, maintaining he had said, merely that he had hired the bulk of the prunners and that Miguel should check with him later.

The theory of General Counsel and the Charging Party is that these acts and statements created in the minds of members of the Ochoa family, a feeling of futility with respect to future or repeated requests for re-hire. If true, Respondent cannot then claim, consistent with the statutory language or any

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[1/] There were minor variations in this statement throughout the transcript, but all accounts agreed substantially and corobated one another in detail.

reasonable interpretation of Section 1153(c), that its own wrongful misconduct did not exist because of a failure to make proper application. (See discussion, infra.)

While it is clear on the record that the Bautista family believed Respondent had acted discriminatorily toward them, and that repeated reapplication would be futile, there is conflict in the testimony as to whether Respondent in fact so acted, and whether its agents were the responsible cause for their belief.

As evidence that the conversation with Bianco took place, there can be marshalled, as circumstantial evidence, the fact that none of the Ochoas were hired, their agreement as to the substance of what was said, their corroboration in detail, without mechanical precision, or the kind of rote that would indicate a purposeful intent to perjure themselves, their demeanor, and most importantly, their subsequent behavior.

As evidence that the conversation did not take place, there is only Mr. Bianco 's word and his apparently truthful demeanor. If this were a criminal preceding resulting in punishment for offensive behavior, doubt might easily be resolved in favor of Mr. Bianco. But as the purpose of the Act is protective rather than retributive, and as the Ochoas gave no evidence of having irrationally or for vindictive motive reached the con-elusion that the company was prejudiced against them, and on the strength of other events cited above and appearing in the re-cord, I find that the conversation in question, together with the failure to make proper re-application on the precise days on which Respondent was proven to have added to its work force , were

both products of a wrongful anti-union intent.

An employee of five years, of admitted competence, who had been rehired every year regardless of irregular returns from Mexico, for the first time refused re-employment shortly after a union election and becoming President of the Union's Ranch Committee, would be unlikely not to pursue re-employment unless he had been discouraged from re-applying. From the perspective of other workers at Respondent's ranch, the observation, that the most active union supporter and members of his immediate family were not rehired shortly after having exercised their section 1152 rights, being elected to the highest union position and filing unfair labor practice charges against the company, must be seen as having a deleterious and chilling effect on the exercise of their rights under Section 1152 of the Act. Respondent, and any reasonable employer, must have understood that to discourage application for re-employment by creating an impression of discrimination, regardless of intention, is no worse in effect than outright wrongful refusal. Having so found, the subsequent efforts by Ruben to secure reemployment for his family are of little importance, since, it having once been established that a wrongful refusal has taken place, Respondent comes under a continuing duty to rehire.

Respondent argues that its' discrimatory animus is negated by the fact that it subsequently hired other members of the union's Ranch Committee, yet it is well established, as will be shown, that the discharge of non-union personnel may be protected where its object is to cover up a discriminatory act.

Miguel Ochoa Bautista, as President of the local Ranch Committee, would have been a far greater threat to Respondent than its other participants. Furthermore, of all the Ranch Committee members, Bautista is the only one remaining. For numerous and conflicting reasons which were not fully litigated in this proceeding, all other members have left Respondent's employ, producing a calculable effect in the minds of other workers on its property. The continued employment of his son Ruben, who expressed great reluctance to involve himself in union activities, in no way dissipates this effect.

Respondent alleges no jobs were available at the time of Mr. Bautista's application for re-employment, yet in spite of earlier irregularities in his return from Mexico, Respondent always hired Bautista immediately thereafter. Respondent failed to prove that it had ever treated admittedly competent employees with several years experience similarly. While its work is superficially seasonal, in fact there are a large body of regular employees, at the head of whom must be included the Ochoa family, who move from job to job on Respondent's ranch as the season demands .

Alex Bianco testified Respondent hired only on personal application and on a "first-come first-serve" basis. Yet in 1974, Bianco hired Alberto and Alejandro sight unseen without their personal application, and on one other occasion non-harvest hiring was initiated by Bianco signaling Bautista to pull his car over and informing him that he might return to work.

Bianco wrote letters promising employment to members of

the Ochoa family, and others with families in Mexico, and Respondent never claimed it denied employment to such individuals because another applicant had arrived first. In fact, Respondents' hiring practice consisted of giving special consideration to trusted, competent employees, and their families.

Finding that Bianco made the comments of February, 1976, as attributed to him by the discriminatees, I turn to the question of the effect of these remarks on members of the Ochoa family other than Miguel Ochoa Bautista, as to whom sufficient evidence of knowledge of union activity is present to justify concluding that Respondent's acts and declarations had the clear effect of discouraging membership in a labor organization. With respect to the other discriminatees, however, the showing of employer knowledge is weak, and General Counsel and the Union rely primarily on family relationship to establish a violation.

First, there is no question but that the sons of Miguel Bautista who were residing with him and present during the conversation in question felt discriminated against, and did not press their re-application for employment with Respondent because they perceived that anti-union animus had been directed against their family as a whole. Second, it is clear that the failure to re-hire any family members other than Ruben, whose very demeanor gave testimony to chilling effect, could not help but have the effect of aggravating whatever discouragement Respondent had already created.

While the test for knowledge is not subjective, but objective, and while it does not depend on the discriminates's

perception of events, it may nonetheless be established inferentially. The question may then be asked, whether a reasonable person, in the same or similar circumstance, would not or should not know, that a discriminatory refusal to rehire an union activist, accompanied by statements indicating anti-union animus, would have the calculable effect of discouraging union membership and re-application for employment among members of his family. If the answer to this question is in the affirmative, then Respondent must be held to have created, by its wrongdoing, the injuries it now disclaims, regardless of its asserted lack of anti-union animus with respect to Mr. Bautista's kin. On the record as a whole, including all permissible inferences, I conclude that a reasonable person in these circumstances would or should have known, that the probable effect of its acts and statements would be to discriminate and discourage union membership, without respect to evidence of animus or knowledge of union activities particular to each member of Mr. Bautista's immediate family, although some evidence was presented on this subject from which knowledge may be inferrentially derived for every son but Gonzalo.

When Bianco began hiring in the second week in March, 1976, he was aware of the family's interest in securing employment, since Ruben had made several requests of Ernesto Merga to find work for his family, and these requests had been communicated to Bianco. Ruben, to be sure, asked the wrong person about employment, and in spite of ample opportunity, never pressed the issue with Bianco. But why? Because he was ignorant of company hiring practices? This most certainly was not the case. Ruben's

friendship with Merga is rather the key to understanding the reason. Ruben's request to Merga were not in fact for employment at all, as counsel for all sides have suggested, but for Merga to intercede on the family's behalf with an apparently hostile Bianco. Indeed, his failure to raise the issue with Bianco directly, while receiving instructions on the tractor or collecting his pay check, is silent testimony to the discriminatory effect of Respondent's acts and statements. Far from proving wrongful application, for which Merga 's authority to hire would be essential, Ruben's behavior adds to the already substantial circumstantial proof of animus.

Turning to that portion of Bianco "s statement in which he threatens to "pull out the vines", Respondent argues in its Brief (at p. 29) that the conversation could not have taken place because Bruce Oelschlager testified he had not discussed it with Bianco. Yet the fact that a threat is not genuine does not diminish its' effect, since even an unrealistic threat to shut down operations, in the context of anti-union remarks, is sufficient to raise the possibility of reprisal, nor does it indicate with any reasonable accuracy whether the statement was actually made.

Moreover, on the issue of animus, Respondent refers in its Brief (at p. 89) to Bianco' s response to the comments by a Mr. Hurtado concerning a "threatened work stoppage" in the 1975 harvest. Alberto Ochoa Zamora testified Manual Hurtado had stated to Bianco:

"Alex, how come you got mad when during the

> harvest we asked for a pay increase per ton? And we were asking you for more work. And what you said was, "The fuck with all the tractors". And, Mr. Bianco said, "How did you expect me not to get mad if you yell at me, "Via (sic) Chavez." (Tr., vol 13 pp. 8-9)

While Mr. Bianco did not comment on this conversation in his testimony, Respondent's brief admits the conversation "indicates that he was rankled by the events which had transpired earlier", and had been "upset" by the threat of a work stoppage.

Several additional remarks substantiating the existence of anti-union animus were indicated on the record, but are unnecessary to discuss in detail prior to reaching a result, since the evidence cited above is substantial, clear and convincing.

E. The Events of November, 1976;

Miguel Ochoa Bautista next applied in person for employment in September after the harvest had begun, and testified that Alex Bianco had stated, in response to his request to make up a crew with his sons, that Respondent would provide him with work, and "swore by his dead wife" that he (Bianco) would call. Baustista allegedly responded that he hoped Bianco would phone, and Bianco replied that he would receive word through his son Ruben.

Again, Bianco denied that he had made any such promise, or swore by his dead wife. In empassioned denial, Bianco stated he was a religious man and would never have made such a remark. Again, no easy credibility resolutions are possible, for Bautista was equally impassioned in describing Bianco's oathi and was corroborated by his sons, to whom he spoke immediately afterward.

Yet here the circumstances differ from the previous conversation, in that its' content contains no facial indication of anti-union animus, but on the contrary, a promise of future employment. Here, the emphasis is not on a willingness to surrender Section 7 rights, though the conversation followed Februarys' refusal of re-employment and a lengthly period of wrongful layoff, but on a return to non-discriminatory treatment.

Further, there is to be considered the circumstance that in this year, for the first time, Ruben, by reason of increased financial needs resulting from his marriage, decided to work as a tractor driver, rather than forming a crew with his family as he had previously done.

Ruben gave another reason, and testified that his father had asked him if he was thinking of forming a crew, and he had responded:

> "So, then I told him that, "No." They asked me why and I told them because all of you are outside so who am I going to use to make the crew with because *I* knew that they didn't want to give them a job there." [Tr. VIII, 61]

Respondent demonstrated, however, that in previous years Rubens' crew had included outside members, and that Bianco had asked him if he was going to form a crew, at which time he had indicated a preference for tractor driving and made no mention of discriminatory treatment. Ruben was not recalled to affirm or deny this conversation. Moreover, hiring for the harvest is different from ordinary hiring, in that crews are hired by their crew leaders, without the intervention of Respondent, except under extraordinary circumstances.

Bianco testified that Bautista had asked to make up a crew with his sons "on this ranch", and that he had replied that sufficient crews had already been hired. In explanation, it was shown that grapes picked on that ranch produced a higher rate of pay than others, and were preferred by harvest workers. Bautista testified he had not specified which ranch he wished to work at, that he had not been contacted by Bianco, and decided to work at another ranch during the harvest.

The circumstances here, then, significantly differ from those of the previous incident, in that the statement by Bianco contains no outward sign of anti-union animus, and the subsequent behavior of Migyel Bautista in failing to return to follow up on Bianco's promise of re-employment, is inconsistent with its substance These circumstances indicate less clearly than before who should be believed.

To be sure, Bautistas' failure to reapply is made rational by Respondent's previous behavior, and were it not for the nature of its harvest hiring practices and the change in Rubens' intentions, Respondent might nonetheless be held responsible for a subsequent refusal to rehire.

Considered as a whole, however, the fact that crews were already formed by the time the request was made, Ruben's decision not to make up a crew, crew-based hiring, general crew continuity, higher wages and a possible misunderstanding concerning the specific request for work, all diffuse Respondent's responsibility for the failure of re-employment. Had Miguel Ochoa Bautista applied to form a crew at the usual application time in August and

been refused, had Ruben applied and been told he could not form a family crew, had crew-hiring been accomplished through Mr. Bianco, or had new crews been added following this conversation, some reason might exist for placing the responsibility for a refusal to re-hire on Respondent.

General Counsel and the UFW assert that the failure of Ruben to apply for a position as crew-leader in the 1976 harvest was a product of his company - inspired fear of being fired, and indeed this may have been the case. But an equally plausable reason, advanced by Bianco, was that of securing higher pay as a tractor driver. General Counsel and the UFW did not show that company animus was significantly involved in Ruben's choice, and the fact of his recent marriage and independent householding, together with customary harvest hiring practices, are adequate and logical reasons, independent of Respondent's intent, for finding no violation.

Considering these circumstances in sum, Respondent's culpability cannot have been as great, given the lateness of the application. I therefore find that Respondent did not discriminatorily refuse to rehire the Ochoa family on the occasion of its 1976 harvest, except insofar as it was under a continuing duty to re-hire.

F. The Events of September, 1976;

In September of 1976, after Miguel Ochoa Bautista approached Alex Bianco at the Truebody Ranch, and requested permission to form a harvesting crew, Ruben Ochoa Zamora testified Bianco approached him after his father had left and asked why

Miguel had to be a "Chavez man":

> After my father left, Mr. Bianco got there very mad with me. He took me apart from the people and he told me, "What the hell" or "what the fuck was my father doing?" That he already told him that he was going to give him work, but that if he kept fucking around or things of that nature, that he was going to tell him to go with Chavez. That, what the hell he wanted there anyway? {Tr. VIII, 58).

While no refusal of re-employment occurred on this occasion, for reasons already stated, the only interpretation which can be given to these remarks is that they are a threat of reprisal for union activity, and thus an interference, restraint and coercion of employee rights under the Act.

There are several reasons for resolving credibility issues in Ruben's favor, although here again, Alex Bianco’s testimony was strong and apparently truthful, and his demeanor gave no indication of purposeful dishonesty. Yet, as before, General Counsel's witness is supported by prior incidents and circumstantial logic. More important is Ruben himself, and the undeniable fact of his intimidation and fear of being associated with the union. The pain of giving testimony was clear in his demeanor, his facial expression and tone of voice, and it stretches the imagination to assume he would manufacture such a story only in order to put himself through an ordeal. His efforts had been directed at securing company approval and disassociating himself from the rest of his family. It was thus not a self-serving declaration, but one which ran against his self-interest, and for that reason is more credible. I therefore find that the statement attributed to Bianco on this occasion to have been made by him.

G. The Medical Examination of September, 1977;

It is alleged by General Counsel that a violation of the Act took place on the occasion of Miguel Ochoa Bautista's return from Mexico in September, 1977, after having had a heart attack. The evidence established, however, that a defect on Respondent's medical questionnaire was responsible for the misunderstanding which subsequently developed, rather than anti-union animus.

The form in question (RX XVIII) asked the employee, in English, to state "job applied for" as opposed to "current occupation." In response, and through a translator who was not called as a witness, Mr. Bautista's occupation was erroneously listed as "tractor driver." When the letter from Dr. Darter (GCX 11-C) was mailed to Respondent on October 10, 1977, stating that Bautista could "return to his usual occupation as a tractor driver", it is not diffucult to understand the confusion which resuited in his temporary unemployment. It is likewise understandable, given his earlier experience with Respondent, that he should come to the conclusion that the letter had been a pretext for discrimination.

It is clear, however, that General Counsel has not satisfied its' burden of proof, either with respect to discriminatory animus, or Respondents' role in having caused Mr. Ochoa's injury. On the contrary, it appears that Respondent acted pursuant to a legitimate interest in making certain that any ambiguity in medical opinion be resolved in favor of the physical well-being of its employee. Not only was the resulting interference with protected rights "comparatively slight", but

evidence of wrongful motivation is nonexistent, given the prior inadvertant error in listing Mr. Bautista's occupation.

H. The Events of December, 1977;

On or about December 5, 1977, Miguel, Alberto, Alejandro and Gonzalo returned to C. Mondavi & Sons to check on the availability of work. They testified Bianco told them that Respondent was not hiring people because "they file too many charges".

At this time, Bianco was aware of three unfair labor practice charges that had been filed against Respondent, the latest on November 22, 1977, and while two individuals were hired as pruners on December 5 and 6 (RX 15 & 16), Respondent alleges the reason for their hire was the fact that they lived in Respondent 's labor camp, and that a long-standing custom gave preference to such employees. Four others were hired to prune the Brown Ranch, but these employees were required to live on the premises.

Aside from the testimony of Mr. Bianco, however, Respondent introduced no evidence to support this proposition, although company records were immediately at hand. Moreover, the timing of the conversation, occurring only a short time after the most recent charge had been filed, together with the unchallenged credibility of four coroborative witnesses, each of whose demeanor was apparently trustworthly, non-defensive, and truthful, compel the conclusion that credibility be balanced in their favor.

I therefore find, on the record as a whole and on a preponderance of the evidence, that Respondent made the state-

ment attributed to it by General Counsel's witnesses, and refused their rehire by reason of their having filed charges against the company.

Respondent argues in its Brief (at p. 156) "Charges had been filed by these individuals over a substantial period of time and the sudden rousing of ire in this regard is totally illogical." Yet General Counsel has not alleged a "sudden" anger, and proof was offered at hearing that there was a general coincidence between effective ALRB enforcement following legislative refunding and the incident in question.

Respondents' explanation concerning the individuals hired to prune the Brown Ranch, on the other hand, is more reasonable. Alex Bianco testified the individuals hired during the relevant pay period were required to live on the Brown Ranch, and the Ochoa family had once refused an offer of employment requiring their relocation onto Respondents' property. This testimony was not challenged by General Counsels witnesses, and is entirely logical under the circumstances. For this reason, no violation of §1153 (c) is made out, and discrimination is confined to §§1153 (a) and (d).

On the basis of the following findings of fact, and on the record as a whole, I make the following:

CONCLUSIONS OF LAW

A. In General;

Section 1148 of the Act requires the Board to "follow applicable precedents of the National Labor Relations Act, as amended.", and Sections 1153(a), (c) and (d) of the Act are

identical to Sections 8 (a) (1), (3) and (4) of the NLRA, 29 USC 158(a)(1), (3) and (4), permitting extended discussion of NLRA precedent.

Section 1152 of the Act, which is identical to Section 7 of the NLRA, 29 USC 157, establishes the rights of agricultural employees to engage in collective self-help:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right 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 subdivision (c) of Section 1153.

In Section 1, the purpose of the Act is stated as follows:

> In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.
>
> This enactment is intended to bring certainty and a sense of fair play to presently unstable and potentially volatile condition in the state.

This purpose is further informed by a declaration of policy contained in Section 1140.2:

> It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such repre-

> sentatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In sum, the purpose and policy of the Act is unequivocal and direct, and lies primarily not in the leveling of punitive sanctions against employer misconduct, but in the protection of employee rights of self-organization.

None of these purposes will be served by permitting Respondent to establish two separate procedures for rehire; one based on qualification or competency, and another based on union activity, or filing charges with the ALRB; nor by sanctioning threats, or the creating of an impression of surveillance.

While considerable testimony was adduced regarding collateral matters which later proved insignificant, the central problems of factual and legal interpretation resolved themselves into the following:

B. The Supervisorial Status of Ernesto Merga;

The Act defines a supervisor in Section 1140.4(j), as:

> "any individual having the authority, in the interest of the employer, to...transfer... layoff... assign... or discipline other employees, or the responsibility to direct them, ... or effectively to recommend such action, if ... the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement."

Respondent's argumentation notwithstanding, its admission of Mr. Merga's supervisorial status in a responsive pleading filed before this Board, after initially denying it in the same action, is dispositive.

While it is clear that a determination made in a certification preceding is not controlling as to supervisorial status in an unfair labor practice preceding where they occur several month apart, NLRB v. Southern Airway Co., 42 LC B> 16, 598, 290 F. 2d 519 (CA 5, 1961), where there has been no showing of a post-certification change in duties or material modification of status a determination made in a certification preceding will be accepted. , see also, e.g., Arizona Public Service Co., 188 NLRB No. 1 (1971), and Mr. Merga testified his duties had not changed since 1971.

Furthermore, as General Counsel points out in her Brief Cat p. 16-17), citing NLRB case law:

> "the possession of any one of the authorities listed in Section 1140.4 (j) of the Act would under federal precedent place the employee vested with this authority in the supervisory class. Ohio Power Co., v. NLRB, 176 F. 2d 385, 387; 24 LRRM 2350 (6th Cir., 1949). The power need not be exercised for all or any definite part of the employee's time; it is the existence of the power which is determinative. Ohio Power Co., v. NLRB, supra.
>
> The fact that one supervisor, in charge of one part of production, works under other supervisors, is bound by carefully formulated rules, and must receive approval of superiors before acting does not preclude supervisorial status. NLRB v. Budd Mfg. Co., 169 F. 2d 571, 22 LRRM 2414 (6th Cir., 1948). The possession of authority to use independent judgement in one of the specified authorities is enough. NLRB v. Brown & Sharpe Mfg. Co., 169 F. 2d 331, 334,22 LRRM 2363 (1948). A higher rate of pay, direction of other employees efforts, reporting employees who do not do good work and possession of greater skill than other employees are factors which support a finding of super-visorial status. Con-Plex Division of U-_S. Industries, 200 NLRB 466, 468, 81 LRRM 1548 (1972).One who instructed other employees,

> who told employees to redo work which was done wrong, who was considered to be a supervisor, and who issued warnings, was found to be a supervisor. Paoli Chair Co., 213 NLRB 909, 920, 87 LRRM 1363(1974).

Higher wages are also an important factor, Dairy Fresh Products Company (1977) 3 ALRB 70, citing NLRB v. Big Ben Department Stores, 396 P. 2d 78 (2nd Cir., 1968), Benson Veneer Co., Inc., 398 F. 2d 999 (4th Cir., 1968), Laminating Services, 167 NLRB 234 (1968), and it was demonstrated that Mr. Merga's salary *is* approximately 40% higher than the wages earned by agricultural employees working all year round (UFW Brief, at p. 28-29). Added to this, is his independent examination of Respondent's fields to assess work needs, his training of new employees, his direction of work, and his granting of leaves of absence. In addition to such traditional indicia of status are the facts, particularly important in the context of agricultural labor, that he lives in a company house, as opposed to a labor camp, and that he drives a company truck. In the minds of its employees, Respondent has identified Mr. Merga's status with its own.

Yet while it is clear from testimony and documentary evidence that Mr. Merga satisfies these requirements, for present purposes it is largely unimportant, since it is equally clear that Mr. Merga had no authority to hire or fire, and because his credibility as a witness was extremely low.

C. Discriminatory Refusal to Rehire;

1.) The Law in General;

Section 1153 (c) of the Act and Section 8(a) (3) of the NLRA provide that it is an unfair labor practice for an

employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

These sections make unlawful all forms of discrimination, whether affecting hire, rehire, transfer, promotion, fire, or any terms or conditions of employment, and the prohibition against employer discrimination extends to applicants for work, as well as those already employed. Pate Mfg. Co., 197 NLRB 793, 802, 80 LRRM 1846 (1972).

To prove a discriminatory discharge, it is generally necessary for General Counsel to prove: (1) that the employee had engaged in "concerted" or union membership activities, (2) that the company at least implicitly knew of the employee's union membership or activities, and (3) that, (a) the effect of discharge was discriminatory, or (b) while this effect was not great, the employer had no adequate economic justification for the discharge, or (c) the employer's motive was to discriminate against the union and thereby affect union membership. In practice, these requirements reduce themselves to three: (1) proof that the activity was protected and concerted; (2) proof of facts indicating a likelihood of company knowledge; and (3) proof of motive or animus, through statements of company representatives or other circumstances. In addition to their denial, these elements may be opposed by affirmative proof that the discharge was economically justified or motivated by cause.

Traditional doctrine has it that the burden of proof rest;; on the General Counsels representative who, must prove his or her

case affirmatively and by a preponderance of the evidence, with no requirement on the employer to exonerate itself until proven to have violated the Act. See e.g., NLRB v. MacSmith Garment Co., 203 F. 2d 868 (CA 5, 1953); NLRB v. National Die Casting Co., 207 F.2d 344 (CA 7, 1953); NLRB v. Abell Co., A.S., 97 F. 2d 951 (CA 4,1938

Given a conflict in the testimony, a decision is reached on a preponderance of the evidence, and on the record as a whole. Informal factors such as witness credibility or inconsistency in company behavior or enforcement may then become crucial in reaching a result.

The NLRB has considered a variety of factors in deciding whether a discharge has been based on pretext, but these are, in essence, simply efforts to prove or disprove the existence of some non-discriminatory alternative motive. Among the factors considered by the NLRB, which have some relevance to this case, are the following:

1.) The extent to which the employee is engaged in union activity. See, e.g., Loray Corp., 184 NLRB No. 57 (1970).

2.) Employment record and general efficiency. See, e.g., Morrison Cafeteria Co., Inc., 179 NLRB No. 97 (1969).

3.) Extent of employer knowledge of employee union activity. See, e.g., Phelps-Dodge Corp., 28 NLRB No. 73, 7 LRRM 138 (1940).

4.) Other unfair labor practices, such as surveillance and interrogation. See, e.g., American School Supply Co., 382 F. 2d 53 (CA 10, 1967).

5.) Statements or conduct showing state of mind. See,

e.g., Benson Veneer Co., Inc., 156 NLRB No. 74 (1966).

6.) The timing of the discharge. See, e.g., NLRB v. Berggren and Sons, Inc., 406 F. 2d 239 (CA 8, 1969).

7.) The lack of any warning. See, e.g., Better Val-U Stores of Mansfield, Inc., 161 NLRB No. 71 (1966).

8.) Prior anti-union activity by the employer. See, e.g., Lapeka, Inc., 187 NLRB No. 109 (1971).

It should be emphasized that these are only factors to be considered in balance, and not automatically determinative.

2.) Concerted or membership activities;

An employer may be found to have violated §1153(c) whenever an employee is discharged by reason either of union membership, see, e.g., Phelps-Dodge Corp. v. NLRB, 313 U.S. 177 (1941), or activities, see, e.g., Southwire v. NLRB, 383 F. 2d 235 (CA 5, 1967), past or present.

If the employee is discharged in part for economic or other reasons, and in part because of union membership or activities, a violation of §1153(c) is nonetheless made out. NLRB v. Park Edge Sheridan Meats, Inc., 341 F. 2d 725 (CA 2, 1965); NLRB v. West Side Carpet Cleaning Co., 329 F. 2d 758 (CA 6, 1964); NLRB v. Jamestown Sterling Corp., 211 F. 2d 725 (1954).

Section 1152 of the Act and §7 *of* the NLRB include, among other guarantees, the right"., to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Sections 1153(c) and 8(a)(3), on the other hand, refer only to "membership", and it is clear that the basis of these sections is "encouragement" or "discouragement", or

having the "effect" of encouraging or discouraging membership in a labor organization.

> In each of subsections (1) (2), (4) and (5) the definition of the substantive unfair labor practice follows immediately the word "to"; that is, the conduct which is made the basis of liability for violation of the Act is described after the word "to" in four out of five subsections. There is no reason to believe that is not also true in the fifth case, that of subsection (3). The unfair labor practice under subsection (3), then—the basis of liability—is for an employer "to encourage and discourage membership in a labor organization." The words preceding "to" in subsection (3) must be given effect, then, as a condition to liability, not as a basis of liability. In other words, "discrimination" is the proscribed means of encouragement or discouragement, but the prohibited conduct is the encouragement or discouragement. Chester Ward, "Discrimination* Under the National Labor Relations Act" 48 Yale L.J. 1152, 1156 (1939).(emphasis in original). See also, Sheiber and Moore, "Encouragement or Discouragement of Membership in any Labor Organization and the Significance of Employer Motive," 33 La.L. Rev. 1 (1972).

In the case of "concerted activities," the principal problem is one of policy arising out of Section 7. Cox, The National Labor Policy (1955); Cloke, "Concerted Activity and the National Labor Policy," 5 S.F.V.L. Rev. 289 (1976); Rosenfarb, The National Labor Policy and How It Works (1940). For this reason, the definition of "concerted activity" has been broad and far-reaching. [Id.] The Supreme Court has held, for example, that the language of Section 7 "is broad enough to protect concerted activities whether they take place before, after or at the same time...a demand is made." NLRB v. Washington Aluminum Co., 307 U.S. 9, 14, (1962).

3.) Respondent's Knowledge of Union Membership or Concerted Activities:

Discrimination under the Act may be found to result either from membership in a labor union, or from engaging in "concerted activities," yet proving an employer violation is often difficult, since, as to membership, it is clear that circumstantial evidence may be the only evidence available to establish employer knowledge. See, e.g., Thomason Plywood Corp., 109 NLRB 898 (1954). Thus, the NLRB and courts have used a variety of inferences, such as the "Small Plant Doctrine", to find employer knowledge or suspicion of employee membership or concerted activities, and where an employer or supervisor has worked with a small group of employees, it can be inferred that the company was aware of union membership or activities, or at least suspected it. See, e.g., NLRB v. Mid-State Sportswear, Inc., 412 F. 2d 537 (CA 5, 1969); NLRB v. Lone Star Textiles, Inc., 386 F. 2d 535, 67 LRRM 2221 (CA 5, 1967); National Paper Co., 102 NLRB No. 157, 31 LRRM 1469 (1953)

While the "small plant" doctrine is not applicable here, for reasons stated by Respondent in its Brief (at p. 128, ft. 6), and has not been claimed by opposing counsel, an analogous "family" doctrine might be stated in its stead. The purpose of the "small plant" doctrine is to describe the circumstances on which an inference of employer knowledge might be validly drawn, sufficient to create a burden on the employer of going forward with the evidence. Knowledge of family closeness and union support accurately reflect the circumstantial proof in this case, and closely serve the purposes of the Act by prohibiting the effective discouragement of union membership and activity. Inferential proof that company knowledge extended to members of an immediate

family is not uncommon in NLRB practice, Forest City Containers, Inc., 212 NLRB No. 16, 87 LRRM 1056 (1974) Hickman Garment Co., 216 NLRB No. 16, 88 LRRM 1651 (1975), as will be seen later.

The NLRB has also looked to whether company officials were aware of a union's organizational drive and made anti-union statements to discharged employees, Phelps-Dodge Corp., 28 NLRB No. 73, 7 LRRM 138 (1940); whether the employee was a member of the union steering committee or similar public post, Entwhistle Mfg. Co., 23 NLRB No. 114, 6 LRRM 359 (1940); whether the discharged employees were openly active in soliciting other workers to join the union, or were spokepersons for the union on grievances, Weyer-hauser Timber Co., 35 NLRB No. 175, 9 LRRM 104 (1941); whether the
employees were conspicuous as, for example, leaders on a picket line, Montgomery Ward & Co., 31 NLRB No. 134, 8 LRRM 162 (1941); and other factors.

If an employer juggles its seniority system or rearranges a department for the purpose of getting rid of union members, the discharge of any worker in the shake-up, including those who are not members of the union or those whose union sympathies are clearly unknown to the company, will be held illegal. American Rolling Mill Co., 43 NLRB No. 181, 11 LRRM 69 (1942). Where a company discontinues certain operations in order to punish some employees for their union activity, all of the employees who loose , their jobs are entitled to reinstatement, and it is immaterial, the NLRB has stated, that some of the employees may not have been union members or that the company had no knowledge of their union membership or activity. Arnoldware, Inc., 129 NLRB No. 25, 46

LRRM 1525 (1960). Even though an employee is not actually a union member a discharge will nonetheless be considered discriminatory if the company knew of facts which led it to believe the employee was connected to the union. D. D. Bean & Sons Co., 79 NLRB No. 98, 22 LRRM 1436 (1948). Since the company's motive is illegal, it makes little difference whether it knew in fact that an employee was a union member. Madix Asphalt Roofing Co., 85 NLRB No. 9, 24 LRRM 1342 (1949).

4. Anti-Union Animus;

The problem of motive arises under Sections 1153(c) and 8 (a) (3), because only discrimination "to encourage or discourage" union membership is prohibited, yet the specific language of 1153(c) and 8 (a) (3) is ambiguous, and in none of the ARLA or NLRA provisions are "motive", "animus", "intent", "purpose", "effect", or any similar expressions used or defined.

Black's Law Dictionary, 4th Ed., p. 1964, defines "motive" as "cause or reason that moves the will", or "an inducement", as "the moving power which impels to action for a definite result," as opposed to intent, which is "the purpose to use a particular means to effect such a result." Intent is defined, Id. at 947, as "design, resolve, or determination," as inferred from the facts and presupposing knowledge, as expressing "mental action at its most advanced point, or as it actually accompanies an outward corporeal act which has been determined on." Ballantine's Law Dictionary, 3rd Ed., p. 818, mentions also for motive, "the moving cause which induces action, having wholly to do with desire," and for intent, "with fixed purpose; earnest; determined; engrossed,"

Id. at 646. The reference in Black's Law Dictionary to "animus" mentions "mind; intention; disposition; design; will." Supra, at 114, while Ballantine's refers only to intent, Supra at 75.

In practice, these terms have been used interchangeably by courts. The language of the statute may fairly be read to require any of the above, however, or simply to prohibit the "effect" of discrimination, without regard to the quantum of evidence necessary to sustain a finding.

In an effort to distinguish motive from intent, Professor Oberer has relied on the common-law distinction. Thus,

> If an employer discharges an employee who is actively engaged in seeking to organize the employer's plant, the employer may be presumed to intend to discourage union membership, since the latter follows not only foreseeably but, it would seem, inescapably from the employer's act, however much he might regret it because of the loss of union leadership and the fear and suspicion generated among his employees. However, if the real motive for the discharge is shown to be a breach of shop rules by the employee, the discouragement of union membership is justified or privileged; the employer has committed no offense, despite the unavoidable and hence intended (pursuant to the common-law presumption), consequence of discouraging union membership. Oberer, "The Scienter Factor in Sections 8(a)(l) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails", 52 Cornell L.J. 491, 505 (1967).

Oberer concludes, if the analogy to common-law rules hold true, that,

> the burden should fall upon the employer at least to raise the issue of his justifying motive by the presentation of supporting evidence. Otherwise the trier of fact (the Board) is entitled to find against him on the basis of what is at minimum a prima facie case.

///////////////

> Id. at 506. See also, Getman, "Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. Chi. L. Rev. 735, 743 (1965).

In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), two categories of 8 (a)(3) violation were created: those in which the discrimination is found to be "inherently destructive" of important employee rights, and therefore no proof of anti-union motive is required, even in the face of business justification; and those in which the "adverse effect" on employee rights is "comparatively slight". Anti-union motive must therefore be shown, "if" (original emphasis) the employer has come forward with evidence of "legitimate and substantial business justifications". Id. at 34. Thus, once it has been proven that the employer has engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden then is placed on the employer to establish that it was motivated by legitimate objections, since proof of motivation is most accessible to the company. See also, Note, "Employer Motive and 8(a)(3) Violations" 48 Boston U.L. Rev. 142, (1968).

In other words, where a showing has been made that an employers' acts have been inherently destructive of important employee rights the burden of going forward with the evidence shifts to Respondent to prove either cause or legitimate and substantial business justification. Having done so, the burden then shifts back to General Counsel to prove discriminatory animus, as having rendered the business justification pretextual.

The ALRB has held that the decision in Great Dane Trailers in effect transfers the burden of proof, on a showing

of discriminatory effect: "The employer has the burden of proving that it was motivated by legitimate objectives once the General Counsel has shown that the employer engaged in discriminatory conduct which would have adversely affected employee rights." Maggio Tostado, Inc., 3 ALRB No. 33 (1977), at 4.

Respondent argues in its Brief (at p. 106) that this language does not mitigate General Counsel's burden:

> "The shifting burden of proof which follows a showing of discrimination by the General Counsel does not eliminate the consideration of anti-union animus, it simply requires Respondent to justify through legitimate and substantial business motive what appears to be discriminatory conduct.
>
> As with a pattern of discrimination, the General Counsel must introduce evidence to prove anti-union animus."

This is somewhat misleading, however, as the previous discussion indicates, where General Counsel has shown the acts or statements to be "inherently destructive" of important employee rights.

In Laidlaw Corporation, 171 NLRB No. 175, 68 LRRM 1252 (1968), aff'd, 414 F. 2d 99, 71 LRRM 3054 (CA 7, (1969)), cert, denied, 397 U.S. 920, 73 LRRM 2537 (1970), see also, Note, 67 Mich., L. Rev. 1629 (1969), the by-passing of economic strikers in favor of inexperienced replacements was held to be conduct "inherently destructive" of employee rights and a violation of §8 (a) (3), in the absence of legitimate and substantial business justifications, without regard to the existence of anti-union animus on the employer's part. See also, American Machinery Corp. v. NLRB, 424 F. 2d 1321 (CA 5, (1970).

Discrimination has been found without motive where an employer did not offer jobs to experienced laid-off employees but at the same time hired new employees who had no experience. See, e.g., Ellenville Handle, Works, Inc. 331 F. 2d 564 (CA 2, 1964); 53 LRRM 1152. See also Warren Co., Inc. 90 NLRB 639, 26 LRRM 1273 (1950)

It has recently been held that an employer's failure to recall any of its former union-represented employees at the time it resumes operations after an economic layoff is "inherently destructive" of important employee rights under Great Dane Trailer. Rushton & Mercier Woodworking Co., 203 NLRB 123, 83 LRRM 1070 (1973), enforced, 86 LRRM 2151 (CA 1, 1974).

The Labor Board has similarly found "inherently destructive", the following employer activities, among others:

a.) discharge of an employee because he had not been referred by the union's hiring hall, Austin & Wolfe Refrigeration, Air Conditioning & Heating, Inc., 202 NLRB 135, 82 LRRM 1521 (1973);

b.) refusal to rehire an employee because he previously served as union steward, Northeast Constructors, 198 NLRB 846, 81 LRRM 1140 (19727!

c.) refusal to pay retroactive wage increases to those who continued on strike after a certain date, Portland Willamette Co., 212 NLRB 272, 86 LRRM 1677 (1974);

d.) refusal to honor a striker's unconditional offers to return to work where one of the objects of the strike was to obtain recognition of the union, The Barnsider, Inc., 195 NLRB 754, 79 LRRM 1587 (1972);

e.) the conditioning of an individual's employment status on whether he continued to file repetitive grievances, Hyster Co., 195 NLRB 84, 79 LRRM 1407 (1972), enf'd 83 LRRM 2091 (CA 7, 1973); See discussion in Morris, supra, Supp. 1971-75) at 62-3; and

f.) an employer's failure to recall its former union-represented employees at the time it resumes operation after an economic layoff, Rushton & Mercier Woodworking

Co., 203 NLRB 123, 83 LRRM 1070 (1973), enf'd. 86 LRRM 2151 (CA 1, 1974).

It is clear from this list that refusal to rehire a known union leader or the members of his immediate family shortly after an election, is conduct "inherently destructive" of important employee rights, for which proof of animus is unnecessary. Even if this were not the case, or if it were found on appeal that interference with employee rights was "comparatively slight", General Counsel has proven the existence of anti-union animus clearly, convincingly, and by a preponderance of the evidence.

5. Defenses;

Respondent, in defense, raises the following arguments:

a.) Prolonged absence in Mexico:

Several cases have held discharge to have been discriminatory, in spite of prolonged or unexcused absences, where the employee has been shown to have given proper notice to the employer. NLRB v. Wix Corp., 336 P. 2d 824 (CA 4; 1964); Mooney Air-Craft, inc., 63-1 142 NLRB 942, enf'd, 337 F. 2d 605 (CA 5; 1964), supplemental decision on other issues, 156 NLRB (No. 36); Rogers Mf g. Co., 155 NLRB No. 17 (1965); Atlas Engine Works, Inc., 129 NLRB No. 17 (1960); Waynline, Inc., 119 NLRB 1698 (1958); Gluck Bros., 81 NLRB 351 (1949).

The same conclusion has been reached where the real motive for discharge was the employee's union activity, rather than a failure to comply with notice of absence rules. Stevens dba Stevens Machine Co., 178 NLRB 144 (1969); Producers Grain Corp., 169 NLRB No. 169 (1968); Maryland Specialty Wire, Inc.,

163 NLRB No. 124 (1967); Evans Products Co., 160 NLRB No. 141 (1966).

Miguel Bautista's delay in returning from Mexico would be pretextual if offered in defense of a refusal to rehire, it having been held that discrimination following an unavoidably late return from a leave of absence or lay off, evidenced by an employer's hiring of inexperienced employees in preference to a competent worker, is a violation of §8(a) (3). Glickley dba Modern Steel Treating Co., 175 NLRB No. 175 (1969); Spotlight Co., Inc., 188 NLRB No. 114 (1971). See also, on illness as pretext, Louisiana Garment Mfg. Co., 161 NLRB No. 78 (1967); G.C. Lingerie Corp. of Alabama, 146 NLRB 690 (1964); Hunt Foods & Industries, Inc. (Southern Cotton Oil Crude Mill Division), 144 NLRB 959 (1963); Antonio Santiseban & Co., Inc., 122 NLRB 44 (1958); Fradkin, d.b.a. American Linen Service Co., 45 NLRB 902 (1942).

b.) Hiring of other union supporters:

The fact that other union adherents were hired does not negate the discriminatory effect caused by Respondent's refusal to hire the Ochoa family. It is unnecessary for an employer to refuse to rehire every union supporter, since discouragement can be accomplished by making examples of only a few of them. Agro Corp. 3 ALRB No. 64, (1977) (citing Reserve Supply of Long Island, Inc., 140 NLRB 330 (1962), 52 LRRM 1012, enf'd, 317 F. 2d 785, 53 LRRM 2374 (CA 2, 1963); NLRB v. Shedd-Brown Mfg. Co., 213 F. 2d 163, 34 LRRM 2278 (CA 7, 1954), enf'd., 103 NLRB 905, 31 LRRM 1591; Nachman Corp. v. NLRB 337 F. 2d 421, 57 LRRM 2217 (CA 7, 1964), enf'd., 149 NLRB 23, 55 LRRM 1249).

c.) Animus, knowledge, and concerted activities proven as to the father, were not proven as to the sons:

An employer may not discriminate against an employee because of the union activities of a relative, Amerace Corp., 217 NLRB No. 160, 89 LRRM 1187 (1975); Mission Valley Mills, 225 NLRB No. 59, 93 LRRM 1227 (1976); Vanella Buick Opel, Inc., 191 NLRB 805, 77 LRRM 1568 (1971) (chief organizer and son fired), and the NLRB has found employee discrimination simply by association, or family relation See, e.g., Roberts Press, 188 NLRB 454, 76 LRRM 1337 (1971) (mother); Hickman Garment Co. 216 NLRB No. 410, 88 LRRM 1651 (1975) (mother-in-law); Independent Stave Co. 208 NLRB 233, 85 LRRM 1394 (1974) (sister); Champion Papers Inc. v. NLRB 68 LRRM 2014 (1968) (cousins, husband's cousins); Hartman Co., Inc 187 NLRB No. 43 (1971) (brother); Forest City Containers, Inc., 212 NLRB No. 16, 87 LRRM 1056 (1974); McNally Enterprises, Inc., 3 ALRB No. 82 (1977) (husband).

Respondent argues in its Brief (at pp. 101-2) that there are two groups of Labor Board cases on discrimination against family members:

> The first is the situation posed where the employer explicitly indicates that an individual is not being hired because of his affiliation with an individual active in the union. These cases, where there is "direct proof" of an individual's affiliation with an individual who is exercising Section 7 rights, are quickly disposed of by the Board. In such, circumstances, the failure to hire an individual who is otherwise qualified becomes an 8(a)(3) violation without extended factual inquiry by the Board. See, Amerace Corporation, Swan Hose Division, 217 NLRB 942 (1975); The Colonial Press, Inc., 204 NLRB 852 (1973); Macon Textiles, Inc., 80 NLRB 1525 (1948).

> In a second group fall those cases where it is alleged that an employer has discriminated against an employee as a consequence of Section 7 activities where there is no "direct proof" that the individual is having his/her job status changed because of the activities of another individual. In these instances, where there is at most "indirect proof" of the reasons for discharge, the Board has gone to much greater length to consider the totality of circumstances to determine whether there is sufficient nexus between one individual's discharge and the known union activist to support the finding that the discrimination was due to another individual 's apparent union activities. See, Swiss Textile, Inc., 214 NLRB 36 (1974); Federal Paperboard, Inc., "206 NLRB 681 (1973) ; J.P. Stevens & Co., 179 NLRB 254 (1969); Big Y Supermarkets, 173 NLRB 405 (1968).

Assuming that Respondents counsel is correct in his characterization of the law, and assuming this were, an "indirect proof" case, there is here a clearly adequate nexus in the form of Respondent's family hiring practices, its knowledge of concerted activities on the part of other family members, its practice of hiring through the application of the father and its discriminator-discouragement of future applications for employment in their collective presence,

d.) The absence of a seniority system:

In general, the absence of a seniority system permits an employer to disregard an application for work made on a day when work is not available, and avoid the necessity of offering employment to the most senior crew member. However, where the employer has created, through its discriminatory acts or statements, an impression that it would be futile to continue applying, or where an employer promises to contact an employee as soon as work becomes available, and the employee reasonably relies on this representation to his or her detriment, then the employer

must not be permitted to enjoy the fruits of its wrongful behavior To hold otherwise would be to permit a discriminatory employer to schedule its job openings so as to coincide with periods of non-application by pro-union employees and effectively encourage non-application.

In NLRB v. Duval Engineering & Contracting Co., 311 F. 2d 291 (CA 5, 1962), a refusal to recall workers employed during a prior season because of their union activities was held unlawful. Where an employer's normal practice is to hire back laid-off employees on resumption of operations, even where no strict seniority system prevails, a refusal to rehire will be held discriminatory. Elsa Canning Co., 154 NLRB No. 139 (1965); Golden Valley Electric Assn. 102 NLRB 397 (1954); Shedd Brown Mfg. Co., 103 NLRB 905 (1953). See also, C.H. Sprague & Sons Co., 175 NLRB No. 61 (1969).

e.) The failure to make proper application:

It cannot be maintained that proof of application is an essential element in General Counsel's case. Where an employer raises the issue of non-application, General Counsel is required to go forward with the evidence, and demonstrate that the employers' acts were sufficient to create in the mind of a reasonable employee, a reluctance or sense of futility regarding re-application.

In Carter v. Gallagher, 452 F. 2d 315 (CA 8, 1971); Note, 41 U. of Cinncinati L. Rev. 250 (1972), a case arising under the 1964 Civil Rights Act, a fire department was found to have dis- j criminated against blacks, and to. have created an impression of the futility of application so deep, that when jobs were offered,

few blacks applied. The court ordered the fire department to take affirmative steps to counter the impression it had created, and advertise in minority communities for applicants.

The cases cited by Respondent in support of its argument That the discrimatees did not pursue their application for reemployment are inapplicable in light of their discouragement of re-application. Respondents reliance in its Brief (at page 97-8) on West Coast Growers & Packers, 42 NLRB 814 (1942), is also misplaced, since, in that case, there was no appropriate application, whereas here there had been at least one. Moreover, the seasonal nature of its employment was contradicted by Respondent's past pattern and practice of rehire and steady work with regard to these employees. Because the absence of evidence "to indicate that the alleged discrimatees would have been refused employment" was essential to West Coast Growers & Packers, that case is not applicable here.

The NLRB has held that an employee need not follow an employer's hiring procedure to the letter, where the circumstances make it clear that a refusal would result. Federal Mogul Corp., Sterling Aluminum Co. v. NLRB, supra. The burden is then placed on the employer to initiate reinstatement for any employees who would have been hired but for its unlawful conduct. Solboro Knitting Mills, 227 NLRB No. 89, 95 LRRM 1583 (1977).

In Macomb Blade and Supply, Inc., 223 NLRB No. 194 (1976), a failure to make formal application for work was held not to constitute a defense to a charge of discriminatory refusal to hire, where an employer made it known to a group of applicants that he

would refuse to hire them because of their union affiliation. The NLRB held that a failure to undertake a useless act is no defense to an unfair labor practice charge under §8 (a)(3). See also Goodwater Nursery Home, Inc., 222 NLRB No. 32 (1976); James K. Sterritt, Inc., and Concrete Haulers, Inc., 215 NLRB No. 143 (1974) .

f.) The existence of an alternative motive:

The ALRB has held that the presence of a legitimate motive does not automatically disprove the existence of an illegitimate one. Thus,

> "... the cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity; a business reason cannot be used as a pretext for a discriminatory firing." Dutch Bros., et. al. (1977) 3 ALRB No. 80, ALO Decision pg. 40 (quoting from NLRB v. Ayer Lar Sanitarium 436 F. 2d 45 (CA 9, 1970).

In S. Kuramura, 3 ALRB No. 49 (1977), at p. 12, the ALRB held:

> "Even where the anti-union motive is not the dominant motive, but may be so small as 'the last straw which breaks the camel's back', a violation has been established." (Citing NLRB v. Whitfield Pickle Co., 374 F. 2d 576, 582, 64 LRRM 2656 (5th Cir., 1967).

It has similarly been held by the NLRB:

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test' (Local 357, Teamsters v. Local NLRB, 365 US 667-675) and so long as a reason for referral or discharge is one proscribed by the Act, it is inmaterial that other valid reasons may also be present".

> International Bro. of Electrical Workers, Local 648 (Foothill Electrical Corp.), 182 NLRB 66 (1970), citing NLRB v. Local Union No. 38, United Assoc. of Journeymen, 388 F. 2d 679, 680 (CA 6).

g.) The absence of work:

The NLRB has held that it is unnecessary to establish the availability of work, where discrimination is proven. Alexander Dawson, Inc., 228 NLRB No. 24 (1977). This is especially the case where Respondent has made further pursuit of employment appear futile. The Loomis Co.,, 101 NLRB 1628, 1632, enfd. as modified, 210 P. 2d 377 (CA 5, 1954); Consolidated Steel Corp., et al. 108 NLRB 1041, 1044 (1954).

In Shawnee Industries, Inc., 140 NLRB 1451 (1963), enf't den, on other grounds, 333 F. 2d 221 (CA 10, 1963) the NLRB held refusal of an application for employment for discriminatory reasons to be a violation of Section 8 (a)(3), even where no jobs were available:

> Under the Act an Employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment for reasons proscribed by the Act, and the question of job availability is relevant only with respect to the employer's backpay obligation. At 1452-3. (citing Consolidated Western Steel Corporation, et al., 108 NLRB 1041, 1044; Akin Products Company, 99 NLRB 1270, 1275; Pacific American Ship owners Association, et *al.,* 98 NLRB 582, 596; Del E. Webb Construction Company, 95 NLRB 75,81; A.B. Swinerton, Richard Walberg and Howard Hassard, dba Swinerton and Walberg Company, 94 NLRB 1079, 1080; Arthur G. McKee and Company, 94 NLRB 399, 401; Daniel Hamm Drayage Company, Inc., 84 NLRB 458, 460, enfd. 185 F. 2d 1020 (CA 5). See also,

NLRB v. Swinerton, 202 f. 2d 511 (CA 9, 1953).

In its second footnote, the Board found a generalized discrimination had existed, rather than a denial with respect to a particular job vacancy:

> The Trial Examiner concluded that the case as to Talbot and Scott was tried only on the basis that they were not employed for alleged vacancies existing on or about the dates of the filing of their job application. He, thus, considered the possibility of vacancies at later dates to be an immaterial consideration. We agree with the exception of the General Counsel to the effect that with respect to these two employees the complaint alleged essentially that they were discriminated against in the consideration of their application for employment generally and not with respect solely to any particular job vacancies that existed only at or about the time of the filing of the applications.

In Southern Cotton Oil Crude Mill, 144 NLRB 959 (1963), decided after Shawnee and relied upon by Respondents in its Brief (at p. 99), the Board held that Shawnee did not apply to seasonal employment (at ft. 3). It has already been established, however, that Respondent did not employ the discriminatees on a strictly seasonal, or "particular season" basis. Moreover, Southern Cotton contained no allegation that the employer had created an impression of futility with respect to future applications.

In Apex Ventilating Co., 186 NLRB 534 (1974), it was again held that "job availability... will be properly left to compliance." (at ft. 1) See also, e.g., Lipsey, Inc., 172 NLRB No. 171 (TXD, 1968).

6. Interference, Restraint and Coercion

a). The Law in General;

Sections 1153(a) of the ALRA and 8(a)(1) of the NLRA

declare it illegal for an employer to "interfere with, restrain, or coerce" employees in the exercise of rights guaranteed under Sections 1152 and 7. As Professor German has pointed out:

> It is also generally agreed that, to establish a violation of Section 8(a)(l), it is not necessaryto demonstrate - by direct testimony of employees or otherwise - that particular employees were actually coerced. It is sufficient if the General Counsel can show that the employer's actions would tend to coerce a reasonable employee. This objective standard obviously facilitates the development of a record and the trial of an unfair labor practice case, and also avoids the need to place employees in the discomforting position of testi fying against their employer. The test for a Section 8(a)(1) violation is objective in a second respect. It is sufficient to demonstrate that the employer action has the effect of restraint or coercion. It is not necessary to demonstrate that the employer intended to produce that effect. German, Basic Test on Labor Law, 132 (1976).

Hence, under Section 8(a)(1), no proof of coercive intent or actual effect is required, the test being whether the employer's conduct reasonably tends to interfere with the free exercise of employee rights. Munro Enterprises, Inc., 210 NLRB 403, 86 LRRM 1620 (1974); NLRB v. Litho Press of San Antonio, 512 F. 2d 73 (CA 5, 1975); Melville Confections, Inc., v. NLRB, 327 F. 2d 689 (1964), cert, denied 377 U.S. 933 (1964). The essence of Section 8(a)(l), therefore, is a balancing of the interests of employee and employer. See e.g. discussion in Sheiber and Moore, supra, 33 La. L. Rev. at 5152. The NLRB has held:

> "Inference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." Cooper Thermometer Co.,

151 NLRB 502, 503, n.2, 59 LRRM 1967 (1965); American Freightways Co., 124 NLRB 146, 147, 44 LRRM 1302 (1959); see also Kawano, Inc., 3 ALRB No. 54 (1977); NLRB v. Illinois Tool Works, 153 F. 2d 811, 17 LRRM 811 (CA 7, 1946). Cf. Harlan's opinion in NLRB v. Burnup and Sims, T79 U.S. 21 (1964).

Professor Oberer, in an excellent law review article on "The Scienter Factor in Sections 8 (a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails", 52 Corn. L.Q. 491(1967) has suggested that Section 8(a)(l) is violated, either; (1) when any other 8(a) Section is violated, or (2) independently, as 8(a)(1) is broader than any of the more specific sections which follow it. Nonetheless, Respondent in its Brief (at p. 94) argues that:

> "Absent proof of discrimination there will be no basis to infer that any individual has been coerced in their exercise of Section 1152 rights and no violation of Section 1153(a) can be established.... Hence Proof of a violation of Section 1153(a) will rise and fall with the alleged violations of Section (c)."

This is clearly mistaken. While a violation of Section 1153(c is automatically also a violation of Section 1153(a), the standard of proof are by no means identical or reversible. Cooper Thermometer Co., supra; Oberer; supra.

Thus, in an 8(a)(1) case, a business excuse does not insulate an employer, if its actions can reasonably be said to interfere with the free exercise of employee rights under the Act. Evansville Ohio Valley Transportation Co., 223 NLRB 186 (1976); Champion Pneumatic Machinery Co., 152 NLRB 300 (1965); International Shoe Co., 123 NLRB 682 (1959).

b). Implied Threats and Impression of Surveillance;

General Counsel states in her Brief (at p. 21) that although the threat of loss of employment in Respondent's comments of February, 1976, were not specifically set forth in the complaint the Board should nonetheless find a violation, since the allegation is sufficiently related to the subject matter of the complaint and the charge was fully litigated at the hearing, citing American Boiler Mfrs. Assn. v. NLRB, 366 F, 2d 815, 63 LRRM 2236 (8th Cir., 1966), Associated Home Builders v. NLRB, 352 F. 2d 745, 735-755, 60 LRRM 2345 (9th Cir., 1965), Alexander Restaurant, 228 NLRB No. 24, 95 LRRM 1365 (1977); and Sunnyside Nurseries, Inc., (1977) 3 ALRB No. 42, pg. 18. While General Counsel did not specifically request it, the same might be said of the impression of surveillance created by Respondents' agent Raphael Rodriquez.

The statement and act in question were part of an allegation of discrimination, and closely related to the subject matter. Given the length of the hearing, Respondent cannot have been injured by a lack of adequate notice, and these matters were fully litigated on the record. Having found the conversation and surveillance to have taken place as alleged by the discriminatees, I direct that the pleadings be conformed by inclusion of violations of the Act by threat of loss of employment and creation of an impression of surveillance.

Section 1155 of the Act and Section 8(c) of the NLRA permit an employer to communicate his or her views of unionism to employees, so long as the communication contains "no threat of reprisal or force, or promise of benefits." See, e.g. discussion

in NLRB v. Gissel Packing Co.. 395 U.S. 575, 618-619 (1969). Threatening employees with a loss of employment if they support the union is clearly a violation of Section 1153(a). River Togs, Inc., 382 F. 2d 198, 65 LRRM 2987 (2nd Cir., 1967), Nicholas-Dove:

S.E., Inc., 414 F. 2d 561, 71 LRRM 3149 (3rd Cir., 1969) cert, den., 400 U.S. 831 (1970).

Professor German has written, of such implied threats, that they are the "most vexing" cases, yet he has also stated:

> "It is clear that language which on its face can be read either as coercive or not can be held to constitute an unfair labor practice when the language is read in light of other conduct on the part of the speaker, such as discriminatory discharges, surveillance of employees and threatening interrogation, at least when that other conduct is rather directly related in time and space to the speech which is under consideration by the Board." German, supra at 151.

While the leaflets distributed by the CWF to Respondents' employees contain mistranslations, and perhaps even distortions, as UFW counsel charges, they contain no threat of reprisal or promise of benefit, and can therefore not themselves constitute evidence of an unfair labor practice. This is not, however, the case with Respondents' threat to "pull out the vines." While it is clear that no violation occurs where the employers' remarks are "limited to a prediction of economic problems if the union [comes] in", this is not the case where an employer threatens "to close down the plant rather than meet the union's demands." Surprenant Mfg. Co. v. NLRB, 341 F. 2d 756, 58 LRRM 2484 (CA 6, 1965); Sinclair CO., 164 NLRB No. 49, 65 LRRM 1087 (1967), enfd., 397 F. 2d 157, 68 LRRM 2720 (CA 1, 1968).

7. Discrimination for Filing Charges;

Section 1153(d) and Section 8(a)(4) make it unlawful "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

According to Professor Gorman, Basic Text on Labor Law, supra, at 142:

> "In determining whether discharge or discipline was motivated by an employee's recourse to the Board, rather than by legitimate work-related reasons, the Board will find facts and draw inferences just as it commonly does in case of discrimination arising under Section 8(a) (3)..."

Thus, the standards for finding a violation of Section 8(a)(4) are essentially the same as under Section 8(a)(3). NLRB v. Fred P. Weissman Co., (1948), 23 LRRM 2131; cert, den. 336 U.S. 972 (1949), NLRB v. Vacuum Platers, Inc., 60 LRRM 1060, enf'd 374 F. 2d 866, 64 LRRM 2366 (CA 7, 1967).

The NLRB has held that an employer violates Section 8(a)(3) and (4) of the LMRA by refusing to re-employ a laid-off employee who had filed an unfair labor practice charge against his or her employer. Glenroy Const. Co. v. NLRB, 527 F. 2d 465, 91 LRRM 2074 (C.A. 7, 1975), enforcing 88 LRRM 1198.

Respondent in its Brief (at p. 108) concedes it knew the discriminatees had resorted to Board process, but requests the ALC to take judicial Notice of the first page of the new set of regulations issued by the Board, which state, in pertinent part:

> The Board's first regulations were adopted by emergency orders effective August and September, 1975, to coincide with the effective date of the Agricultural Labor Relations Act on August 28, 1975. Those regulations governed

> "the processing of cases originating in the Board's regional offices from September 1,1975, through February *6,* 1976, when the regional offices were closed for lack of operating funds. While the regulations remained in effect until next revised in 1976, the cases to which they applied originated during this first period of operation.
>
> Following funding of the Board in July, 1976, the Board revised its regulations extensively in light of its initial experiences. These revisions were adopted by emergency orders in the fall of 1976, effective December 1, 1976, to coincide with the date on which the regional offices opened and began accepting petitions.

The Board has recognized that the timing of a discharge is one basis for finding it to have been discriminatorily motivated, S. Kuramura,3 ALRB 49 (1977), yet the date of resumption of ALRB activities in Napa while discussed at length by counsel in hearing was not proven by documentary or testimonial evidence. Counsel for the UFW cites the filing of an amended charge in November, 1977, in its Brief (at p. 46) as important to the issue of timing,, and while no dates can be pinpointed with accuracy, it can be seer that there is a coincidence in timing with the general period of renewal of Board activity, and concern would be likely to re-focus at this time on earlier unresolved charges.

In NLRB v. Scrivener, 405 U.S. 117, 79 LRRM 2587 (1972), the U.S. Supreme Court endorsed a liberal construction of 8(a)(4) to facilitate a policy of encouraging the free flow of communications to the Board, and promote enforcement of the Act's protective provisions:

> This broad interpretation of §8 (a) (4) accords with the Labor Board's view entertained for more than 35 years. Section 8 (a)(4) had its origin in the

> National Industrial Recovery Act, 48 Stat. 195. Executive Order No. 6711, issued May 15, 1934, under that Act (10 NRA Codes of Fair Competition 949), provided, "No employer ... shall dismiss or demote any employee for making a complaint or giving evidence with respect to an elleged violation ...." The first Labor Board interpreted that phrase to protect the employee not only as to formal testimony, but also as to the giving of information relating to violations of the NLRA. New York Rapid Transit Corp., 1 N.L.R.B. Dec. 192 (1934)(affidavits) Ralph A. Freundlich, Inc., 2 N.L.R.B. Dec. 147,"T48 (1935) (state court testimony .... The approach to §8(a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose. Id. at 122 and 124).

As was stated in United Brotherhood of Carpenters, 195 NLRB 799 (1972), however,

> "The Board at various times, in cases which need not here be cited, had indicated the necessity for continuing to a finding of violation of Section 8(a)(4) in addition to a finding of 8(a)(3) violation. Conversely, it has declared an 8(a)(4) finding unnecessary where 8(a)(3) has been found. Whether as it has recently said in another connection, "Board precedent on the issue is something less than a model of clarity," is not for me to say." (citing Linden Lumber Division, Summer & Co. , 190 NLRB No. 116.)

And in Hoover Design Corporation, 167 NLRB 461, 462, it was held:

> The discharge of an employee because he made known a decision to seek Board assistance on behalf of himself or for himself and others is an independent violation of Section 8(a)(4).

While Hoover Design was not enforced by the Court of Appeals for the Sixth Circuit, NLRB v. Hoover Design Corporation, 402 F. 2d 987 (CA 6, 1968), this case appeared prior to the U.S. Supreme Courts' decision in the Scrivener case, supra, and was based on a strict construction of Section 8(a)(4). I therefore conclude that

Respondent independently violated §1153(d) of the Act by discriminating against the Ochoas for having filed charges with the ALRB.

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The Remedy;

As Professor Morris has stated:

> Remedies for employer discrimination in violation of Sections 8(a)(3) and (4) are tailored to the discrimination involved and are as varied as the violative discriminatory acts. In the typical discrimination case where an employee is discharged for union activity or discriminated against because of charges or testimony under the Act, the Board normally orders reinstatement of the employee with back pay in addition to the posting of a notice in which the employer states that he will not engage in further discriminatory activity and will take the affirmative action ordered. Morris, supra at 854.[citing Chase National Bank, 65 NLRB 827, 829, 17 LRRM 255 (1946); cf. Phelps Dodge Corp. v. NLRB, 313 US 177, 8 LRRM 439 (1941); LaidTaw Corp., 171 NLRB No. 175, 68 LRRM 1252 (1968), enforced, 414 F. 2d 99, 71 LRRM 3054 (CA 7, 1969), cert, denied, 397 US 920, 73 LRRM 2537 (1970); Am. Machinery Corp. v. NLRB, 424, F. 2d 1321, 73 LRRM 2977 (CA 5, 197077 Little Rock Airmotive, 182 NLRB No. 98, 74 LRRM 1199 (1970)].

Respondent must make the discriminatees whole for all losses suffered by reason of their refusal of rehire, including any wage increases, increases in work hours, bonuses or vacation pay given Respondent during the period when the discriminatees would have been working, but for their discriminatory refusal to rehire. Interest should be computed at the rate of seven percent per annum. Sunnyside Nurseries, Inc., supra, citing F.W. Woolworth Co., 90 NLRB 289, 26, LRRM (1950); NLRB v. Seven Up Bottling Co., 344 U.S. 344, 31 LRRM 2237 (1953) .

The discriminatees, who have already been reinstated, must be ordered to be made whole without prejudice to their seniority or other rights and privileges enjoyed by employees who did not suffer the deprivation of unemployment due to violations of the Act.

Valley Farms and Rose J. Farms, 2 ALRB No. 41 (1976); Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

A "Notice to Employees" is appended to the Decision, and Respondent will be ordered to read this Notice in English, Spanish and Portuguese to its assembled employees during working hours, at a time designated by the Regional Director, and to post it, in English, Spanish and Portuguese at conspicuous places on Respondent's property for a period of 60 days.

The reading of this Notice is to be followed by a question and answer period in which a Board Agent will be permitted to further explain employee rights under the Act. Mailing or distribution of the Notice should be made to the last-known home address of all 1976 and 1977 peak-season employees, and all current employees.

Agents of the Board will be directed to visit Respondent's premises next year to check on the effectiveness of these remedies See, e.g., Valley Farms and Rose J. Farms, supra. This remedy is indicated by testimony to the effect that employees of Respondent have been threatened and intimidated from engaging in union membership and activity.

The UFW requests that the ALO order expanded access in its Brief (at p. 48):

> "C. That the UFW should be guaranteed the right of access immediately upon the effective date of the Order, and continuing thereafter for a period of no less than twelve months regardless of the pendency of the challenge to the certification and the refusal to bargain." (citing Sunnyside Nurseries, supra.)

In addition, the UFW requests:

"G. That Respondent make available to the UFW sufficient space on a convenient bulletin board for its posting of notices and the like, for a period of twelve (12) months from Respondent's beginning compliance with the mandates of a decision and order, and to provide the UFW the names and addresses of all employees who will receive the notice." Id.

It does not appear from the evidence, however, that either form of expanded access is necessary, nor was any proof or argumentation offered by the UFW at hearing or in its Brief to support these prayers for relief, and they are, for these reasons, denied.

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

ORDER

The Respondent, C.K. Mondavi and Sons d.b.a. Charles Krug Winery, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the United Farm Workers Union (UFW), or any other labor organization, by unlawfully discharging, refusing to hire or recall, or in any other manner discriminating against individuals in regard to their hire, rehire, or tenure of employment, or any term or condition of employment, because of their union sympathies, or engagement in union activity, or because they filed charges under the Act, except as authorized by Sections 1153(a), (c) and (d) of the Act.

(b) In any other manner threatening, creating an impression of surveillance, or interfering with, restraining or coercing employees in the exercise of their rights under Section 1152 of the Act, to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain

from any and all such activities except as authorized in Section 1153(a) of the Act.

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

(a) Make Miguel Ochoa Bautista, Miguel Ochoa Zamora, Jr., Alejandro Ochoa Zamora, Alberto Ochoa Zamora, and Gonzalo Ochoa Zamora whole, for any and all losses they may have suffered as a result of their termination, without prejudice to their seniority or any other rights and privileges.

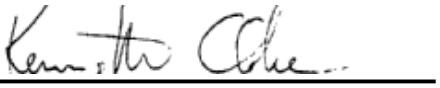
(b) Preserve and upon request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay due under the terms of this Order.

(c) Give to each employee hired up to and including the peak employment season in 1978 copies of the Notice attached hereto and marked "Notice to Workers. "Copies of this notice, including appropriate Spanish and Portuguese translations, shall also be furnished by Respondent for distribution by the Regional Director for the Sacramento Regional Office. Respondent is required to explain to its employees at the time the Notice is given to them that it is important that they understand its contents, and Respondent is further required to read the Notice to all of its employees during working hours, and to post it in a conspicuous and suitable location on Respondent's property, including all places where notices to employees are customarily posted.

(d) Permit a Board Agent to conduct a question and answer period among its assembled employees immediately after the reading of the Notice.

(e) Mail or otherwise distribute the Notice to the last-known home address of all 1976 and 1977 peak-season employees not otherwise notified.

(f) Notify the Regional Director following in the Sacramento Regional Office within twenty (20) days following receipt of a copy of this Decision of the steps taken to comply therewith, and continue to report periodically thereafter until full compliance, is achieved.



DATED: June 26, 1978

KENNETH CLOKE
ADMINISTRATIVE LAW OFFICER

NOTICE TO WORKERS

After a hearing in which all parties presented evidence, an Administrative Law Officer representing the Agricultural Labor Relations Board has found that C. Mondavi & Sons doing business as Charles Krug Winery have engaged in violations of the Agricultural Labor Relations Act, and we have been ordered to notify all employees that we will remedy these violations, and that we will respect employee rights in the future.

All Mondavi employees are free to support, become or remain members of the United Farm Workers of America (UFW), or any other union. Employees may wear union buttons or pass out and sign union authorization cards or engage in other organizational efforts including passing out literature or talking to fellow employees about the union of their choice, provided this is not done at times and in a manner that does not interfere with doing the job for which they were hired.

We also say:

The Agricultural Labor Relations Act is a law that gives all farm workers the right:

(1) to organize themselves;

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

(3) to bargain as a group and choose whoever they wish to speak for them;

(4) to act together with other workers in getting a contract helping to protect one another;

(5) to decide not to do any of these things. We promise that we will not do anything in the future that

forces you or stops you from doing any of these things.

Especially:

(1) We will not discriminate against Miguel Ochoa Bautista, Alejandro Ochoa Zamora, Miguel Ochoa Zamora, Jr., Alberto Ochoa Zamora, or Gonzalo Ochoa Zamora, and we will compensate them for any losses they have suffered as a result of our illegal refusal to rehire them.

(2) We will not discharge or refuse to rehire any employee for engaging in union activity.

(3) We will not threaten employees with discharge in order to discourage union activity.

(4) We will not attempt to spy or create an impression that we are spying on employees who desire unionization.

(5) We will not penalize any employee for filing charges with the ALRB.

DATED:_____

C. MONDAVI & SONS
C. Krug Winery

By:_____

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