Thermal, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TENNECO WEST, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 79-CE-5-IN; 6 ALRB No. 53

ERRATUM

The Board concluded that the Respondent in this case violated section 1153 (a) of the Act by refusing to rehire the entire Gonzalez crew. Two members of that crew, Samuel Ceja and Maria L. Mendez, were inadvertently omitted from paragraph 2 (a) of our remedial Order and the Notice to Employees attached thereto.

Accordingly, the list of employee names in paragraph 2 (a) of the said Order and the list of employee names in the Notice to Employees attached thereto are hereby amended to add the name Samuel Ceja, before the name Celina Diaz, and to add the name Maria L. Mendez, before the name Maria de Los Angeles Mendoza.

Dated: October 17, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. MCCARTHY, Member

Thermal, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TENNECO WEST, INC.,	)	
Respondent,	)	Case No. 79-CE-5-IN
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	6 ALRB No. 53
Charging Party.	)	

DECISION AND ORDER

On November 26, 1979, Administrative Law Officer (ALO) Michael Schmier issued the attached Decision and recommended Order in this proceeding. Thereafter Respondent, Charging Party, and the General Counsel each timely filed exceptions[1/] with a supporting brief, and the General Counsel filed a brief in response to Respondent's exceptions.

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

Respondent excepts to several of the ALO's credibility resolutions. We will not reverse an ALO's credibility resolutions based on demeanor unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard

1/ In, its exceptions, Respondent has renewed its earlier motion to reopen the hearing. As the motion raises no issues not previously considered by the Board, the motion is hereby denied.

Dry Wall Products, Inc. (1950) 91 NLRB 544 [26 LRRM 1531]; Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24, review den. by Ct. App., 2nd Dist., Div. 3, Mar. 17, 1980. We find that the ALO's credibility resolutions herein are supported by the record as a whole.

The ALO has analyzed the facts of this case, alternatively, as a discharge after a protest over wages, a constructive discharge, a refusal to rehire after an unconditional offer to return from a concerted work stoppage, a punitive lockout, and a retaliatory discharge based on union activity. Under each theory, he concluded that Respondent violated the Agricultural Labor Relations Act (Act) and recommended reinstatement of the Gonzalez crew with back pay.

We find that the facts most clearly support the theory that Respondent refused to rehire the crew after a very brief work stoppage to protest the wage rate. Respondent's employees did not immediately begin picking mustard on March 2, 1979, when directed to do so. Instead, they briefly discussed whether to accept the offered wage rate. After this discussion, the employees looked for their foreman and later the harvest manager, in order to begin picking mustard at the offered rate. Respondent refused to put the employees back to work, despite the fact that work was still available.

A work stoppage to protest the wage rate is concerted activity protected under Labor Code section 1152. See Resetar Farms (Feb. 24, 1977) 3 ALRB No. 18. Respondent's refusal to rehire the employees after their offer to return tended to

interfere with the employees' right to engage in protected activity, and was therefore a violation of Labor Code section 1153(a).2/

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent Tenneco West, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to rehire or otherwise discriminating against agricultural employees because of their engagement in concerted activity for the purpose of collective bargaining or other mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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

(a) Offer the following-named employees full reinstatement to their former positions or substantially equivalent positions without prejudice to their seniority or other

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2/ As Luis Alcocer and Pedro Zaragoza will be reinstated and made whole with the rest of the Gonzalez crew, it is unnecessary to decide whether Respondent's denial of their request to work in the carrots was a separate violation of section 1153(c) and (a). Further, since we have found that Respondent violated section 1153 (a) by the refusal to rehire the Gonzalez crew and since the remedies for a violation of section 1153(c) would, in this case, be essentially the same as those included in our Order herein, we do not reach the section 1153 (c) allegations or other theories discussed by the ALO.

rights and privileges:

Luis Alcocer	Miguel A. Lua
Carmen Ceja	Samuel Lua
Consuelo Ceja	Teresa Lua
Reyes Ceja	Alicia Madrigal
Celina Diaz	Maria de Los Angeles Mendoza
Elena Fee	David Nunez
James Fee	Juana Nunez
Remedies V. Lopez	Amelia B. Torres
Alejandro Lua	Josefina Vargas
Lilia Lua	Pedro Zaragoza
Martha P. Lua	

(b) Reimburse the above-named employees for all wage losses and other economic losses they have suffered as a result of Respondent's discrimination against them. Such losses shall be. computed according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43. Interest, computed at the rate of 7 per cent per annum, shall be added to the net back-pay to be paid to each of the above-named persons.

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

(d) Sign the Notice to Employees attached hereto. After its translation by a Board agent into Spanish and any other appropriate language(s), Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice for 60 days at conspicuous places on its premises, the periods and places of posting to be determined by the Regional Director. Respondent

shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice in Spanish and any other appropriate language(s) within 30 days after the date of issuance of this Order, to all employees employed at any time from March 2, 1979, up to the date of this mailing.

(g) Arrange for a representative of Respondent or a Board agent to read the attached Notice in Spanish and any other appropriate language(s) to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by 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 in writing, within 30 days after 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 or her periodically thereafter in writing what further steps have been taken in

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compliance with this Order.

Dated: September 12, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. MCCARTHY, Member

NOTICE TO EMPLOYEES

After a trial in which each side had an opportunity to present its facts, the Agricultural Labor Relations Board has found that we violated the law by refusing to rehire a group of our employees because they engaged in activity protected under the Act.

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

1. To organize themselves.

2. To form, join, or help unions.

3. To choose, by secret-ballot election, a union to represent them in bargaining with their employer.

4. To act together with other workers to try to get a contract or to help and 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 prevents you from doing, any of the things listed above.

Especially:

WE WILL NOT refuse to rehire or otherwise discriminate against any employee because he or she exercised any of these rights.

The Agricultural Labor Relations Board has found that we discriminated against the following employees by discharging them because they engaged in activity protected under the Act:

Luis Alcocer	Remedies V. Lopez	Alicia Madrigal
Carmen Ceja	Alejandro Lua	Maria de Los Angeles Mendoza
Consuelo Ceja	Lilia Lua	David Nunez
Reyes Ceja	Martha P. Lua	Juana Nunez
Celina Diaz	Miguel A. Lua	Amelia B. Torres
Elena Fee	Samuel Lua	Josefina Vargas
James Fee	Teresa Lua	Pedro Zaragoza

WE WILL reinstate all of the above-named employees to their former jobs, or substantially equivalent jobs, and reimburse them for any loss of pay and other money losses they suffered as a result of their discharge, plus 7 per cent interest per annum.

Dated: TENNECO WEST, INC.

By: _____

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Tenneco West, Inc. (UFW)

6 ALRB No. 53
Case No. 79-CE-5-IN

ALO DECISION

The ALO found that the employer violated Labor Code section 1153(c) and (a) by terminating twenty-one employees who engaged in a brief work stoppage over wage rates. He reached this result under five separate analyses, including; a discharge after a protest over wages, a constructive discharge, a refusal to rehire after an unconditional offer to return to from a concerted work stoppage, a punitive lockout, and a retaliatory discharge based on union activity.

BOARD DECISION

The Board found that the twenty-one employees engaged in a brief work stoppage on March 2, 1979, over the piece rate offered by Respondent's harvest manager. When they offered to return to work/ the harvest manager refused to rehire them, though the work was still available. The Board concluded that this refusal to rehire tended to discourage the employees from exercising their right, under section 1152, to engage in concerted activity in violation of section 1153(a) of the Act. Having found a violation on this ground, the Board declined to comment on the other theories suggested by the ALO. The twenty-one employees were ordered reinstated with back pay as of March 2, 1979.

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STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:

TENNECO WEST, INC.,

Respondent,
and

UNITEDFARMWORKERSOFAMERICA,
AFL-CIO,

Charging Party.

Case No. 79-CE-5-IN

Suzanne Vaupel, Esq.
of Sacramento, California for the
General Counsel

Suellen Anderson, Esq.
of Bakersfield, California for the
Respondent

Nancie Jarvis
of Coachella, California for the
Charging Party

DECISION

STATEMENT OF THE CASE

MICHAEL K. SCHMIER, Administrative Law Officer: This case was heard before me June 21 to 23, 1979 [1/]July 2, 3, 5, 6 and 18 through 21 in Indio, California and August 13 through 15 in Palm Springs, California; all parties were represented. The charge was filed by the United Farm Workers of America, AFL-CIO (herein called "UFW") on March 6, 1979. The complaint issued April 25, 1979 alleges violations by Tenneco West, Inc. (herein called "Respondent") of Sections 1153(a) and (c) of

1/ See page 4.

the Agricultural Labor Relations Act (herein called the "Act"). Copies of the charges and complaint were duly served on Respondent. The parties were given the opportunity at the trial to introduce relevant evidence, examine and cross-examine witnesses and argue orally, briefs and reply briefs in support of their respective positions were filed after the hearing by the General Counsel and the Respondent.

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

FINDINGS OF FACT

I. Jurisdiction

Respondent is a corporation engaged in agriculture in Riverside County, California, as so admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

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

II. The Alleged Unfair Labor Practices

The Complaint alleges that Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed them by Section 1152 of the Act in violation of Section 1153(a) of the Act and discriminated in regard to hiring, tenure and terms or conditions of employment to discourage union membership in violation of Section 1153(c) of the Act by: 1) discharging Jose Gonzalez' crew on March 2, 1979 and 2) refusing to rehire Luis Alcocer and Pedro Zaragoza that same day.

Respondent denies that it engaged in any unlawful activities

III. The Facts

Respondent is a corporation involved in the growing, harvesting, and marketing of citrus, grapes, dates, peaches and vegetables in the Coachella Valley, California.

Following a petition for certification filed by the UFW , a secret ballot election was held on April 21, 1977. On April 16, 1979, the OFW was certified as the collective bargaining agent for "all agricultural employees of Tenneco West, Inc. in the Coachella Valley of the State of California." Tenneco West, Inc., 5 ALRB No. 27.

Respondent grows vegetables and row crops at Rancho Tigre and Briggs Ranch in the Coachella Valley. The events at issue took place at Rancho Tigre. Rancho Tigre consists of about 1000 acres at Jefferson and Fifty-sixth Avenue and about 100 acres at Eighty-sixth and Sixtieth Avenues in Thermal. In March, 1979, the crops in production at Rancho Tigre were mustard, alternatively referred to as rappini or broccoli rabe, carrots, asparagus, broccoli, cabbage, cauliflower, peppers, onions, and alfalfa.

The Agricultural Employment Authorization Form, which is filled out when a worker is hired at Rancho Tigre reflects "job title" and a coding for "job skill". All workers at Rancho Tigre are hired under the job title "field laborer" and job skill "23". At Rancho Tigre, foremen in the fields receive applications for work and hire workers.

Rancho Tigre employees are shifted from crop to crop and crew to crew as necessary. Workers are not required to have

previous experience in the crops to which they are assigned.

The harvest supervisor, Ray Alva, determines the work assignments of crews. These assignments are made according to sales. He determines how many hours of work are needed in each field and assigns crews accordingly. Generally, assignments are made the day before, but sometimes work assignments are changed during the working day.

March 2, 1979 [1/] was the last day of the mustard harvest for that season. Before the harvest ended, some crews which had been working in the mustard had already been assigned to other crops, working a few hours in mustard and a few hours in the carrot packing shed each day. With the exception of the crew of Jose Gonzalez, whose circumstance is the instant issue, almost all employees who worked in the mustard at any time during the last week of the harvest were assigned to other crops.

Crews were paid $3.80 an hour while cleaning broccoli and planting asparagus. When employees Josefina Vargas and David Nunez were first sent to work in the mustard, their wages continued at $3.80 per hour. After a couple of days, however, Benjamin Dorantes told them they would be paid by piece rate of $1.75 a box or the minimum wage of $2.90 an hour if they did not pick enough boxes.[2/]

When first sent to pick mustard, the crews were instructed how to pick the mustard by a forelady named Maria. They were told to pick a stalk about a foot long and pull off two or three

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[1/] Unless otherwise indicated, all dates herein refer to calendar year 1979.

[2/] A mustard box is about two feet long by one and one half feet wide, and one foot tall. When filled, it weighs about 26 pound

leaves at the bottom of each stalk.

At first, the workers could earn more by the piece rate than by the hourly wage. Then, after about a week, Alva told the crews they had to pick off all the leaves except for two or three small ones close to the bud at the top. This new method of picking forced the crew to spend more time cleaning each mustard stalk. Employee Vargas asked Alva to pay the crew more money to pick the mustard the new way because they could not make enough money picking this way. Vargas invited Alva to try picking along with them to verify this. Alva refused to pay more. The crew returned to work and picked the new way as instructed.

The next day, Vargas and her four riders reported to frorelady Maria for work but were told they must return to their previous crews. The five workers went to the field where they tad worked for a foreman named Geronimo. Geronimo was not there but they met Benjamin Dorantes, another supervisor and told Dorantes they were looking for Geronimo. Dorantes took the group out of the field and told them he did not want them to be talking for more money and that they should not be talking about prices (rates of pay) in the field. Vargas told Dorantes that they wanted to work. Dorantes answered that he would give them one last chance and sent them to Manual's crew in the mustard.

After a few days with the foreman Manual, Vargas and her riders were transferred to the crew of Jose Gonzalez.

On or about Februay 28, 1979, Alva addressed Jose Gonzalez' mustard crew and told them he wanted one box per hour and that le would lay off anyone who did not pick that much. Vargas and

Other members of the crew complained that there was not enough to pick because the field was already in flower. (To be saleable, the mustard stalk must be picked while the bud is still green, before it flowers.) Vargas told Alva that if Alva laid the crew off he would have to give crew members a document to enable them to claim unemployment. The whole crew then returned to the work.[3/]

On March 1, the fields were unusually wet from irrigation.

[3/] Contrary to the workers' testimony, Alva testified that he asked the workers to pick two boxes an hour. He also testified that two members of the crew whom he could not name said,"Run us out so we can get unemployment insurance." This does not make sense. If the workers were not even making one box per hour, as the testimony of workers and the records reveal-; it would be outrageous for Alva to expect them to make two boxes an hour especially when there was so little mustard left to pick. Alva's testimony supports the statements of workers that much of the mustard had already gone to flower and little good mustard remained.

After Alva told the crew to pick one box per hour or they would be laid off, Vargas responded that "if you run us off you must give us a document to collect unemployment." Alva twists her words into an innuendo which the Respondent is trying to make, i.e., that the workers wanted to be laid off. To the contrary, the testimony and actions of the workers continually demonstrate: their desires to maintain their jobs and pick as they were told.

It would not make sense for workers who repeatedly said they could not make enough on the wages being paid to ask to be laid off and receive a much smaller amount.

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It was wet and the employees were having trouble working in those conditions. Jose Gonzalez told his crew that they did not have to continue work that day because of the conditions of the field. The crew left about noon. Other crews left early also.

Events of March 2

On the morning of March 2, Gonzalez[1] crew reported to work at the field where they had worked the previous day. Although work usually began at 7:00 a.m., some of the workers arrived to start work early, an arrangement agreed to by Gonzalez the previous day. When the workers arrived, their foreman was not there. A representative from the UFW, Ellen Starbird, and Father Joe Tobin, a Catholic priest, were on the road beside the field. Starbird was wearing a dress and high heels.[4/]

The workers continued to arrive, dressed in work clothes with protective hats, scarves and gloves and mud boots. Starbird began talking to the workers about the wages they were receiving, Upon hearing that the people had been offered varying wages, she set up a meeting for later that day at the union office.

Dorantes arrived about 6s35 a.m. and Alva a few minutes later. Speaking in English, Alva asked Starbird who she was, what she was doing there and, tongue in cheek, if she wanted work. Answering in Spanish, Starbird asked Alva why the workers had been offered $4.00 and were only being paid $2.90.

Alva addressed the workers and said he wanted to have a meeting inside the field. The workers replied that the field

[4/] Starbird and Tobin were UFW representatives visiting the ranch to investigate possible violations of the Labor Code. The previous day, March 1, James and Elena Fee, two members of Jose Gonzalez' crew, had gone to the UFW office and reported to Starbird that they were being paid less than the company had told them they would be paid when they were hired. The next morning, March 2, the two UFW representatives drove to Rancho Tigre, found the Fees, then

was too wet. Seeing that this was true, Alva agreed to have the meeting outside the field. The mustard crews of Jose Gonzalez and Domingo Gamez were both present. Alva addressed the crews and offered to pay them $2.25 per box but said that he would no longer guarantee an hourly wage.

Vargas and the other members of the crew protested the change in the wage payments. They asked Alva to keep the guaranteed hourly salary or else pay more for the piece rate. Vargas repeated what she had told Alva previously—that there was too little mustard to make it on piece rate. Starbird told Alva he would have to continue paying the hourly minimum wage which the law requires.

Alva refused to change the wages he had just quoted. The crew protested the new wage rate, but no one said they would not work for the wages offered.

Alva then directed Jose Gonzalez, the foreman, to go to the field and start work. He walked to his truck, then drove to the edge of the field. He was accompanied by Silvia, the checker. The side of the field was one quarter mile long and the group was standing near one end of it.

After Gonzalez left the group, the workers discussed the loss of a guaranteed hourly wage for three to five minutes and then started walking into the field to begin work. Father Tobin told the employees to go to work because even if the company did not want to pay the minimum wage, it would have to pay it anyway by law. Tobin and Starbird left as the crew started to work'.

After sending Gonzalez to the other end of the field,

[4/] drove to the mustard field where the crew was to report. They arrived about 6:00 a.m.

Alva left in his blue pick-up truck and drove to where Gonzalez was standing. Then Gonzalez got into Alva's truck and they drove off. Dorantes was in front of Alva in his own pick-up truck. Silvia, the checker, drove Gonzalez[1] truck to the field where Gamez[1] crew was waiting for work.

When the crew walked into the field, they saw that their foreman was gone. Most crew members got into their cars in an effort to try to find him. Three carloads of people, among others, followed immediately. These were 1) the car driven by Josefina Vargas with her riders [5/] 2)the car driven by Reyes Ceja with his riders, Amelia Torres and Maria Mendez[6/]; and 3) the Rochas and Maria De Leon. Luis Alcocer and Pedro Zaragoza could not get their car started.[7/]

Following in the direction taken by Alva's truck, the crew found Domingo Gamez and his crew about five minutes later, waiting for their assigned mustard field to dry so they could start work. Gonzalez[1] crew arrived about ten minutes after Gamez did.

Vargas asked Gamez where their foreman was and told Gamez the members of the crew wanted to work. Gamez told her he could not let them work with his crew. Then Alva arrived. The crew

asked him for work. Vargas asked Alva where the foreman of the

[5/] At the time Vargas' riders were David Nunez, Remedio Vargas Lopez, Maria de los Angeles Mendoza, Consuela Ceja Lua, Juana Nunez, Marta Patricia Lua and Teresa Lua.

[6/] Carmen Ceja, Reyes' wife, was home with a sick child that day. Nevertheless, she was terminated with the rest of the crew.

[7/] The car with the remaining members of the crew left because one of the riders was sick and they thought they had been fired

crew was. Alva answered that he had gone home to fix his car Since the crew did not want to work. Vargas told Alva the crew wanted to work, even with Gamez as foreman. Alva answered that they could not work because their foreman was not there, This was not explained. Alva told the crew that Gamez' crew as going to do their work.

Then Luis Alcocer and Pedro Zaragoza, who had had car trouble, arrived and told Alva that they wanted to work. Alva refused to give them work and told them that they were shameless. Vargas asked Alva if they were fired. Alva answered no, but he refused to give them work. There was work available. Zaragoza told Alva it was unjust for him not to give them work. Alva angrily answered that it was unture, pointed at Vargas, David Nunez, and Amelia Torres and said they were the leaders that had caused the problem. Dorantes told the crew they were shameless aand that if they had any shame they would have already left, Dorantes then told the crew members that California is a big state—-they could look for a job elsewhere.

Gonzalez' crew continued pleading for work. They had given up asking for wage increases, and were pleading for work wherever available. Alva refused their pleas and told them to turn in the company boots.

After the crew members had begged Respondent for work for over an hour and had been given none, and after the boots had been taken back by Respondent, the crew members asked for their checks. Alva contacted Gonzalez and directed him to be at the office when le crew came for their checks.

Zaragoza and Alcocer, the two men who had car trouble at

the first field, got the car started and arrived at Gamez' crew about one-half hour later, as the conversation between Alva and the crew was taking place. They heard Alva say that the crew was not fired, but that he would not give them work and would prefer to "disc" (plow under) the field. They also witnessed Alva point to Vargas, Nunez and Torres and say that those three were the troublemakers. After hearing this segment of the conversation, Zaragoza and Alcocer went to the carrot field at Rancho Tigre to find work there. They had heard radio advertisements for additional workers in the carrots at Rancho Tigre.[8/] At the carrot field, they saw Gonzalez, their foreman. He was picking up bunches of carrots and checking the work. When Gonzalez had arrived earlier, he had told the foreman in carrots, Rodolfo de la Garza what had occurred in the mustard field.

Zaragoza and Alcocer asked Garza for work in the carrots, Garza refused to give them work, saying that he already had enough people. As they were leaving the field, Zaragoza and Alcocer saw four people arrive and start to work.

Francisco Alcocer was working in the carrot field when Zaragoza and Alcocer asked for work in the morning of March 2. [e had arrived a few minutes earlier and had asked Garza for work :or him and his family. Garza had given all four work. Francisco Alcocer heard Luis Alcocer asked for work and he heard Garza tell him that he already had enough people. After Zaragoza and Alcocer

left the carrot field, Francisco Alcocer asked Garza why he had

[8/]Respondent sometimes advertises for workers on KVIM, the local Spanish speaking radio station. On Feb. 28, March 1, & March 2, 1917 Respondent was advertising for app. 80-100 workers in carrots. The ad, a 60 second spot, told workers to report to Garza in carrots, stating no previous experience was required. Eighteen such spots ran on 2/28/79; 27 on 3/1/79; 33 on 3/2/79. On 3/2/79, spots ran on 5:14a.m. through 9:04a.m. All spots were ordered by Garza and paid for by Respondent.

not given work to Luis Alcocer and Pedro Zarazoga. Garza responded that "there was no more work for those persons." About a half hour later, Francisco Alcocer saw three more people arrive and ask Garza for work. Garza said yes and they began working. Later that day, Francsico Alcocer saw four or five more people arrive in one car and ask Garza for work and then start working.

After Garza refused them work in the carrots, Zaragoza and Luis Alcocer returned to the mustard field where the two mustard crews were gathered. They were told by other crew members that Respondent was going to give out their checks . Zaragoza and Alcocer told Amelia Torres and Marie Mendez that they had been turned down for work in the carrots . Three members of Gonzalez' crew, Elisa Rocha, Stella Rocha and Maria de Leon, did not participate in the aforementioned activities. they were pointed out by Alva to the rest of the crew as an example. There were not treated like the remainder of the crew. they remained at work.

On the morning of March 2, while the rest of the crew as talking to the UFW representatives, the Rochas and De Leon are at a distance and were not .with the crew when its members 3re' talking to Alva and presenting the grievances over wages .

The Rochas and De Leon went with the rest of the crew com the first mustard field to the second. Again, they did not the rest of the crew in the discussion with Alva. Instead, Alva went over to their car and said something to them out of the hearing of the other workers. The Rochas and De Leon[9/] then

[9/]The Rochas and De Leon were not involved in the aforementioned activities or the conversation in which Alva refused to let Gonzalez' crew work. They went to work.

left while the rest of the crew remained. Alva told the remaining crew members "those that have shame have already left."

DISCUSSION AND ANALYSIS

This case turns upon credibility. Other matters are peripheral. Alva testified that Gonzalez' crew left early on arch 1, because it was raining. Later he testified that this crew had refused to work for three days. However, Gonzalez id not indicate that his crew refused to work on March 1.

Alva testified that Gonzalez' crew refused to work at lie first field on March 2 and therefore he recorded "voluntary quit" on their termination forms. However, he testified that e left before the crew members decided what to do. "That is why I walked out of there, to let them decide on themselves." Dorantes and Gonzalez, respondent's supervisors and witnesses, testified that no one in the crew refused to work.

Although Alva testified that he assured the crew on ;arch 2 that he was raising the piece rate and still guaranteeing he minimum hourly wage, the great majority of witnesses testified to the contrary—that Alva would not guarantee the minimum wage. It was the refusal of Alva to guarantee the minimum wage that prompted Starbird to say "you have to guarantee .he minimum wage." If Alva had said that he would guarantee an hourly wage, the subsequent events would have been illogical, the workers had shown up to work at the previous wage. If Alva offered them a higher piece rate and maintained the hourly rate, then nothing would have changed and they would have started work immediately. Alva's testimony here simply is not plausible.

Alva testified that unnamed workers in Gonzalez' crew

asked to be laid off so they could collect unemployment. crew members specifically denied that anyone in the crew asked to be laid off. I credit them. Vargas testified that she told Alva, if Alva laid them off, then he must give them a document for unemployment. This version makes sense as the workers were concerned that they were not making enough money. They would be making less money on unemployment. Vargas, Consuelo Lua Ceja, Juana Nunez and Pedro Zaragoza each testified that they did not apply for unemployment after being severed from Respondent. Moreover, Nunez, Zaragoza and Ceja have never applied for unemployment.

Alva denied having stopped to pick up or talk to Gonzalez on the way out of the field. However, members of Gonzalez' crew consistently testified that Gonzalez left with Alva. If Alva ad not talked to Gonzalez, then Alva could not have known that Gonzalez left the field and went home. But as soon as Alva arrived at Gamez' field, he told Gonzalez[1] crew members that Gonzalez had left. Based upon the above as well as my observation of the demeanor of the witness, Alva, and my impressions of his testimony, I am unable to credit it.

Dorantes testified that his duties included the responsibility of seeing that each crew leader had an adequate number of workers each day. He checked on the work of the crew leaders three to four times each day during his rounds of the March. On arch 2, 1979, he checked on the work of Garza's crew in the carrots. On that day and two previous days, an advertisement was being run all day on the local radio station saying Respondent needed to hire workers in the carrots. Dorantes testified that

he walked into the carrot fields and looked at the work being done.

Garza testified to events in the carrot field on the morning of March 2. His testimony was contradicted by the testimony of other of Respondent's witnesses. Jose Gonzalez testified that he entered the carrot field and talked to Garza about the events that had taken place in Gonzalez ' crew. Gonzalez testified that Garza asked him what happened and why.

Garza however, testified that Gonzalez did not set foot in the carrot field and that he did not talk to Gonzalez at all that day. Garza claimed not to have known about anything that occurred in the mustard fields until a later meeting with Alva.

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Garza testified that when Zaragoza and Luis Alcocer asked him for work, he told them he did not have time, but would talk to them later on. This testimony was uncorroborated. No one else could have heard this conversation because the whole crew was working. However, later he testified there were 8, 10, or 15 people who were around him when Zaragoza and Alcocer asked for work.

Garza was the person hiring carrot workers on March 2. When asked how many people he hired on March 2, his answers

varied greatly. First he answered, that if he hired anyone it was only someone who worked for him before and no one new[10/]. Then he testified that he did not hire anybody that day. Respondent's Daily Time Records show, however, that 20 people were hired in the carrots on March 2. The testimony of Francisco Alcocer also indicates that there were even more people hired that day whose names did not appear in the records.

When questioned about the other people he hired other people who asked for work, Garza could not remember the name of any person who asked for work because there were too many, yet, incredibly, he testified to remembering the exact words he spoke 3 Luis Alcocer and Zaragoza.

When asked about the ad for carrot workers, Garza first testified that he contacted the radio station to put on the ad for workers in the carrots. He testified that it was a very simple thing—whenever he needed more workers, he just put the ad in. Then Garza reversed himself and testified that Alva was the one who placed the ads. To the contrary, the records of the radio station indicate that Garza placed the ad. Based upon the above as well as my own observations of the demeanor of the witness, I am unable to credit Garza's version as to the March 2 application for work of Luis Alcoca and Zaragoza.

Jose Gonzalez testified that he arrived at the mustard field before 6:30 a.m. on March 2 and asked his crew several times to start but no one did and that Alva and Dorantes arrived about 7;00 a.m. However, Alva and Dorantes said they arrived at 6;30 a.m.

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[10]This testimony is impeached by Respondent's records which show 20 people who started work for Respondent in carrots on March 2. The Employment Authorization Forms, indicate that March 2 was. the original date of hire of 15 of these people.

According to Dorantes and Alva, therefore, only a few minutes had passed in which the crew had been asked to work. Gonzalez himself stated that if crew members were ten or fifteen minutes late in starting, it did not matter.

Gonzalez testified that as soon as Alva and Dorantes arrived, he went to the edge of the field to start work expecting his crew to follow. From the edge of the field, he called for his crew to start work. Gonzalez testified that none of the crew members followed except the three from Calexico. He concluded that they did not want to work. He saw Alva leave and some other cars and then, even while some of the crew were still at the end of the field, he decided to go home and fix his car.

Gonzalez' testimony is implausible. A foreman (Gonzalez) would not expect his crew to follow him into the field* to work while members were talking to the harvest supervisor (Alva). Yet, according to Gonzalez, he went to the edge of the field and called his crew to work while they were still talking to Alva and Dorantes. Moreover, a forman would not likely decide on his own that he would go home at 7;00 a.m. and fix his car without checking with his supervisor about leaving. Therefore, I conclude that Alva either picked up Gonzalez on his way out of the field or told him to leave.

Respondent asserts that the members of Gonzalez' crew engaged in "intermittent work stoppages" on February 22 and March 1. On both days, the crew members left work early but with the permission of their supervisors.

Respondent contends that Vargas and her riders engaged in a work stoppage on February 22, 1979. The only testimony

concerning events of February 22 was that of Vargas. Vargas testified that she and her riders received approval from their forelady before leaving the fields. This is uncontradicted. From these facts, it is clear no "work stoppage" occurred on February 22. The facts show only that a few workers left work approximately one hour early with the approval of their supervisor

Respondent also contends that members of Gonzalez' crew angaged in a work stoppage on March 1. Vargas testified that Gonzalez gave the crew permission to leave because it was too wet. This is uncontradicted. Gonzalez was not questioned about this event. Alva testified that the crew's early departure was reasonable in light of the rain. Respondent's daily timesheets for March 1 indicate that at least 83 other Rancho Tigre workers worked the same number of hours or less than Gonzalez' crew on March 1.

Respondent then contends that a "work stoppage" took place in March 2, 1979. However, as discussed above, the crew was prevented from working, by the departure of the foreman from the field and by Alva's refusal to give the crew work despite the persistent requests. Respondent's reference to the record for evidence that a "strike" was taking place is misplaced. Vargas explained that "huelga" was a general greeting used whenever the saw Ellen Starbird.[11] Respondent's assertion that there was a "general atmosphere" of strikes in the Coachella Valley is unsupported.

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[11]"A. When I got there, I saw Elena and she—I looked at her and she looked at me and I mentioned "huelga" and she said—she answered "huelga." Q. What did you mean by saying "huelga?" A. It was like a greeting because every time we see them we always greet each other with "huelga" and "huelga." Q. Were you striking?
A. No."

The instant record shows that a continuing dispute concerning wages existed between the members of Gonzalez' crew and Ray Alva, harvest manager for Respondent. Prior to the discharge, Alva had asked the crew to do more work for the same wages[12]. At that time, the crew asked for higher wages for the additional work but their request was denied.

On March 2, Alva announced that he was raising the piece rate but would no longer guarantee an hourly wage. The minimum hourly wage required by law was $2.90. The piece rate Alva offered was $2.25. Workers had not been able to pick as much as one box per hour because the mustard was flowering and therefore unusable. The new wage rates announced by Alva would actually lower the worker's income.

The members of Gonzalez[1] crew protested the change in rage rates. They asked Alva to maintain the minimum hourly rage. In the alternative, they asked him to raise the piece rate if he would no longer guarantee an hourly minimum.

It has long been held that asking for higher wages or protesting the lowering of wages is a concerted activity for the mutual aid and protection of employees which is protected by section 7 of the NLRA (Section 1152 of the Act):

> "The notion that employees have a right to negotiate with their employer about their wages is the Act's very reason for being. No right can be said to be more protected than that one." (Cites omitted.) L.C. Cassidy & Son, Inc. (1973) 206 NLRB 486.

The courts have held that employees seeking a raise in wages are

[12]Rather than just strip a few big leaves from the mustard stalk as Maria had told them to do, Alva required that they strip all but two or three small leaves from the stalk. Stripping more Leaves would slow their work and thereby lower their piece rate wages.

protected by the Act, even when the presentation of such grievances involves a brief work stoppage. NLRB v. Kennametal, Inc. (3rd Cir. 1950) 182 F.2d 817, 26 LRRM 2203; Gullet Gin Co. v. NLRB (5th Cir. 1950) 179 F.2d 499, 25 LRRM 2340, revs'd on other grounds 340 U.S. 361, 27 LRRM 2230. The Agricultural labor Relations Board (ALRB) had held that employees were engaged in protected concerted activity in protesting new work instruction which they believed would slow their work and thereby decrease their wages. Resetar Farms (1977) 3 ALRB No. 18.

In the instant case, the wage demand of Gonzalez' crew was a protected concerted activity. As in Resetar tar Farms, supra, the employees were protesting a change in working conditions which would decrease their wages.

National Labor Relations Board (NLRB) precedent is well settled that the discharge of employees for engaging in concerted activities which are protected under section 7 of the National labor Relations Act (NLRA) is an unfair labor practice in violation of section 8(a)(1) of the NLRA. NLRB v. Washington Aluminum 1962) 370 U.S. 9, 50 LRRM 2235; Shelly & Anderson Furniture Co., Inc. v. NLRB (9th Cir. 1974) 497 F. 2d 1200, 86 LRRM 2619; First National Bank of Omaha v. NLRB (8th Cir. 1969) 413 F.2d 921, 71 LRRM 3019; NLRB v. Morris Fishman & Sons, Inc. (3rd Cir. 1960) 278 F.2d 792, 46 LRRM 2175; NLRB v. M & M Bakeries, Inc. (1st Cir. .959) 271 F.2d 602, 45 LRRM 2085. The Agricultural Labor Relations Board-has followed this precedent. Jesus Martinez (1979) 5 ALRB No. 51; Royal Packing (1979) 5 ALRB No. 31; S & F Growers (1978) 4 ALRB No. 58; Resetar Farms (1977) 3 ALRB No. 18.

Section 1153(a) of the ALRA, makes it an unfair labor

practice to interfere with, restrain or coerce agricultural employees in the exercise of their rights guaranteed by section 1152 of the Act. Section 1152 of the Act guarantees agricultural workers the right to "engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection."

In the instant case, the workers were restrained and coerced in the exercise of their section 1152 rights by being discharged immediately after they protested the loss of a guaranteed hourly wage and asked for an increase in wages. The employees were told by Alva that the wages would not be increased. They talked among themselves for a short while- and made the decision to go into the field to work. They were prevented from working, however, because their foreman had left at Alva's direction. They tried to locate their foreman so that they could work, asking Respondent's representatives Gamez and Alva where he was and telling each that they wanted to work. Alva told them their foreman had left because they did not want to work. When the crew told him they did want to work, Alva said they could not work because they had no foreman. As Alva- sent the foreman away, he posed an ineluctable "Catch 22" to the employees. He told them Gamez' crew was going to do the work they had been assigned.[13/] Alva knew, however, where Gonzalez was and could have contacted him to work with his crew.

The employees were told they should be shameful, that California was a big place to look for a job and that there was no-work for them. Despite Alva's saying that they were not

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[13/] Later in the discussion, Alva told Gonzalez[1] crew that there was no work for them because the company had decided to disc the field they had been assigned.

fired, the employees Were reasonable in concluding that they had been discharged, as I find they were in fact. If this was not correct, it was incumbent on Alva to tell the employees that there would be work available to them. Precision Tool and Die Manufacturing Co. 205 NLRB 205 (1973) Instead, Alva gave Gamez' crew work in the mustard, and later in the carrots, while continually telling Gonzalez' crew there was no work for them. Because Alva refused to assign work to Gonzalez[1] crew it was reasonable for them to conclude that they had been fired.

The Board has held that an employee was constructively discharged when the employer required him to quit work. Highland Ranch and San Clemente Ranch, Ltd. 5 ALRB No. 54 (1979)

Work assignments were made at the start of each day and were often changed during the course of the day.[14/] If an employee had no previous experience

in the crop, a foreman showed him how to do the work. Rancho Tigre was also advertising for additional workers on the day Gonzalez' crew was discharged.

Alva claimed that he had no work for Gonzalez' crew. However, according to Alva's testimony, there was plenty of work available. The workers persisted in asking for work wherever it was available. Alva nevertheless denied Gonzalez[1] crew the opportunity to work in the mustard or in another crop even though work was available. Indeed, Respondent was advertising for

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[14/] Alva's testimony that workers were only hired for one job cannot be credited in light of his testimony to the contrary and the uncontradicted evidence of the company's actual practices. When hired,, workers were not asked their previous job experience. The Employment Authorization forms are the only forms kept by the company on each worker. On these forms, every Rancho Tigre worker is classified under the same job title and same job skill. Workers are shifted among crops and crews as needed.

and hiring additional workers.[15/] Thus, with the knowledge of the protected concerted activity, Respondent caused employees to Lose their jobs.

General Counsel alternatively contends that Respondent's interference with the protected concerted activities of Gonzalez' crew was a partial lockout violative of Section 1153(a) and (c) of the ALRA. Although on the instant facts it may not be necessary to consider this contention to dispose of the causes herein, I do not disagree with the Genral Counsel. The NLRB has held that an employer violates Section 8(a)(1) and (3) of the NLRA by locking out employees who had engaged in protected concerted activities and union activities. Shelly & Anderson Furniture Co., Inc. v. NLRB (9th Cir. 1974) 497 F.2d 1200, 86 LRRM 2619; Anderson Plumbing & Heating Co. (1973) 203 NLRB 13. In Anderson Plumbing, the employer refused to let nine employees work who he believed had signed union membership cards. In Shelly & Anderson Furniture Co., the 9th Circuit upheld the NLRB's finding that the respondent violated section 8 (a)(3) and 8(a)(1) of the NLRA by a punitive lockout. Some of the employees there held a 10-15 minute demonstration. Fifteen minutes after the demonstration began, the employees presented themselves for work. They were not allowed to return to work. The demonstration was found, to be a protected concerted activity. The company there

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[15/] According to Alva's own testimony and company records, work was clearly available. More than 20 workers were .hired in carrots on the same day Gonzalez crew was denied work. Additionally, the radio spots for carrot workers were run all day, indicating that work was available for the next day. Respondent's Daily Time Records show that 44 people were hired to work in carrots from March- 2-6.

Work was available in the first mustard field as well. Accord! to Alva's testimony, there were at least 200 boxes of mustard left to be picked. This work would have been available had the company not wrongfully decided to disc it in retaliation for the crew's (cor

argued that even if it was protected, the employees were striking and therefore were required to make an unconditional application for reinstatement. It was found that the employees did make such an offer. The court held that even if they had not, the employer was required to offer unconditional reinstatement where he was guilty of an unfair labor practice, i.e., the lockout.

> "The reason for requiring an unconditional offer to return (by employees) is that employees who have caused their own unemployment should be required to notify the employer when the work stoppage is over... It was obvious when the employees presented themselves at the gate that they wanted to work." Shelly & Anderson Furniture Co., supra, 86 LRJRM at 2622.

In the case at hand, Gonzalez' crew engaged in protected concerted activities by protesting a change in. wage rates and asking for higher wages. Immediately thereafter, they were not allowed to return to work. First, their foreman left them so they could not work. Then Alva denied them work after they asked him where their foreman was and unconditionally requested work. This denial of work amounted to a punitive lockout as in shelly & Anderson, supra. As the employees had not caused their own unemployment, the employer was required to make an uncondition al offer of reinstatement. Here, however, the employees made an unconditional request for work. By locking them out, Respondent committed an unfair labor practice in violation of section 1153 (a) and (c) of the Act.

Respondent's defense is that the named discriminatees voluntarily quit their work; that they refused to work at their given assignment; and that there was no work for them. These

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15/(con't) concerted activities.
Additionally, there were approximately nine other crops n production at Rancho Tigre, to which members of Gonzalez' crew could have been transferred.

will be discussed seriatim.

Respondent's first contention is that the discriminatees voluntarily quit their jobs. At Alva's direction, the termination papers of each member of Gonzalez' crew were filled out voluntarily quit." The facts of the case, however, do not support Respondent's claim that Gonzalez' crew quit their jobs.

At the first field, Alva, Dorantes and Gonzalez all left before the crew had even a minimum amount of time to consider alva's "take it or leave it" wage offer and start working. The assertion that they quit is not even supported by the testimony of Respondent's three supvervisors. .Alva testified that he left to let them decide what to do. Dorantes testified that no workers told him they were not going to work. Gonzalez testified that no one said the employees were not going to work and members of his crew were still in the field when he left.

Even if the supervisors had the misimpression that the employees quit, they were disabused of that notion at the second field. There, Gonzalez' crew members told Alva they were looking for their foreman and that they wanted to work. Alva's answer to them that they could not work because they had no foreman is a circular argument. Then Alva told them that Giamez' crew was going to move to the field they had been assigned. also circular was his statement that they could not work because hey quit at the other field. Alva's job was to assign workers to fields where needed. He testified that work was available. He also knew how to contact Gonzalez which he later did. Gonzalez[1] crew members were ready, willing and able to do this available work and so informed Alva. His claim that there was nothing he

could do because the crew had "quit" lacks merit.

In Union Camp Corporation (1972) 194 NLRB 933, the NLRB overturned the Trial Examiner's conclusion that an employee had quit his job. There, the employee testified that on Friday he might have said, "I will just quit." When he reported to work on Monday, he was denied continued employment. The Board found that the employee's statement was an ambiguous statement of future intent and was insufficient to justify the company's assertion that he quit his job.

> "The most that can be said as to proof in that connection is that Respondent may have had a misunderstanding as to Cowart's intentions. But by Monday morning no such misunderstanding could have existed, both in view of Cowart's attempted resumption of his duties and his clear denial at that time of any intention to quit." Union Camp Corporation, supra, 194 NLRB at 433.

In the case at hand, there is an absence of evidence that Gonzalez' crew quit. As in Union Camp, however, any possible misunderstanding on the part of Respondent could no longer have existed after the crew found Alva, told him their foreman had left them and asked for work. At this point, the evidence is clear that the employees had no intention of leaving their work.

Similarly, the NLRB concluded in Irwin's Barber (1975) 220 NLRB No. 185, that employees were unlawfully discharged for their protected activities despite Respondent's claim that they had quit. There, as here, the employees demanded higher wages, but did not indicate that they would quit if their demands were not met. When the employer rejected their demands he collected their keys and other company property. The employees were sent out a "final paycheck." (See also NLRB v. Phaostron Instrument

& Electronic Co. (9th Cir. 1965) 344 F.2d 855, 59 LRRM 2175).

The events in the second mustard field are closely analogous to Irwin's Barber. After refusing to give the crew work, Alva ordered Gonzalez' crew to turn in the company's boots and he gave them final paychecks. These actions lead to the conclusion that the employees were fired and not that they quit. (See also C.J. Krehbiel Co. (1976) 227 NLRB 383.)

Alva tried to bolster his conclusion that the employees quit" by asserting that on March 2 and on the previous day they refused to work." There is no evidence that Gonzalez' crew refused to work on March 2.

The day before (March 1) Gonzalez' crew members left early after Gonzalez told them they were not obligated to work in the rain and heavy mud. Alva did not protest when he was told they left early; nor did he tell the crew members that they should not have left early. Alva twisted the facts to bolster his assertion that they refused to work on March 1 to support Respondent's contention that Gonzalez[1] crew quit on March 21 similarly, Alva's assertion that Gonzalez' crew members asked him to run them off so they could get unemployment lacks merit.

Even if the workers had engaged in a work stoppage after protesting the wages, such a work is a protected activity. In NLRB v. Kennemetal, Inc. (3rd Cir. 1950) 182 F.2d 817, 26 LRRM 2203, the court was presented with this issue, whether a single spontaneous brief work stoppage inspired by wage grievances is an activity protected by the NLRA. This proposition is in accord with previous decisions of the NLRB and the courts, and has been well established in subsequent decisions. (NLRB v.

Washington Aluminum Co., Inc. (1962) 370 U.S. 9; 50 LRRM 2235; Gullet Gin Co. v. NLRB, supra; American Homes Systems (1972) 200 LRB 1151; Botany Industries (1968) 171 NLRB 1590; Gulf & Western Industries (1967) 166 NLRB 7.)

Even if the members of Gonzalez' crew did engage in a work stoppage, such a work stoppage, like that in Kennmetal, supra, is protected by the Act. The crew had engaged in protected concerted activities by protesting a change in wage rates and asking for higher wages. Their wage requests were rejected, if, as Respondent contends, the crew then refused to work, such a work stoppage would be a protected concerted activity. Respondent's refusal to allow the crew to return to work, therefore, violates the Act.

Additionally, respondent has attempted to show that the members of Gonzalez' crew struck on March 2. It is well settled, however, that a strike in protest of working conditions falls within the ambit of protected activity. (NLRB v. Washington Aluminum Company, Inc., supra; NLRB v. Guernsey-Muskingham Electric Cooperative, Inc. (6th Cir. 1960) 285 F.2d 8, 47 LRRM 2260; American Home Systems, supra.) It is also well established that "if (employees) strike in connection with a current labor dispute, their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act." (NLRB v. Mackay Radio and Telegraph Co. (1938) 304 U.S. 333, 347, 2 LRRM 610; Gulf & Western Industries, supra.)[16/]

[16/] If the actions of the crew members were somehow construed to be a strike, the strike, too, would be a protected activity. The crew members engaged in protected concerted activities by asking Alva for higher wages. He refused to grant their requests, (con't)

When Gonzalez' crew presented themselves to Alva and asked for work, his refusal to let them work was tantamount to discharge It is clear that the discriminatees made an unconditional request for work at the second mustard field on March 2. Respondent does not contend that replacements were hired in the interim time. Had the members of Gonzalez1 crew gone on strike, they were entitled to reinstatement upon their subsequent unconditional request for work. The decision to disc the field came later so that its proffer as an excuse is pretextual. Respondent's refusal to reinstate them is a violation of the Act.

Respondent also contends that there was no work- for Gonzalez' crew on March 2. This contradicts Alva's testimony that there was work available. It also contradicts respondent's later recorded forms that the employees had "voluntarily quit" for then the forms would have logically reflected "lay off."

Alva testified that he told Gonzalez' crew there was no work for them because Gamez1 crew was going to complete work which had been assigned to Gonzalez' crew. Alva decided not to give Gonzalez1 crew work even though work was available. The choice of Gonzalez1 crew as the crew to be laid off as a result of the subsequent decision to disc the field was discriminatory.[17] Other Rancho Tigre employees who had worked in the mustard at any time during the last week of the harvest were transferred to other crops

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16/(con't)Respondent claims that members of Gonzalez' crew "heckle workers who started to work saying "Hey don't go in—that's the only way we are going to get our raise." According to respondent's evidence, it is clear that a strike, if it occurred, was to protest wag Even if so, such activity is clearly protected by the Act. As state above, strikers do not lose their status as employees when they go out 6n strike. Economic strikers have a right to reinstatement until their jobs are filled by permanent replacements.(MacKay Radio and telegraph Co., supra; NLRB v. Fleetwood Trailer Co. (1967) 389 U.S. 375, 66 LRRM 2737)

17/ See next page.

Respondent was advertising for and hiring workers in the carrots throughout the day, but members of Gonzalez[1] crew were told there was no work for them. Alva assigned Gamez' crew to work in the carrots after the decision to disc the mustard field.

The claimed "layoff" of Gonzalez[1] crew was clearly pre-textual. It was used as a means of ridding the ranch of a crew which had been engaging in protected concerted activities.

No further findings are required to establish that respondent violated section 1153(a) of the Act.

> "It is too well settled to brook dispute that the test of interference, restraint and coercion under Section 8(a)(1) of the Act (the equivalent of ALRA section 1153(a)) does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act." El Rancho Market (1978) 235 NLRB No. 61, p. 10. (See also Cooper Thermometer Co. (1965) 154 NLRB 502; American Freightways Co., Inc. (1959) 124 NLRB 146; S & F Growers (1978 4 ALRB No. 58)

The discharge of a crew within moments of their requests for higher wages is conduct which may reasonably be said to have a tendency to interfere with the free exercise of their right to engage in protected concerted activities. I conclude Respondent violated section 1153(a) of the Act by this action.

Section 1153(c) of the ALRA, like section 8(a)(3) of the NLRA, proscribes discrimination in regard to the hiring and tenure of employment to encourage or discourage membership in a labor organization. Respondent also violated section 1153(c) of

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17/ Rancho Tigre had had trouble with a poor mustard crop since December. As late as the night of March 1, however, Alva, Dorantes and Gamez had decided to offer what was termed an "incentive wage" to get the last of the mustard crop harvested. Between the time that decision was made and the decision to disc the mustard was made, the only changed circumstance was the protected concerted activities of the crew. The sales office, which Alva alleges (con't

the ALRA by discriminatorily discharging the members of Jose Gonzalez' crew.

The first element necessary to prove a violation of section 1153(c) is discrimination in regard to tenure of employment. The discharge of an employee is such discrimination. (NLRB v. Link Belt Co. (1941) 311 U.S. 584, 7 LRRM 297.) As discussed above, Gonzalez' crew members were discharged, whether termed a discharge, constructive discharge, lockout or even a failure to reinstate after a strike or work stoppage.

The second element necessary to prove a violation of 1153(c) is that the discrimination was accomplished for the purpose of discouraging membership in a labor organization. Respondent's knowledge of labor organization activity is a key in establishing its motivation. The courts, recognizing that proof of motivation can rarely be made by direct evidence, permit an inference of unlawful motive to be made by circumstantial evidence. NLRB v. Putnam Tool Co. (6th Cir. 1961) 290 F.2d 663, 48JLRRM 2263. A prima facie case of unlawful motivation consists of evidence (1) that the discharges had engaged in union activity of which the employer had knowledge (NLRB v. Whitin Machine Works (1st Cir. 1953) 204 F.2d 883, 32 LRRM 2201; NLRB v. Ampex Corp. (7th Cir. 1966) 368 F.2d 298, 63 LRRM 2462); (2) that the employer had an animus against the union (Maphis Chapman Corp.v. NLRB(4th Cir. 1966) 368 F.2d 298, 63 LRRM 2462); and (3) that the discharges had the effect of discouraging union activity, though

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17/ (con't) made the decision to disc, was informed of the crew's concerted activities through Bob Tate. In these circumstances, I find the motivation for the decision to disc the crop was in retaliation for' the employees protected concerted activities.

subjective evidence that employees actually were discouraged is not required. (Radio Officers Union v. NLRB (1954) 347 U.S. 17, 33 LRRM 2417.)

Once the General Counsel has put forth a prima facie case that the employer has engaged in discriminatory conduct, the burden shifts to the employer to establish that it was motivated by legitimate objectives. (NLRB V. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 65 LRRM 2465; NLRB v. Okla-Inn (10th Cir. 1973) 488 F.2d 498, 84 LRRM 2585, enforcing 198 NLRB 410 (1972).)

In the instant case, the activities of Gonzalez' crew immediately preceded their discharge, and were observed by Alva, Dorantes and Gonzalez. The named members of Gonzalez' crew were meeting and talking with two UFW organizers when Ray Alva and Benjamin Dorantes arrived and called the crew into the field for a meeting. At the meeting the crew protested changes in the wage-rates and asked for higher wages. Immediately after the meeting, that crew was discharged.

The UFW representatives were Father Tobin- and—Ellen Star-bird. Father Tobin was dressed in priest's attire. Alva, Dorantes and Gonzalez readily admitted knowing that he was a priest. Father Tobin had organized Tenneco West workers for the UFW prior to the ALRB election and was well known to field - hands.

Alva's treatment of the UFW organizers leads to the conclusion he knew they represented the UFW. It is well known that representatives of the Catholic Church, such as priests and nuns, work "with the UFW. If a person did not know that a Roman Catholic priest was working with the UFW, it would be a matter of great

curiosity to see a priest in the fields at 6:00a.m. Alva's reaction, however, was not of surprise but of sarcasm. He asked Father Tobin if he was looking for work. Ellen Starbird was wearing a dress and high heels the morning of March 2. Despite all appearances, Alva asked her, too, if she were looking for work. If Alva had not known who they were, his reaction would certainly not have been to ask a priest and a woman in a dress and heels if they were looking for work. Gonzalez testified that he knew Father Tobin and Ms. Starbird were not workers.

The discharge of a whole crew immediately after they were seen talking to UFW representatives would clearly have the effect of discouraging union activity. This effect was felt not only by the discharged employees but also by other employees who observed the events of March 2. Domingo Gamez' crew was gathered outside the same mustard field on March 2 where Gonzalez' crew was meeting with the UFW and witnessed the concerted activities of Gonzalez' crew. Gamez' crew was also present when, less than thirty minutes later, Gonzalez' crew was told by Alva that there was- no work for them and that their work was being given to Gamez' crew. The clear message of the results of the crew's union activities could not escape the members of Gamez' crew.

Section 1153(c) of the ALRA, like section 8(a)(3) of the NLRA, proscribes discriminatory discharges whose aim is the discouragement of membership in "any labor organization." The term "labor organization" is defined by each act in broad language, The Act defines it as "any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists, in whole or in part, for

for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work for agricultural employees." The definition of "labor organization" set forth in section 2(5) of the NLRA is identical to the above without the words "for agricultural employees."

In NLRB v. Kennemetal, supra, the court found that employees who informally joined together to present their grievances fall within the statutory definition of "labor organization". There was no union or formal collective bargaining agency. Seven or eight employees who were gathered around a water fountain during working hours were discussing a wage increase which had reportedly been won after a strike at a neighboring plant. Someone suggested that the group should immediately present its wage grievance to the company and the group started walking toward the executive offices. As they walked, the number swelled. The group met with the company president that day. Four days later, leaders of the spontaneously formed group were discharged. The Board and the court held that the informal and spontaneous group met the definition of a labor organization and the discharge of their leaders violated section 8(a)(3) of the NLRA.

Kennemetal is closely analogous to the case at hand. The events at issue occurred after a representation election but before the UFW was certified as the collective bargaining agent. Respondent's employees, therefore, were not yet represented by a certified union or bargaining agent at the time of the discharge. On March 2, when Alva announced the change in wage payment rates, a group of employees spontaneously reacted against that change

and requested higher wages. It was that group which was not allowed to work, and then told there was no work for them. That spontaneously formed group, like the one in Kennemetal, meets the statutory definition of a labor organization. It was an organization of employees or employee plan, even if on an ad hoc basis, in which employees participated and it existed for the purpose of dealing with the employer on wages and rates of pay.

In the instant case, UFW representatives were present during the exercise of concerted activities. I find that Respondent's representatives knew this. Retaliation against the concerted activities was thus[1] also retaliation against union activities in violation of section 1153(c) of the Act. Even if the UFW representatives were not present or even if Respondent's supervisor had no knowledge of their presence, discrimination against employees for engaging in concerted activities has been regarded as just a step removed from discrimination for the purpose of discouraging union membership and held to violate section 8(a)(3) of the NLRA. In NLRB v. Erie Resistor Corp. 373 U.S. 221, 233, 53 LRRM 2121 (1963), the Supreme Court held;

> "Under §8(a) (3), it is unlawful for an employer by discrimination in terms of employment to discourage 'membership in any labor organization[1], which includes discouraging participation in concerted activities... such as a legitimate strike."

The Supreme Court cited NLRB v. Wheeling Pipe Line, Inc. 229 F.2d 391, 37 LRRM 2403 (CA 8, 1956); Republic Steel Corp. v. NLRB, 114 F.2d 820, 7 LRRM 364 (CA 3, 1940).

Discrimination against the spontaneously formed group took the form of immediate discharge. Respondent was unable to show legitimate reason for the discharge. Based upon the above as

well as the fact of the timing of the discharge immediately after the group's protest against wage changes, the fact that only those that protested the wage changes were discharged, and the fact that Respondent did not give still available work to the protesters who then and immediately requested it, I infer and find a retaliatory motive violative of Section 1153 (c) and (a) of the Act.

I now turn to consideration of the circumstances of Luis Alcocer and Pedro Zaragoza on March 2. Alcocer and Zaragoza were members of Gonzalez' crew on March 2, participated in the discussion with the CFW representatives and the discussion with Alva wherein crew members presented their grievances concerning wages.

Zaragoza asked Alva for a continuation of the hourly pay. Like the rest of the crew, Zaragoza and Alcocer were prevented from working because their foreman left the field. Alcocer and Zaragoza, after fixing their car, joined the rest of their crew at the field where Gamez[1] crew was waiting to work. Alcocer and -Zaragoza joined the discussion wherein the crew members told Alva they wanted to work anywhere work was available. After seeing that Alva was denying the crew's pleas to work, Alcocer and Zaragoza went to the carrot fields because they had heard on the radio that Respondent was advertising for help in the carrots. They asked Garza for work and were told there was no work for them. Garza hired other workers in the carrots before and after Alcocer and Zaragoza asked for work. As indicated above, the crew was engaged in protected concerted activity and union activity. Knowledge of these occurences was transferred

to Garza and thus to Respondent, by Gonzalez. Garza refused to rehire Alcocer and Zaragoza. Garza falsely claimed that he had enough workers. Francisco Alcocer, a credible witness, overheard the conversation. Francisco Alcocer's family of four had been hired by Garza only a few minutes before Luis Alcocer and Pedro Zaragoza asked for work. After Alcocer and Zaragoza left, Garza said to Francisco Alcocer, in answer to a question that "there was no more work for those persons."

Garza hired two more groups of workers totalling seven or eight during the day of March 2, after Alcocer and Zaragoza were denied work. Respondent was running ads for workers until 9:00 p.m. on March 2.

Throughout the day of March 2, and on days thereafter, additional workers were hired to work in the carrots and other Rancho Tigre crews were assigned to work in the carrots.

In a similar case, the NLRB noted the significance of an employer's hiring new employees while denying rehire to a former employee who had engaged in union activity. Fabric Mart Draperies (1970) 182 NRLB 390:

> "(I)t is noted that in view of the fact that respondent was continuously hiring sewers for its drapery department, it was in a position to give Veljikovic a promise of employment as a drapery sewer when she called Williams on April 1 and begged for any job..."

In the present case, Garza was in a position to rehire Alcocer and Zaragoza in the carrots on March 2 inasmuch as he was advertising for and hiring new workers in the carrots that day and continuing thereafter. He also hired workers just before Alcocer and Zaragoza asked for work and hired other workers soon

after they left. It is well established that a refusal to rehire because of concerted activities and for union activities violates section 8(a)(l) and 8(a)(3) of the NLRA. (Kellwood Co. v. NLRB (9th Cir. 1970) 427 F.2d 1170, 74 LRRM 2639; Gates Air Conditioning, Inc. (1972) 199 NLRB 1101; Fabric Mart Draperies (1970) 182 NLRB 390; Casino Operations, Inc. (1968) 169 NLRB 328; Kitiyama Bros. Nursery (1978) 4 ALRB No. 85; Sahara Packing Co. (1978) 4 ALRB No. 40)

In view of these circumstances, it must be concluded that the only reason Alcocer and Zaragoza were denied rehire was because of their protected concerted activities and union activities in violation of Section 1153(a) and (c) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Tenneco West, Inc., is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

'2. The United Farm Workers of America, AFL-CIO ("UFW")-is a labor organization within the meaning of Section 1140". 4 (f) of the Act.

3. The 23 employees of Respondent whose names are listed below ("the employees") are agricultural employees within the meaning of Labor Code Section 1140.4(b) of the Act ("ALRA"):

Luis. Alcocer
Carmen Ceja
Consuelo Ceja
Reyes Ceja
Samuel Ceja
Celina Diaz
Elena Fee
James' Fee
Remedies V. Lopez
_Alejandro Lua
Lilia Lua
Martha P. Lua
Miguel A. Lua
Samuel Lua
Teresa Lua
Alicia Madrigal
Maria L. Mendez
Maria De Los Angeles Mendoza
David Nunez
Juana Nunez
Amelia B. Torres
Josefina Vargas
Pedro Zaragoza

4. By discharging the employees on March 2, 1979 for engaging in protected concerted activities for their mutual aid and protection, respondent violated Section 1153(a) of the ALRA.

5. By discharging the employees to discourage membership in a labor organization, respondent violated Section 1153(c) of the ALRA.

6. By refusing to rehire Luis Alcocer and Pedro Zaragoza on March 2, 1979, because of their protected concerted activities, respondent violated Section 1153 (&,) of the ALRA.

7. By refusing to rehire Luis Alcocer and Pedro Zaragoza on-March 2, 1979, because of their labor organization activities, respondent violated Section 1153(c) of the ALRA.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153(a) and (c) of the Act, I shall recommend that it cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act and take certain affirmative action designed to effectuate the policy of the Act.

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

ORDER

Respondent, Tenneco West, Inc., its officers, agents, successors, assigns 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, 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 except as authorized by Section 1153 (c) of the Act.

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

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

a. Immediately offer the persons named below employment in their former or substantially equivalent jobs and make each of them whole with interest for any losses he or she may have suffered as a result of his or her termination and failure to be hired and hold such job offers open until the season of the year during which the persons formerly worked at Tenneco West, Inc.

Luis Alcocer
Carmen Ceja
Consuelo Ceja
Reyes Ceja
Samuel Ceja
Celina Diaz
Elena Pee
James Fee
Remedies V. Lopez
Alejandro Lua
Lilia Lua
Martha P. Lua
Miguel A. Lua
Samuel Lua
Teresa Lua
Alicia Madrigal
Maria L. Mendez
Maria de Los Angeles Mendoza
David Nunez
Juana Nunez
Amelia B. Torres
Josefina Vargas
Pedro Zaragoza

b. Preserve, and upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination of the amounts due these employees 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 thereafter reproduce sufficient copies in each language for the purpose set forth hereinafter.

d. Post in conspicuous places, including all places

where notices to employees are customarily posted, copies of the attached notice. Copies of said notice shall be posted by respondent immediately upon receipt thereto. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material. Said notice shall be posted for a period of 60 days and shall be in English and Spanish.

e. Provide a copy of the attached Notice to each employee working for respondent or hired by respondent during the 12-month period following the issuance of this Order.

f. Within 30 days after issuance of this Order, mail copies of the attached Notice in all appropriate languages to the last known home addresses of all employees employed by respondent from February 28, 1979 until the issuance of this Order.

g. Arrange for a representative of respondent or a board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of respondent op company time. The reading or readings shall be at such times and places as are specified by the Regional Director. A representative of respondent shall be present. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be: paid by respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

h. Notify the Regional Director in writing, within 30 days from the date of issuance of this Order of the steps which have been taken to comply with it. Upon request of the Regional Director, respondent shall notify him periodically thereafter in writing of further actions taken to comply with this Order.

It is further ORDERED that all allegations contained in the complaint and not found herein be dismissed.

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Dated: November 21, 1979

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MICHAEL K. SCHMIER
Administrative Law Officer

NOTICE TO WORKERS

After a trial where 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 by discharging and refusing to rehire the workers named below, and has ordered us to 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 farmworkers these rights:

1. To organize themselves;

2. To form, join, or help any union;

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

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

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

Because this is true, we promise you that:

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

WE WILL NOT discharge or refuse to hire or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL offer jobs to each of the following persons, and we will pay each of them any money they lost because we discharged and refused to hire them.

Luis Alcocer	Miguel A. Lua
Carmen Ceja	Samual Lua
Consuelo Ceja	Teresa Lua

Reyes Ceja
Samuel Ceja
Celina Diaz
Elena Fee
James Fee
Remedies V. Lopez
Alejandro Lua
Lilia Lua
Martha P. Lua
Alicia Madrigal
Maria L. Mendez
Maria de Los Angeles Mendoza
David Nunez
Juana Nunez
America B. Torres
Josefina Vargas
Pedro Zaragoza

We recognize, that the Agricultural Labor Relations Act is the law in California. If you have any questions about your rights under the Act/ you can speak to an agent of the Board.

The nearest Board office is located at:

1629 West Main Street
El Centro, CA 92243

Telephones (714) 3S3-2130

Dated:

TENNECO WEST, INC.

By: _____
Representative Title

Dated:

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

DO NOT REMOVE OR DEFACE: