

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PROHOROFF POULTRY FARMS,)	
Respondent,)	Case No. 76-CE-26-R
)	
and)	
)	
UNITED FARM WORKERS)	5 ALRB No. 9
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

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

On July 1, 1977, Administrative Law Officer (ALO) Paul Albert issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions ^{1/} and a supporting brief. Respondent also filed a reply brief to the General Counsel's exceptions and subsequently submitted a motion to correct transcript with a supporting memorandum.

On July 15, 1977, the Charging Party (UFW) filed a motion to consolidate exceptions, in this and another proceeding involving the same Respondent, pursuant to 8 Cal. Admin. Code

^{1/} Respondent alone ordered transcripts; it contends that the General Counsel cannot receive the benefit of the extended filing period for filing exceptions. It is the policy of this Board to allow the same extension of the filing period for all parties to an unfair labor practice proceeding when the time for filing is extended for any party.

20244, and Respondent filed a motion in opposition thereto. The UFW's motion was denied by the Board in Prohoroff Poultry Farms, 3 ALRB No. 87 (1977).

The Board has considered the record, as corrected,^{2/} and the attached Decision in light of the exceptions and the briefs of the parties, and has decided to affirm the ALO's rulings, findings, and conclusions, as modified herein, and to adopt his recommended Order, with modifications.

The ALO concluded that Respondent discriminatorily refused to rehire Maria Hernandez in violation of Section 1153(c) and (a) of the Act some weeks after she had been lawfully laid off. We do not agree with that conclusion. In our judgment, the record evidence does not establish that Respondent failed or refused to rehire Mrs. Hernandez because of her union membership or union activity. We find that the General Counsel failed to prove by a preponderance of evidence that Mrs. Hernandez applied for rehire at a time when work was available.

Mrs. Hernandez was first employed, as an egg gatherer, on April 5, 1975. Later that month, she was laid off for a four-week period and in June, 1975, she was laid off for a six-week period. She returned to work in August but was again laid off on November 7, 1975. She testified that she knew, from her own experience, that the poultry flock to which she had been

^{2/} As the General Counsel, the Charging Party, and the ALO concurred in the proposed corrections set forth in Respondent's motion, its request for transcript corrections is hereby granted, as follows: at page 230, line 3, change "two" to "one"; at page 606, lines 10 and 18, change "21" to "11".

assigned would soon enter a forced moulting period, during which time hens are inhibited from laying eggs by a reduction in their food and water intake. Respondent explained that moulting periods usually run about a six-week cycle and are warranted whenever hens begin producing a soft-shell egg. During such periods, as the ALO found, there is a decreased need for chicken feeders and egg gatherers. We agree with the ALO's finding that Mrs. Hernandez was laid off because of a lack of work and that, in view of her employment history, she was the logical person in her crew to be selected for layoff at that time.

On December 11, 1975, the UFW filed an unfair labor practice charge in which it alleged that Mrs. Hernandez had been discriminatorily discharged on November 7. At some time during December, 1975, on a date or dates unknown, Mrs. Hernandez sought but was denied reemployment on the grounds of unavailability of work.

We note initially that a representation election had been held in a unit of Respondent's employees on October 24, 1975, approximately two weeks prior to the layoff. See, Prohoroff Poultry Farms, 2 ALRB No. 56 (1976). The ALO considered but rejected Mrs. Hernandez' role in that election as a factor in her layoff, finding that Respondent lacked knowledge of her minimal activity in behalf of the UFW, but he nevertheless found that Respondent later refused to reinstate her because of her union activity. He assumed that Respondent's receipt of the December 11, 1975, unfair labor practice charge established its knowledge of her involvement with the union and found that its

subsequent refusal to rehire her was based on anti-union animus. As the General Counsel neither established, nor attempted to establish, that Mrs. Hernandez applied for work after service of the charge, there is no basis in the record for the ALO's conclusion that she was denied reinstatement for discriminatory reasons.

The General Counsel attempts to refute Respondent's lack-of-work defense by pointing to the alleged hiring of two part-time students, Oscar Jimenez and Sylvia Garcia, and the transfer of employees from other departments to perform tasks previously assigned to Mrs. Hernandez after she had been laid off.

The record evidence establishes that Jimenez and Ms. Garcia were hired much earlier than Mrs. Hernandez: Jimenez was hired on August 7, 1974, Ms. Garcia on October 5, 1974,^{3/} and Mrs. Hernandez on April 5, 1975. Placing considerable reliance on Respondent's payroll records, the ALO found that when more employees were needed in Mrs. Hernandez' former crew (Group No. 1) between December 28, 1975 and January 11, 1976,

^{3/} Respondent contends, and the ALO found, that Jimenez and Ms. Garcia usually worked on weekends and holidays in various departments as needed. According to employment logs admitted into evidence, their work record after October 20, 1975 is as follows:

Oscar Jimenez worked in Group No. 1 daily from December 22 through 26. He also worked on November 1, 22, 27, 28, 29 and on December 6 and 9 in Group Nos. 2 and 3 as well as in Department 21. Many of the foregoing dates fell on Saturdays or coincided with the Thanksgiving and Christmas holidays.

Sylvia Garcia worked in Group No. 1 daily between December 24 and 28. All of her previous work dates fell on Saturdays and Sundays: October 25, 26, November 1 (Group Nos. 1 and 9); November 8 (Department 21); November 15, 16, 22 (Group No. 1).

Respondent filled the positions with persons who had not been regularly assigned to that group, but it was not established that any of these individuals were new hires. Mrs. Hernandez testified that she sought rehire once, or perhaps twice, during the month of December but did not specify the particular dates. Therefore, General Counsel has not established either that new employees had been hired after Mrs. Hernandez' layoff or that she had applied for rehire when work was available, on or about December 28, or at any time thereafter. Accordingly, we find that the General Counsel has failed to prove that Mrs. Hernandez applied for rehire at a time when work was available. Central Air Corporation, 216 NLRB 204, 89 LRRM 1063 (1975).

There remains for consideration the General Counsel's allegation, and the ALO's finding, that Respondent violated its own recall policy when it hired new employees before recalling Mrs. Hernandez. The General Counsel has failed to establish that Respondent had a policy of recalling laid-off employees. Moreover, we have already found that no new employees, or employees with less seniority than Mrs. Hernandez, were hired or recalled after she was laid off.

Accordingly, we hereby dismiss the allegations of the complaint which pertain to the layoff and failure to rehire Mrs. Hernandez.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Prohoroff Poultry Farms, its officers, agents, successors and

assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by unlawfully discharging, laying off, refusing to reinstate, changing working assignments of, or in any other manner discriminating against, employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized by Labor Code Section 1153(c).

(b) In any other manner, interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively, through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Offer to Arnulfo Jimenez reinstatement to his former or substantially equivalent employment and make him whole for any loss of pay and other economic losses he has suffered, as a result of his layoff, between December 1, 1975, and his subsequent reinstatement on December 24, 1975, plus interest thereat at seven percent per annum, in accordance with the formula set forth in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

(b) Preserve and, upon request, make available

to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due under the terms of this Order.

(c) Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereafter.

(d) Post copies of the attached Notice, at times and places to be determined by the Regional Director, for a period of 12 months. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(e) Mail copies of the attached Notice in all appropriate languages, within 31 days from the date of issuance of this Order, to all employees employed during the payroll periods which include the following dates: December 1 through December 24, 1975.

(f) Arrange for a representative of Respondent or a Board Agent to distribute copies of, and read, the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such time(s) and place(s) as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The employees are to be compensated at their hourly rate for work-time lost during

this reading and the question-and-answer period. The Regional Director shall determine any additional amounts due workers under Respondent's incentive system as well as rate of compensation for any nonhourly employees.

(g) Hand a copy of the attached Notice to each of its present employees and to each employee hired during the next 12 months.

(h) Notify the Regional Director in writing, within 31 days from the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: February 7, 1979

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act. The Board has told us to send out and post this Notice.

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

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

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

Because this is true we promise that:

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

Especially:

WE WILL NOT fire, lay off, refuse to rehire or otherwise discriminate against any employee because he or she joined or supported the UFW or any other union.

WE WILL reinstate Arnulfo Jimenez to his former job and give him back pay for the time he was out of work between his layoff on December 1, 1975, and his subsequent reinstatement on December 24, 1975.

Dated:

PROHOROFF POULTRY FARMS

By: _____
Representative Title

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Prohoroff Poultry Farms (UFW)

Case No. 76-CE-26-R
5 ALRB No. 9

ALO DECISION

The ALO concluded that Respondent laid off Arnulfo Jimenez, and later refused to rehire him and Maria Hernandez, because of their union activity, in violation of Labor Code Section 1153(c) and (a). He also concluded that Respondent did not discriminatorily lay off Mrs. Hernandez, as he found that she was the logical person in her crew to be laid off when the poultry group to which she had been assigned as a chicken feeder entered a forced-moult period that reduced normal staff requirements.

BOARD DECISION

The Board dismissed all allegations relative to Mrs. Hernandez, agreeing with the ALO's conclusion that she was not discriminatorily laid off, but finding, contrary to the ALO, that the General Counsel had failed to prove that she applied for rehire at a time when work was available. The Board affirmed all other findings and conclusions of the ALO and modified his recommended Order accordingly.

REMEDY

The Board ordered Respondent to cease and desist from unlawfully laying off or refusing to reinstate employees because of their union activity, and to make Jimenez whole for any loss of pay or other economic losses he suffered as a result of his layoff.

* * *

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

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



PROHOROFF POULTRY FARMS,)

Respondent,)

and)

UNITED FARM WORKERS OF)
AMERICA, AFL-CIO,)

Charging Party.)

CASE NO. 76-CE-26-R

Richard Tullis
for the General Counsel

James K. Smith Gray, Gary, Ames & Frye of San
Diego, California for the Respondent

Jeffrey P. Sweetland
of Los Angeles, California
for the Charging Party

DECISION

STATEMENT OF THE CASE

PAUL ALBERT, Administrative Law Officer: This case was heard by me on
May 23, 24, 25, 26, and 27, 1977 in Del Mar, California. ^{1/} The complaint dated
February 24, 1977,

^{1/} Unless otherwise specified, all dates herein refer to 1975. An unspecified
reference to the month of January will refer to January 1976.

is based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW"). The charges were duly served on the Respondent, Prohoroff Poultry Farms, on January 29, 1976. The complaint alleges that the Respondent committed various violations of the Agricultural Labor Relations Act (hereafter referred to as the "Act").

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel, the Respondent and the Charging Party filed briefs after the close of the hearing.

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

FINDINGS OF FACT

I. Jurisdiction

Respondent, Prohoroff Poultry Farms, is engaged in agriculture in San Diego County, California, as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

It was also admitted by the parties and I find that the UFW is a labor organization within the meaning of

Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint charges that the Respondent violated Section 1153(a) and (c) of the Act by the discharge and subsequent refusal to rehire of two employees in November and December of 1975 because of their membership, assistance and sympathy for the UFW. The Respondent denies that it violated the Act in any respect.

III. The Facts

A. Background

Respondent is a poultry farm located in San Marcos, California. In November 1975 Respondent employed approximately 140 persons. John Prohoroff was its general manager Victor Kolesnikov and Greydon Koellmann were part of the management staff.

The farm was divided into various departments for cost-accounting purposes. Roberto Jimenez was the supervisor of the egg production department. This department included the gathering of eggs and the feeding and care of Respondent's 1,153,000 egg-laying chickens. These chickens were divided by age into five separate groups.

A union representation election was held at Respondent

on October 24 pursuant to a petition for certification filed by the UFW. The vote was extremely close.^{2/} The UFW lost the election.

Arnulfo Jimenez worked for Respondent as an egg gatherer and feeder in October and November. He first worked for Respondent in December 1970. He worked until November 1971 when he left Respondent for approximately two years. Except for a one month period, he worked for Respondent continuously from December 1973 until December 1975.

Jimenez was a supporter of the UFW during the election campaign. He spoke in favor of the union at a meeting sponsored by the company to discuss the election. He was elected by other UFW supporters to be an election observer at the polls.

Maria Hernandez began work as an egg gatherer for Respondent on April 5. She was laid off in late April for four weeks and in late June for six weeks. After her re-employment in August, she worked until November.

Hernandez supported the union during the election campaign. She talked to employees at work about the union and attended union meetings. Her husband, Raymundo Hernandez, was also an employee of Respondent and an advocate of

^{2/} See Prohoroff Poultry Farms, 2 ALRB No. 56 (1976).

the union.

B. The Layoffs

Arnulfo Jimenez and Maria Hernandez were both assigned to work with the same group of chickens in October and early November. Respondent labelled this group as "Group 1." Group 1 chickens were placed in force molt in two divisions in October and November.

Force molt is a process designed to inhibit the laying of eggs. The chickens are not fed for a period of ten days. This puts them into a state of shock. When the feeding begins again, they do not lay eggs for approximately eight weeks. During this period, they use the nutrients in their food to build up their bodies rather than to produce eggs. As a result, when the chickens begin to lay eggs again, the eggs are of a higher quality.

The egg gatherers and chicken feeders are not needed during most of the force molt period. When the Group 1 chickens were placed in force molt on November 3, supervisor Roberto Jimenez transferred some of the Group 1 employees to other work assignments. As a result, only five employees - including Maria and Raymundo Hernandez and Arnulfo Jimenez - were assigned to the group during the first week of November.

When a chicken group went into force molt, it was Respondent's policy to attempt to place employees assigned to the group in other work assignments. If employees were laid off, it was the policy prior to mid-September to lay off the most unskilled workers first. Seniority was not considered. Supervisor Roberto Jimenez had complete authority to lay off or reassign employees within the egg production department on this basis.

On September 18, Respondent joined the San Diego Employers Association. This association advised Respondent on a wide variety of aspects concerning its relationship with employees. One of its recommendations was to institute a seniority system to determine layoffs. Another recommendation was to increase employee wages and fringe benefits. These recommendations were immediately put into effect.

John Prohoroff decided that layoff decisions should be made by management personnel rather than by supervisors. It was decided that seniority for layoff and rehiring purposes would be determined within each chicken group rather than from the egg production department as a whole. Such a seniority system was consistent with Respondent's practice of assigning a group of employees to a chicken group when it first arrived in the egg production department. These employees would remain with this chicken group until it was

sold approximately two years later. Employees who were transferred or laid off during force molt periods would be reassigned to the group when it went back into full production. It was Respondent's theory that this system of work assignment motivated the employees to greater diligence because the piece-work nature of their pay resulted in higher wages if the chickens were relatively healthy and laying many eggs.

Maria Hernandez was the first person to be laid off under the new program. This decision was made at a management meeting. Prohoroff testified that the decision was based on the fact that analysis of employee records showed Hernandez to have the least seniority of all employees remaining in Group 1. She was laid off on November 9.

Arnulfo Jimenez was transferred to another chicken group at this time. He worked with this group until December 1 when it went into force molt and he was laid off. The decision to lay off Jimenez was made by management personnel. It was the first time Jimenez had ever been laid off by Respondent.

Arnulfo Jimenez and Maria Hernandez both filed charges against Respondent alleging that their respective layoffs were related to their UFW activities. These charges were combined by the UFW into a single document which was first served on Respondent on December 11.

C. The Refusals to Rehire

Raymundo Hernandez was transferred to another work assignment when his wife was laid off. During December, he asked supervisor Roberto Jimenez to rehire Maria Hernandez. Jimenez informed him that there was no work available and that she would be rehired when work became available. Maria Hernandez testified that she made the same request to Jimenez. Although he denied having spoken directly with her, Jimenez acknowledged seeing her at the farm when she brought lunch to her husband.

Maria Hernandez was never rehired by Respondent. John Prohoroff testified that a chicken group was sold prematurely in February 1976 because of economic conditions in the egg market. The group sold was not Group 1, but the sale diminished the need for employees. However, a number of people were employed as egg gatherers in Group 1 in December who had not been working there in the weeks prior to the force molt.

Arnulfo Jimenez twice approached John Prohoroff directly with a request for reemployment. The first request took place in mid-December. Prohoroff informed him that there was no work available and that he would be rehired when his chicken group came out of force molt.

Jimenez approached Prohoroff a second time on December

23. In addition to a request for reemployment, Jimenez stated that his family was in poor financial circumstances, that their situation was particularly difficult' because of the proximity of Christmas, and that he now realized that the UFW would not benefit the employees. He stated that if he was rehired, he would drop the charges he had filed against Respondent and no longer engage in pro-UFW activities. Prohoroff informed him that union activities were not a factor in his layoff and that there was no work available.

Later that day, Prohoroff discussed this matter in a meeting with Kolesnikov and Koellmann. Prohoroff testified that they decided to find work for Jimenez out of sympathy for the financial plight of his family and because of the importance of Christmas to the employees. Kolesnikov then sent a memorandum to supervisor Roberto Jimenez concerning their decision. The supervisor was instructed that Arnulfo Jimenez was to be reemployed but that he had to sign the memorandum as a condition of reemployment.

The memorandum was in English and stated:

"John J. Prohoroff has instructed me [Kolesnikov] to create a temporary job for Arnulfo Jimenez until he is needed on his old job. Please put him to work somewhere until his old job is available. Apparently he thought that he was temporarily laid

"off because of his union association. Please inform him that his temporary lay off and his present temporary . job has nothing to do with his union activities, and that he is free to continue to do as he pleases with that respect."

Roberto Jimenez gave this memorandum to Arnulfo Jimenez when informing him of the reemployment. As neither man spoke or read English and Roberto Jimenez did not know what the memorandum stated, Arnulfo Jimenez took it with him and subsequently returned it signed. He returned to work the following day.

ANALYSIS AND CONCLUSIONS

Respondent asserts that Jimenez and Hernandez were laid off and refused reemployment due to economic necessity and their seniority status. The layoff was necessary because the force molting of chickens led to a decrease in the number of employees needed to operate the farm. When Group 1 went into force molt in November, only a skeleton crew was needed to tend it as opposed to the six or more employees required for feeding and egg gathering during other periods. Maria Hernandez was the Group 1 employee with the least seniority. She was selected for layoff on this basis and Jimenez was transferred to another group labelled "Group 3." When Group 3 went into force, molt in

December, Jimenez was laid off as he had low seniority status within this group. When Jimenez first requested re-employment, there was no work available and so he was not rehired. Although work was still not available on December 24, Jimenez was rehired on this day solely because management officials had sympathy for the financial plight of his family and because they were aware of the importance of Christmas to the employees. These explanations will be analyzed first with respect to the refusals to rehire.

I. The Refusals to Rehire

Group 1 was placed in force molt in two stages. A small number of chickens went into force molt on October 6 and the remainder on November 3. The chickens continued to lay eggs for approximately one week after the commencement of the force molt process. Light feeding began after ten days and egg laying returned to its former volume after eight weeks of feeding.

The employment logs reflect this activity in the group. Three feeders were employed on a full time basis commencing November 15. At this time, all the chickens were receiving some food. Only one or two egg gathers per day were employed from November 10 until mid-December. The number of egg gatherers each day from December 15 until December 28 is as

follows:

DATE: December	15	16	17	18	19	20	21	22	23	24	25	26	27	28
NO. OF EGG GATHERERS:	1	3	2	2	2	1	3	3	2	4	4	4	4	5

From December 28 until January 11, there were between three and six egg gatherers each day. The increase in the number of egg gatherers clearly reflects the fact that the force molt period had come to an end.

The employment logs indicate that Respondent filled some of these positions with persons not regularly assigned to Group 1 in the period prior to the force molt. For example, Faustino Ayala worked as a feeder in Group 1 for nine days between December 17 and December 26. J. Guadalupe Garcia was employed as a Group 1 egg gatherer for eight days between December 5 and December 15 and for 10 days between December 29 and January 9. Garcia had been regularly employed in Group 3 prior to the force molt of this group and had not worked in Group 1 in the weeks prior to its molt. Agusten Jimenez, another employee regularly assigned to Group 3, worked as an egg gatherer each day from January 5 through January 9. Three part-time employees who were students and worked only on a "work available" basis on weekends and during vacations were employed in Group 1 in late December. Sylvia Garcia worked every day from December 24 through January 2. Oscar Jimenez worked for nine days between De-

ember 22 and January 1. Raul Jimenez worked for five days between December 29 and January 3.^{3/}

Respondent does not adequately explain these deviations from the seniority system. John Prohoroff had told Arnulfo Jimenez that no work was available in mid-December while other employees with less Group 1 seniority were working in the group. Respondent has never advanced an explanation for the hiring of Faustino Ayala, J. Guadalupe Garcia, Oscar Jimenez and Sylvia Garcia during the period in which Jimenez was laid off. Two explanations have been asserted for the hiring of student employees and employees from Group 3 in place of Hernandez.

Respondent first asserts that Oscar Jimenez and Sylvia Garcia had "employment preference" over Hernandez as they had

^{3/} The employment records indicate that 12 employees worked in Group 1 between December 1 and January 11 who had not been regularly employed in this group between October 20 and November 16. The employees and the number of days each was employed are: J. Guadalupe Garcia (19 days), Sylvia Garcia (14 days), Faustino Ayala (12 days), Oscar Jimenez (9 days), Raul Jimenez (6 days), Agusten Jimenez (5 days), Manuel Mendez (4 days), Jose Meriscal (4 days), Socorro Jimenez (2 days), Jose de la Cruz (2 days), Jorge Mejia (1 day) and Eduardo Zamora (1 day). Only Faustino Ayala and Sylvia Garcia had been employed in Group 1 in the period from October 20 until November 9. Ayala had been employed for one day and Garcia on most weekend days during this period. Employment records for the period prior to October 20 were not introduced. I assume that if these records revealed that any of the employees listed above had Group 1 seniority over Jimenez or Hernandez, Respondent would have placed them in evidence.

worked at the farm prior to the date Hernandez was first employed. No evidence was introduced as to the date of hire of Raul Jimenez. Seniority was calculated by chicken group, however, and Oscar Jimenez and Raul Jimenez had not worked in Group 1 during the period before Hernandez' layoff. She had Group 1 seniority as to them. It is also difficult for me to believe that the seniority system was designed to give a part-time, work-available, student employee preference over a fulltime employee.

Respondent also asserts that J. Guadalupe Garcia, Sylvia Garcia and other employees who worked in Group 1 in December and January were hired on the spur of the moment when the need for employees unexpectedly developed. These employees made themselves available to supervisor Roberto Jimenez while Maria Hernandez was not available.

This argument is also unconvincing. While it is reasonable that such a make-shift hiring system be employed to take care of unexpected work needs or tasks that require an employee only for a short time to complete, this is not the situation with respect to the lengthy, continuous employment of J. Guadalupe Garcia, Oscar Jimenez, Sylvia Garcia and other employees in Group 1 in December and January. Their employment was on a daily basis and occurred at a time when the chickens were coming out of force molt. Hernandez had

requested reemployment, was readily available for work and had seniority as to her chicken group.

An explanation for the failure to rehire Hernandez is found in Respondent's decision-making process. A new procedure had been employed in the determination to lay off Hernandez. It was the first time that an employee had been selected for layoff by management personnel. It was the first time that Roberto Jimenez had been instructed to lay off a particular employee. Although Hernandez' layoff was handled in a special way, John Prohoroff testified that he did not recall any special effort being made to rehire her. As the layoff decision had been communicated to him by management personnel, it is not surprising that Roberto Jimenez would not rehire Hernandez without some direction from them to this effect. For example, he waited to rehire Arnulfo Jimenez until he received specific instructions to do so. No such instructions were ever received with respect to Hernandez.

Both Jimenez and Hernandez had served an unfair labor practice charge on Respondent through the UFW. The manner in which they were refused reemployment while other employees with less seniority were employed in Group 1 raises the suspicion that they were given unfavorable treatment because of

their aggressive union affiliations. ^{4/} The failure to make any effort to recall Hernandez raises similar suspicions. ^{5/} These suspicions are reenforced by the circumstances surrounding the reemployment of Jimenez, by Respondent's union animus and by the timing and circumstances of the change in procedure made by Respondent for selecting the employees to be laid off.

Respondent asserts that the decision to reemploy Jimenez was based solely on the sympathy of management personnel for the financial plight of his family and because they were aware of the importance of Christmas to the employees. This explanation is difficult for me to believe. Jimenez was selected for Respondent's largess within a matter of hours after renouncing the UFW. This in itself is sufficient to cast Respondent's explanation in doubt. See Marx-Haas Clothing Co. , 211 NLRB 350, 352 (1974) ; P.M. Rotary Press, Inc., 208 NLRB 366, 374 (1974). Moreover the evidence indicates that Respondent's employment practices were dictated

^{4/} See Taylor Rose Manufacturing Company, 205 NLRB 262, 755-67 (1973); D.H. Baldwin Co., 207 NLRB 25, 26 (1973)

^{5/} See National Utility Products Co., 220 NLRB 64, 67-68 (1975); Rushton & Mercier Woodworking Co. , 203 NLRB 123 (1973), enfcd., 86 LRRM 2151 (CA 1, 1974).

virtually exclusively by legal, ^{6/} economic or business considerations . There was no evidence that other laid off employees were rehired because of Christmas. Maria Hernandez was in fact not rehired during the Christmas season in spite of the availability of work in her chicken group. On the other hand, the rehiring memorandum from Kolesnikov to Roberto Jimenez demonstrates that Arnulfo Jimenez was re-hired despite an asserted lack of work. ^{7/} These considerations lead me to the conclusion that Jimenez was rehired on December 24 primarily because of the UFW renunciation and his promise to withdraw the charge.

^{6/} For example, Respondent proved that changes in its policies with respect to child labor were motivated exclusively by a change in federal law.

^{7/} Respondent maintains that the memorandum is evidence that it was not attempting to discourage union affiliation because the document clearly states that Jimenez' layoff and reemployment were not related to his union activities. It is clear from the memorandum, however, that Kolesnikov understood that Jimenez might feel that his reemployment was related to his renunciation of the union. Nonetheless, the memorandum does not explain to Jimenez what other factors might have accounted for the highly unusual action of rehiring an employee in spite of an asserted absence of work. Under all the circumstances, I find that the immediate reemployment of Jimenez after his renunciation of the union is a much stronger "message" to him than that contained in the memorandum.

The fact that Respondent rehired Jimenez on December 24 because of his renunciation of the UFW demonstrates Respondent's dislike for the union. Some of the 'tactics' used by Respondent in the election campaign also reveal union animus.^{8/}

Respondent announced new employee benefits on September 19, a day or two before the first company meeting to discuss the election. These benefits included overtime pay and holidays. It was also announced that wages would be reviewed and some wages were in fact increased later that month. Greydon Koellmann testified that the increase in benefits had been recommended by a staff member of the San Diego Employers Association the day before the announcement. He denied that there was any connection between the announcement of these new benefits and the union campaign. However, because of the close proximity in time between the announcement and the company meeting and because of the speed in

^{8/} Respondent was charged in ALRB case number 76-CE-38-R with various unfair labor practices arising out of certain pre-election conduct. The decision of the Administrative Law Officer in this case was filed May 21, 1977. At the commencement of the present hearing, the General Counsel requested that I take judicial notice of the decision. This request was denied as the decision was not final. See ALRB Reg. 20286(a); Pratt v. Local 683 260 C.A.2d 545 (1968).

which the benefits were announced after their recommendation to management personnel only one day before, I find that the increased benefits were a tactic used by Respondent to defeat the union in the election.

Respondent also put personal pressure on employees not to side with the union. In the period prior to the election, admitted supervisor Rogellio Garcia approached Arnulfo Jimenez and urged him to "vote for the boss" in order to be "well established" and in "good standing" with Respondent. Garcia stated that the other employees would not know how Jimenez voted and that if Jimenez told him he was going to vote for Respondent, Garcia would inform management personnel of this decision. Garcia urged Jimenez to let him know his decision before the election. Garcia denied making any statements to Jimenez about the campaign. However, I credit Jimenez' testimony because the treatment of Jimenez upon his renunciation of the union demonstrated the truth of the statement that an employee who sided with the company would be in good standing and because I do not accept Garcia's testimony that he did not share his views about the union campaign with Jimenez.

A similar conversation took place between Victor Kolesnikov and employee Rafael Grave. Grave testified that Kolesnikov said that if he went to "the boss' side" koles-

nikov would help him get better situated at work; , otherwise, Kolesnikov said he would "take some action." This testimony has not been disputed by Respondent and, as with the Garcia-Jimenez conversation, I give it credence in part because of the truth that an employee who favored the union could receive unfavorable treatment from Respondent.

The making of threats or inducements by supervisors to employees relating to their union activities and the announcement of increased benefits shortly before an election as a tactic to defeat a union constitute unfair labor practices under the Act. N.L.R.B. v .Exchange Parts Co., 375 U.S. 405, 409 (1964); Propak Corp., 225 NLRB No. 160, 93 LRRM 1048 (1976). These actions and the rehiring of Jimenez because of his union renunciation demonstrate the existence of union animus. See Kellwood Co., 206 NLRB 665, 669 (1973); D.H. Baldwin Co., 207 NLRB 25, 26-27 (1973); Mademoiselle Shoppe Inc., 199 NLRB 983, 990 (1972).

The context, timing and nature of the changes in procedure used by Respondent in determining which employees to lay off also raise questions about Respondent's use of the seniority system. Prior to the certification election, layoff decisions were made at the supervisory level. The decisions to lay off Hernandez and Jimenez and the later decision to rehire Jimenez were made by management personnel.

John Prohoroff testified that this change in procedure was made shortly after the election because of a desire to be cautious with respect to layoffs and to scrutinize each layoff in a careful manner.

The timing of the change raises suspicions about the procedure. It occurred during a period in which Respondent had engaged in various unfair labor tactics in order to defeat the union. It consolidated power in the hands of management personnel who then used the power to discourage union affiliation. Moreover, Respondent's explanation of the change is doubtful in several respects.

First, the business justification given by Respondent for the change is questionable. John Prohoroff claimed that the change was motivated by a desire to see that all employees were treated equally in the period after the election. However, the "care" with which Hernandez and Jimenez were selected for layoff was nowhere in evidence when work became available in Group 1. If even-handedness had been a true priority, management personnel would have seen to it that laid off employees were rehired on the basis of seniority. Instead, employees from other groups and part' time students were given Group 1 jobs instead of the persons selected by management for layoff. Moreover, the manner in which Jimenez was suddenly rehired showed no regard for the

even-handed implementation of the seniority system. Although there is evidence that Respondent followed the seniority system in some cases - perhaps even in most cases - there is substantial evidence that the system was ignored when this suited the purposes of management personnel. This casts into doubt upon Respondent's assertion that it really cared about the even-handed implementation of the seniority system.

Second, it is not at all clear that management personnel were able to determine the seniority of the employees. The November layoff decisions were made from a list prepared by Victor Kolesnikov which was based on employment records. However, the records- kept by the personnel office were in great disarray. Even today, when the records are in a much more, complete state, Respondent could not locate records of some employees. There was also great confusion over the meaning of the term "date of hire" on the employment records and this entry was computed in inconsistent ways. Graydon Koellman, the head of the personnel department, testified that the supervisors knew the employment history of their employees. Because of the fact that the records were a mess and management personnel felt that the supervisors were able to determine seniority, because there is little evidence to support Respondent's contention that the change in procedure was motivated solely by a desire for even-handedness, because the procedural change resulted in management personnel assuming greater power over employment decisions, because this power was then used to discourage union affiliation by rewarding Jimenez when he renounced the union and because the

decision to give to management the power to make such rewards was made in a heated environment in which Respondent had displayed union animus and engaged in various unfair labor practices, it is my conclusion that the desire to discourage union affiliation was a motivating factor in the decision to change the procedure for selecting employees to be laid off.

The above discussion demonstrates that there exists substantial evidence that Respondent refused to reemploy Jimenez and Hernandez because of their union affiliation. It is reasonable to conclude from Respondent's union animus that management personnel reacted very negatively to the filing of the unfair labor practice charges. The replacement of Jimenez and Hernandez with other employees with less Group 1 seniority after the filing of the charge, the immediate reemployment of Jimenez after his promise to withdraw the charge and refrain from union activities. Respondent's participation in unfair labor tactics against the UFW and the fact that the refusals to rehire were the product of a decision-making system structured to give management personnel the power to discourage union affiliation lead me to the conclusion that the union activities of Jimenez and Hernandez were a significant motivating factor in Respondent's refusals to reemploy them. Although there also exists sub-

stantial evidence that Respondent had a legitimate business need to decrease the number of its employees in December, this need does not make lawful the present refusals to re-hire as the refusals were improperly motivated. See N.L.R.B. v. Brown Food Stores, 380 U.S. 278, 287 (1965); The Colonial Press, 204 NLRB 852, 858 (1973). I therefore find that Respondent engaged in unfair labor practices within the meaning of sections 1153(c) and (a) of the Act by its refusals to reemploy Jimenez and Hernandez.

II. The Layoffs

A. Arnulfo Jimenez

The union activities of Arnulfo Jimenez were well known to Respondent. He spoke in favor of the UFW at a company meeting; he was an election observer for the UFW; he spoke with supervisor Rogellio Garcia about his sympathies for the union. Respondent asserts that his selection for layoff was unrelated to these activities but was based solely on his seniority status. He was not laid off when Group 1 went into force molt. He had lowest seniority in Group 3, so he was laid off when this group started the force molt process.

The fact that Jimenez was not laid off at the first

opportunity after the election is a factor which supports Respondent's contention. However, it does not explain why he was laid off on December 1. Respondent had in prior years always made an effort to find work for Jimenez rather than to lay him off. He was a versatile employee and could work as an egg gatherer, a feeder and in the general maintenance of the farm. He was related to supervisor Rogellio Garcia, which may in part explain why he had never before been laid off. ^{9/}

Respondent made an effort to locate work for other Group 3 employees at the time of the force molt of this group. J. Guadalupe Garcia was placed in Group 1, for example, in spite of the total absence of seniority in this group. Moreover, Respondent returned to its former treatment of Jimenez by finding him work as soon as he renounced the union. These considerations and the numerous exceptions to the seniority system which were discussed in the preceding section lead me to the conclusion that Respondent determined to rigidly apply the seniority system to Jimenez at the time of his layoff while making exceptions to the system for the benefit of other employees.

^{9/} There was evidence that employees who were related to supervisors received preferential treatment. Several of the student employees who were hired in the place of Jimenez and Hernandez were related to supervisors.

There is strong evidence that Jimenez' layoff was motivated by a desire to discourage union affiliation in that he had never been laid off before engaging in union activities, he was given unfavorable treatment after these activities became known to Respondent and he was immediately rehired upon renouncing the union. This evidence is buttressed by Respondent's union animus and the questionable purpose of the procedural changes which gave management personnel the power to select Jimenez for layoff. Under these circumstances, it is my conclusion that Respondent would have made work arrangements for Jimenez had he renounced the UFW at the time of his layoff and that his union affiliations were a significant motivating factor in Respondent's employment decisions concerning him. I therefore find that Respondent engaged in unfair labor practices within the meaning of sections 1153(c) and (a) of the Act by its dismissal of Arnulfo Jimenez.

B. Maria Hernandez

The situation with respect to the layoff of Maria Hernandez is different. At the time of her layoff, she had only worked for Respondent a total of 22 weeks. She had the least seniority of anyone in Group 1 and had been laid off for long periods earlier in the year. She was

not related to a supervisor and had not been given preferential treatment in the past. She was the logical person to be laid off from within her group. Moreover, her testimony is not sufficiently reliable to establish that Respondent was aware of her union activities.

Hernandez testified that she was approached by John Prohoroff and urged to vote for the company. She informed him that she would do whatever her husband did. The pro-union sympathies of Raymundo Hernandez were well-known to management personnel through conversations held with several supervisors and Greydon Koellmann. Maria Hernandez also testified that she wore a UFW button to work and that Victor Kolesnikov told employees at a meeting that all those who supported the union would be fired and evicted from their company-owned houses.

After her layoff in November, Maria and Raymundo Hernandez went to a local UFW office and spoke with a union investigator. The investigator filled out a printed form which contradicted this testimony. The questions "Have you ever worn a UFW button?", "Have you ever talked to your supervisor about your UFW activities?" and "Has the management ever threatened you or other workers that they would fire you for UFW activities?" were all answered "no." The form is unsigned and undated. It appears to have been

taken from information supplied by Raymundo rather than Maria Hernandez because of the interviewer's notation on the first page that "her husband is telling all this." Moreover, Hernandez is illiterate and had difficulty understanding many of the questions posed to her during the hearing. It is not clear to me that she understood the contents of the form or verified the information. Nonetheless, it casts the testimony of Maria Hernandez in sufficient doubt that it cannot be relied upon to prove Respondent's knowledge of her pro-union sympathies prior to the service of the charge on December 11.

Proof that an employer is aware of a dismissed employee's union activities is ordinarily an essential element in the establishment of a violation of section 1153(c). Such knowledge bears heavily on the issue of whether the dismissal was for the purpose of discouraging union activity. However, lack of knowledge of a dismissed employee's union activities is not necessarily fatal to the General Counsel's case. It is also impermissible to discriminate against an employee because of the union activities of a relative (Amerace Corp., 217 NLRB 942, 944 (1975); The Colonial Press, 204 NLRB 852, 858 (1973)) or to dismiss an employee as part of a scheme to disguise the dismissal of union adherents (Howard Johnson Co., 209 NLRB 1122 (1974)).

The General Counsel has failed to establish that either of these situations apply to the present case. The inference that Maria Hernandez was dismissed because of her husband's activities is weak. The evidence indicates that Arnulfo Jimenez had engaged in union activities to a greater extent than Raymundo Hernandez and yet Jimenez was not laid off at the time of the layoff of Maria Hernandez. The circumstances surrounding the reemployment of Jimenez and the failure to rehire Hernandez indicate that Respondent was willing to make exceptions in its hiring policy to reward and punish employees for their UFW affiliations if their affiliations were substantial or they had actively engaged in concerted activities. Such a practice would have no effect on its layoff decisions with respect to persons it only marginally associated with the union. Nor is there any evidence that the layoff was a cover-up for other discriminatory layoffs. As the record indicates a business justification existed for the layoff, I do not find sufficient evidence to warrant the conclusion that the layoff of Hernandez was discriminatorily motivated. Accordingly, I conclude that Respondent did not violate section 1153(c) of the Act by its conduct on November 9.

It is also necessary to determine whether the layoff was an independent violation of section 1153(a). Such a

violation would occur if Respondent had used this layoff for the purpose of demonstrating its hostility to its employees' organizational activities.

Vacuum Plating Corp., 155 NLRB 820, 821 (1965).

The layoff was handled in a manner dramatically different from prior layoffs. As discussed in a preceding section, the changes in procedure granting management personnel the power to determine layoffs occurred in a heated environment in which Respondent had demonstrated union animus to its employees. Such a change under these circumstances is evidence of a violation of section 1153(a). See Vacuum Plating Corp., cited above. However, there was no evidence that Respondent attempted to publicize the change in procedure or that it was known to anyone other than the employees directly involved in the layoff. I therefore conclude that Respondent did not violate section 1153(a) of the Act by the layoff of Maria Hernandez.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of sections 1153(a) and (c) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged and refused to rehire Arnulfo Jimenez and unlawfully refused to rehire Maria Hernandez, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges. I shall further recommend that Respondent make each of them whole for any losses they may have suffered as a result of its unlawful discriminatory action by payment to them of a sum of money equal to the wages they each would have earned from the date of the discharge (in the case of Arnulfo Jimenez) or from the date of the refusal to rehire (in the case of Maria Hernandez) to the dates on which they are each reinstated, or offered reinstatement, less their respective earnings, together with interest at the rate of seven percent per annum, such back pay to be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

In order to further effectuate the purposes of the Act and to ensure to the employees the enjoyment of the rights guaranteed to them in section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act and that it has been ordered not to engage in future violations of the Act.

Accordingly, I shall recommend that Respondent furnish the regional director of the San Diego region, for his or her acceptance, copies of the notice attached to this decision, accurately and appropriately translated into Spanish and that the notice and translation then be made known to its employees in the following methods:

1. Post a copy of the Notice, including a copy of the Spanish translation, for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.
2. Mail a copy of the Notice and the Spanish translation to each employee employed by Respondent for any period from December 1, 1975 to the date of mailing (excluding employees who are current employees.) The Notice shall be mailed to the employee's last known home address.
3. Give a copy of the Notice and the Spanish translation to each employee employed by Respondent at the time of distribution.
4. Have the Notice and the Spanish translation read to assembled employees on company time by a company representative or by a Board agent and accord said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under section

1152 of the Act. This remedy is deemed essential because of evidence of illiteracy among Respondent's employees. See Tex-Cal Land Management, 3 ARLB No. 14 (1977).

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 recommended

ORDER

Respondent, its officers, agents and representatives shall:

1. Cease and desist from discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging, laying off, or in any other manner discriminating against individuals in regard to their hire or tenure of employment, or any term or condition of employment, except as authorized by section 1153(c) of the Act.

2. Take the following affirmative action:

(a) Offer to Maria Seniorina Hernandez and Arnulfo Jimenez immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges, and make each of them whole for any losses each of them may have suffered as a result of his or her termination in the manner described

above in *the* section entitled "The Remedy."

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

(c) Furnish the regional director of the San Diego region, for his or her acceptance, copies of the Notice attached hereto, accurately and appropriately translated into Spanish.

(d) Post a copy of the Notice attached hereto, including the Spanish translation, for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

(e) Mail a copy of the Notice attached hereto and the Spanish translation to each employee employed by Respondent for any period from December 1, 1975 to the date of mailing (excluding employees who are current employees.) The Notice shall be mailed to the employee's last known home address.

(f) Give a copy of the Notice attached hereto and the Spanish translation to each employee employed by

Respondent at the time of distribution.

(g) Have the Notice attached hereto read in English and Spanish to assembled employees on Company time by a company representative or by a Board agent and accord the Board agent the opportunity to answer questions which employees might have regarding the Notice and their rights under section 1152 of the Act.

(h) Notify the regional director in the San Diego Regional Office within twenty (20) days from receipt of a copy of this decision of the steps Respondent has taken to comply therewith, and to continue to report periodically thereafter until full compliance is achieved.

It is further recommended that the allegations in the complaint that on or about November 9, 1975, Respondent discriminatorily discharged Maria Senorina Hernandez in violation of sections 1153(a) and (c) of the Act be dismissed.

DATED: July 1, 1977

A handwritten signature in cursive script that reads "Paul Albert". The signature is written in black ink and is positioned above a solid horizontal line.

PAUL ALBERT
Administrative Law Officer

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to hand out or send out and post this Notice.

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

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

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

Because this is true we promise that:

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

Especially:

WE WILL NOT fire, lay off, refuse to rehire or do anything against you because of the union;

WE WILL OFFER Maria Seniorina Hernandez and Arnulfo Jimenez their old jobs back if they want them and we will pay each of them any money they lost because we laid them off.

DATED:

Signed:

PROHOROFF POULTRY FARMS

By: _____

(Representative) (Title)