El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

COLACE BROTHERS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-110-EC 79-CE-240-EC 79-CE-246-EC 8 ALRB No. 1

DECISION AND ORDER

On July 8, 1980, Administrative Law Officer (ALO) Stuart A. Wein issued the attached Decision in this proceeding. Thereafter, Respondent and Charging Party, the United Farm Workers of America, AFL-CIO (UFW), each timely filed exceptions and a supporting brief. The General Counsel also filed exceptions[1/] to the ALO's Decision but not in a timely fashion. Respondent opposes the acceptance of the General Counsel's untimely exceptions based on the absence of extraordinary circumstances justifying the late filing. We accept General Counsel's tardy exceptions for Respondent has not shown that it was prejudiced by the late filing. Sam Andrew's Sons (Aug. 15, 1980) 6 ALRB No. 44.

Pursuant to the provisions of Labor Code section 1146[2/] of the Agricultural Labor Relations Act (Act), the Agricultural Labor

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[1/] General Counsel's motion to consolidate on appeal this matter with Vessey and Company, Inc. (Dec. 15, 1981) 7 ALRB No. 44 and Joe Maggio, et al., 79-CE-186 et seq., is hereby denied.

[2/] All code references will be to the California Labor Code unless otherwise stated.

Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the ALO only to the extent consistent herewith, and to adopt his recommended order as modified herein.

In our Decision in Admiral Packing, et al. (Dec. 14, 1981) 7 ALRB No. 43, we concluded that as of February 21, 1979,[4] the economic strike at Respondent's operation was converted to an unfair-labor-practice strike. That conclusion renders moot much of the ALO's analysis herein and a substantial number of the UFW's and Respondent's exceptions. Therefore, the first question presented by the consolidated complaint herein is whether, on December 4, Respondent's employees tendered an unconditional offer to end their work stoppage and to return to work.

Under well-settled principles of labor law, and applicable precedents of the National Labor Relations Act, 28 U.S.C. section 151 et seq., which section 1148 of the ALRA requires us to follow, when the strike against Respondent was converted to an unfair-labor-practice strike by Respondent's bad-faith-bargaining tactics, the

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[3] Respondent excepts to certain of the ALO's credibility resolutions. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios (April 26, 1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531]. We have reviewed the record and find the ALO's credibility resolutions to be supported by the record as a whole.

[4] All dates are 1979 unless otherwise stated.

strikers became unfair-labor-practice strikers and Respondent incurred the obligation to reinstate them to their original positions upon receipt of their unconditional request to return to work. Further, Respondent must, upon receipt of such an offer, terminate, if necessary, any temporary replacements who were hired during the strike, in order to accommodate the returning strikers. Mastro Plastics Corp. v. NLRB (1956) 350 U.S. 270 [37 LRRM 2587]; Gorman, Basic Text on Labor Law (1977) p. 341; Admiral Packing, et al., supra, 7 ALRB No. 43; Vessey & Company (Dec. 14, 1981) 7 ALRB No. 44.

On December 4, Respondent received the following communication from its striking employees:

> We the undersigned workers of Colace Company [sic] hereby offer to return to work and declare that we are available for work upon recall.
>
> Nosotros los trabajadores de la Colace Company [sic] ofrecemos devolver al trabajo y declaramos que estamos listos para trabajar cuando nos llaman.

This statement was followed by the signatures of 34 striking employees.[5/] The ALO found that this was an unconditional offer to return to work. Respondent excepts to that finding and argues that the employees' offer was conditional since it was made to depend upon the happening of another event, i.e., recall according to seniority. This argument is rejected as without merit, for the employees' mention of Respondent's anticipated acceptance (recall) cannot be considered as constituting the imposition of a

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[5/] The identical communication (except for the name of the company and the names of the workers) was discussed in Vessey & Company, Inc., supra, 7 ALRB No. 44.

condition precedent.[6/]

In effect, Respondent would have us require a highly formalized system of terminating labor stoppages where the slightest deviation would render the offer to return to work defective. We emphasize that the purposes of the Act would not be furthered by creating such a burden on workers abandoning a strike caused or prolonged by their employer's unfair labor practices. The legal authorities on which Respondent's argument rests concern a type of conditional offer that would have involved some concession from the employer. See, e.g., Swearington Aviation Corp. v. NLRB (5th Cir. 1978) 568 F.2d 458 [97 LRRM 2972]; H & F Binch (2d Cir. 1972) 456 F.2d 357 [79 LRRM 2692]; NLRB v. Pecheur Lozenge Co. (2d Cir. 1953) 209 F.2d 393 [33 LRRM 2324]. Here, nothing more than an act of acceptance by Respondent, recalling the strikers to their former positions, was called for by the offer to return. Such an act is a necessary part of the process of rehire and cannot be considered as a concession demanded of Respondent. An unequivocal offer to return to work immediately upon recall certainly does not amount to a conditional offer. See, e.g., Retail Store Union v. NLRB (D.C. Cir. 1972) 466 F.2d 380 [80 LRRM 3244]; Colecraft Manufacturing Co. v. NLRB (2d Cir. 1967) 385 F.2d 998 [66 LRRM 2677]; NLRB v. McQuaide (3d Cir. 1977) 552 F.2d 519 [94 LRRM 2950]; American Cyanmid v. NLRB (7th Cir. 1979) 592 F.2d 356 [100 LRRM 2640]; Decker Foundary Co. (1978)

[6/]It goes without saying that the employees' offer required acceptance by Respondent before they could resume their prior jobs. The fact that the employees clearly indicated that they would return to work immediately upon recall actually underscores the unconditional nature of their offer.

237 NLRB 636 [99 LRRM 1047]; Kayser-Roth Hosiery Co. (1970) 187 NLRB 562 [76 LRRM 1231]; New Orleans Roosevelt Corp. (1961) 132 NLRB 248 [48 LRRM 1337]; Admiral Packing, et al, supra, 7 ALRB No. 43; Vessey and Company, Inc., supra, 7 ALRB No. 44.

Accordingly, when Respondent failed to reinstate the returning strikers on December 4 and thereafter, it violated section 1153(c) and (a) of the Act. Mastro Plastics Corp. v. NLRB, supra, 350 U.S. 270. Respondent's returning striking employees are entitled to backpay and recovery of other economic losses for the period starting December 4, 1979, the date they were unlawfully denied reinstatement.[7/]

The ALO found that Pedro Zaragosa joined Respondent's striking employees on December 15, 1979, and that his offer to return to work on December 15, 1979, was not an unconditional offer, but that he made an unconditional offer to return to work by the filing of the instant charge, 79-CE-240-EC. We affirm the ALO's conclusion that Zaragosa joined the picketing employees on December 15, 1979 and that his offer to return on that same day was not an unconditional offer to return to work. However, unlike the ALO, we find no record evidence to support a finding that Zaragosa has made an unconditional offer to return to work. Contrary to the finding

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[7/]At a compliance hearing on this matter, Respondent may demonstrate that certain of the striking employees were permanently replaced prior to the date of the conversion of this strike to an unfair-labor-practice strike. Such permanently replaced workers are entitled to reinstatement as of the date of their unconditional offer to return to work (December 4) unless Respondent can also demonstrate that it was necessary to offer permanent employment to the replacements beyond the first harvesting season. Seabreeze Berry Farms (Nov. 16, 1981) 7 ALRB No. 40.

of the ALO, nothing in the charge filed herein could lead Respondent to conclude that Zaragosa was unconditionally prepared to resume his duties. In light of our conclusion that this strike was an unfair-labor-practice strike, Respondent incurs the obligation to immediately reinstate Zaragosa only upon receipt of an unconditional offer to return to work. As we find that the charge did not constitute such an offer, and that there is no evidence of such an offer, we conclude that the General Counsel has not proven a prima facie case of a violation of section 1153(c) and (a) as to Zaragosa and we therefore dismiss the allegations of the consolidated complaint based on the charge in Case No. 79-CE-240-EC.

We affirm the ALO's conclusion that insufficient evidence was adduced to support the allegation based on alleged comments of Joe Colace, Jr. on November 2, 1979, to the effect that Respondent would not bargain in good faith. We therefore dismiss the portion of the consolidated complaint based on the charge in Case No. 79-CE-110-EC.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Colace Brothers, Inc., its officers, agents, successors, and assigns shall

1. Cease and desist from:

a. Failing or refusing to rehire or reinstate, or otherwise discriminating against, any agricultural employee because of his or her union activities or sympathies;

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

a. Offer to the following employees who offered to return to work on December 4, 1979, full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or other employement rights and privileges and reimburse them for any loss of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them on and after December 4, 1979, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest at a rate of seven percent per annum:

Refugio Acosta	Adolfo Melchor
Daniel Aguirre	Arnolfo Moreno
Eufemio Anaya	Luis Montero
Ruben M. Barrajas	Francisco R. Paz
Espiridion Bermudez	Rual Pacheco
David Cajero	Rosario Panela
Cresenciano Castellon	Luciano Perea
Ignacio Esqueda	Ignacio Perez
Guillermo Gomez	Jesus Ramirez
Maria Luisa Guzman	Maria Elena Reyes
Jose Luis Haro	Josefina B. Rico
Elias Hernandez	Juan M. Rivera
Manuel Hernandez	Merced Romero
Santiago Jauregi	Manuel Urena
Manuel Lizaola	Jesus Velasquez
Bernardino Lopez	Manuel Villalobos
Jesus Martinez	Jesus Villegas

b. Preserve and, upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying, all personnel records, social security payment records, time cards, personnel records and reports, and other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

c. Sign the Notice to Agricultural Employees attached

hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each langauge for the purposes set forth hereinafter.

d. Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from December 4, 1979, to the date of issuance of this Order.

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

f. Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable 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.

g. Notify the Regional Director in writing, within 30

days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: January 7, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

MEMBER McCARTHY, dissenting in part:

I would affirm the rulings, findings, and conclusions of the ALO except as to the reinstatement rights of Pedro Zaragosa. I agree with the majority that the evidence does not show that Zaragosa made an unconditional offer to return to work. I also agree with both the ALO and the majority that the evidence does not support the allegation that Joe Colace, Jr. stated that Respondent would never sign a contract with the United Farm Workers.

I strongly disagree with the majority as to the nature of the strike and Respondent's obligations to the returning strikers. The economic strike here is the same strike as that involved in Admiral Packing (Dec. 14, 1981) 7 ALRB No. 43. For the reasons set forth at pages 117 and 118 of my Dissent in Admiral Packing, I agree with the ALO's conclusion that the strike in question was not converted to an unfair-labor-practice strike. For the reasons given in my Dissent in Seabreeze Berry Farms (Nov. 16, 1981) 7 ALRB No. 40, I agree with the ALO's conclusion that the returning economic

strikers who were permanently replaced are entitled to reinstatement only as vacancies occur in Respondent's work force. Respondent fulfilled its initial obligation to the returning economic strikers by not hiring any replacements after December 4, 1979, the date on which the employees in question made their unconditional offer to return to work.

I would not accept the General Counsel's exceptions as they were four days late and the regulations do not set forth any grounds upon which such late filing may be excused. Moreover, one extension of time had already been granted to the General Counsel for the filing of its exceptions.

I believe the Board should have dismissed this complaint in its entirety.

Dated: January 7, 1982

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by refusing to reinstate unfair-labor-practice strikers who offered to return to work on December 4, 1979.

The Agricultural Labor Relations Board has told us to send out and post this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farmworkers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. 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 fail or refuse to rehire or reinstate, or otherwise discriminate against any employee in regard to his or her employment because he or she has joined or supported the UFW or any other labor organization.

WE WILL offer to reinstate all employees, then on strike, who offered to return to work on December 4, 1979, into their previous jobs or to substantially equivalent jobs, without loss of seniority or other rights or privileges, and we will reimburse them for any loss of pay and other economic losses they incurred because we discharged or failed to hire or rehire them, plus interest at seven percent per annum.

Dated: COLACE BROTHERS, INC.

By: _____
(Representative) (Title)

If you have any questions about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (714) 353-2130.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Colace Brothers, Inc.

8 ALRB No. 1
Case Nos. 79-CE-110-EC/
240-EC/246-EC

ALO DECISION

In January of 1979, Respondent's employees began striking Respondent's lettuce harvesting operations. On December 4, 1979, 34 of the striking employees offered to return to work "upon recall." Respondent viewed the offer as conditional and also informed the strikers that they had been permanently replaced. The ALO concluded, based solely on the record before him, that the strike was an economic strike and that the 34 employees had made an unconditional offer to return to work. The ALO further concluded that Respondent had permanently replaced the striking employees, therefore finding that by offering to place the returning strikers on a rehire list, Respondent had fulfilled its obligations under the Act.

On December 15, 1979, Pedro Zaragosa left his worksite with Respondent and traveled to an area where Respondent's striking employees were congregated. Zaragosa returned later that day to his worksite and was denied employment. Zaragosa offered to return to work if Respondent would guarantee him protection from retaliation from the strikers. The ALO concluded that Zaragosa had joined the strike and had not tendered an unconditional offer to return to work. However, the ALO further concluded that by filing a charge, Zaragosa indicated his unconditional offer to return to work and the ALO ordered that Zaragosa be placed at the bottom of the rehire list.

Certain of Respondent's employees charged that Joe Colace, Jr., had stated to them that he would never sign a contract with the UFW. Faced with Colace's denial of the statement and the circumstances under which the statement was alleged to have been made, the ALO concluded that the General Counsel had not supported the charge with sufficient evidence. The ALO recommended that the entire consolidated complaint be dismissed.

BOARD DECISION

The Board, citing Admiral Packing Company, et al. (Dec. 14, 1981) 7 ALRB No. 43, and Seabreeze Berry Farms (Nov. 16, 1981) 7 ALRB No. 40, noted that as the strikers had become unfair-labor-practice strikers on February 21, 1979, they had an absolute right to reinstatement. The Board therefore found it unnecessary to consider the rights of economic strikers on this record. The Board affirmed the ALO's finding that the strikers offer to return was unconditional and found that Respondent violated section 1153(c) and (a) of the Act by not immediately offering reinstatement to the

strikers upon receipt of their offer. The Board affirmed the ALO's finding that Zaragosa had joined the strike but was unable to find any record evidence that he had tendered an unconditional offer to return to work and therefore ordered the dismissal of this portion of the complaint. The Board affirmed the ALO's conclusion as to the alleged statement by Colace and directed the dismissal of this portion of the complaint. The Board otherwise ordered reinstatement and back pay with the other usual remedial provisions as to the returning strikers.

DISSENT

Member McCarthy, citing to his Dissents in Admiral Packing, et al. (Dec. 14, 1981) 7 ALRB No. 43, and Seabreeze Berry Farms (Nov. 16, 1981) 7 ALRB No. 40., would have concluded in conformity with the ALO herein and directed the dismissal of the complaint. McCarthy joined the Majority as to Zaragosa and the alleged Colace statement; however, he dissented from the Majority's Decision to accept late exceptions from the General Counsel. He would have denied the exceptions for the General Counsel had not established any extraordinary circumstances justifying the late filings.

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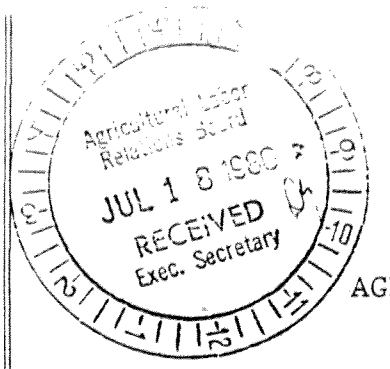

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

COLACE BROTHERS, INC., Respondent, vs. UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-110-EC 79-CE-240-EC 79-CE-246-EC

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for the Charging Party

DECISION

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer: This case was heard by me on April 8, 18, 19, May 1, and 2, 1980, in El Centro, California.

Two Complaints -- one dated January 31, 1980, and the other

March 11, 1980, are based on three charges filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW" or "Union"). The charges were duly served on the Respondent COLACE BROTHERS, INC., on November 6, 1979, December 22, 1979, and December 31, 1979. The cases were consolidated pursuant to Section 20244 of the Agricultural Labor Relations Board Regulations by Order of the General Counsel dated March 11, 1980.

The Complaints and Amendment thereto[1] allege that Respondent committed three (3) violations of the Agricultural Labor Relations Act (hereinafter 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 and the Respondent filed briefs after the close of the hearing.

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

FINDINGS

I. Jurisdiction

Respondent, COLACE BROTHERS, INC. is a corporation engaged in agricultural operations -- specifically the growing and

[1]The first Complaint embodies charges Nos. 79-CE-110-EC and 79-CE-246-EC (the alleged threat of November 2, 1979 and the failure to re-hire the 34 workers. It is dated January 31, 1980. The second Complaint embodies charge No. 79-CE-240-EC (the failure to reinstate Pedro Zaragoza) and is dated March 11, 1980. Pursuant to 8 California Administrative Code Section 20222 (1978), General Counsel formally amended the consolidated Complaints on 7 May 1980 by inserting the names of the 34 workers who petitioned to return to work.

harvesting of lettuce, cantaloupes, and carrots in El Centro, Imperial 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.

I find that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act, as was admitted by Respondent.

I also find that the charges in all three cases ("110", "240" and "246") were properly filed and served on the Respondent. While there is some question about the service of the "246" charge, I find that General Counsel's Exhibit 8 sufficiently corroborates the service. Even though not affixed to the charge itself (General Counsel's Exhibit 1(C)), I note that the date of the proof of service -- 31 December 1979 -- corresponds to the filing date of the "246" charge. The other two charges were filed on November 6, 1979 (charge "110") and December 22, 1979 (charge "240"). The only proof of service on file is affixed to the "240" charge and is dated 22 December 1979. Since the adequacy of the service of the "110" charge has not been challenged, I infer that General Counsel's Exhibit 8 refers to the "246" charge, and consequently reject Respondent's contention that the "246" charge should be dismissed for lack of jurisdiction. See ALRB Regulations Sections 20202, 20206, and 20430.

II. The Alleged Unfair Labor Practices

The General Counsel's Complaints and subsequent Amendment charge that Respondent violated the Act in three instances:

(1) On or about November 2, 1979, Joe Colace, Jr. threatened workers by saying he would never sign a contract with the UFW, thus violating Sections 1153(a) and (e) of the Act.

(2) On or about December 14, 1979, Respondent violated Sections 1153(a) and (c) of the Act by failing to rehire any of 34 named workers who had been on strike prior to lettuce harvest operations.

(3) On or about December 15, 1979, Respondent violated Sections 1153(a) and (c) of the Act by failing to reinstate Pedro Zaragoza to the first available job in the lettuce harvest, because the latter had joined a picket line on the Respondent's property.

The Respondent denies that it violated the Act in any respect. Particularly, Respondent contends that it offered to and did in fact rehire some of the 34 workers seeking reinstatement as work became available during the lettuce harvest operation. Mr. Zaragoza was allegedly not reinstated because of his apparent return to the picket line and Respondent's obligation to first rehire from the list of 34 employees who formally sought reinstatement on or about December 4, 1979.

At the close of General Counsel's case, Respondent moved for dismissal of all three charges on the ground that General Counsel had failed to produce sufficient evidence to meet its burden of proof. Said motions were denied. All three cases will be discussed, infra.

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III. Background

Respondent grows lettuce, cantaloupes, and carrots on its Imperial County ranches which were the sites of the alleged unfair labor practices. In 1979-80, approximately 392 acres of lettuce were harvested, and 500 acres of cantaloupes; some 150 acres of carrots were also grown. Lettuce and cantaloupes were the only two crops that the Respondent harvested, packed and sold during the relevant period, and served as the primary source of Respondent's income.

Lettuce is the major crop of the winter season which is harvested usually from the first week in December to mid-March but will vary according to the weather. In 1979, the lettuce harvest commenced on December 14. It was preceded by ground preparation work (tractor operations, pre-irrigation), planting-germinating, and then thinning and irrigation, which would normally run from August to early December.

During the peak lettuce harvest season, some 55-60 workers would be hired to harvest, pack, and ship the crop out to market--all three of which processes would preferably be completed in one day for a particular yield because of the perishable nature of the crop. Accordingly, the lettuce is planted in approximately 35-acre blocks which would take some five to nine days to harvest. The planting is staggered so that the harvest will not be "bunched up" all at the same time. Thus, the harvest is spread over the December - March period with various numbers of workers required at any one time. In 1979, the first 35 acres planted

was probably the "poorest yielding field" of the year, and thus there was no tremendous need or pressure for a large work force at the early stages of the 1979-80 harvest.

Lettuce is harvested by "trios" -- groups of three -- who cut the lettuce in the field and place it in cartons. These workers are called "cutters" and "packers". The cartons of lettuce are then stapled by a "closer" and placed on a truck by a "loader".[2] One or more "floaters" would also move from trio to trio to assist in the cutting and packing when the labor force for a particular day was not evenly divisible by groups of three. (R.T., Vol. III, p. 28, ll. 15-28; p. 54, ll. 4-7)

Respondent had been under contract with the UFW during the period June, 1976 through January 15, 1979. On 26 January, 1979, all of Respondent's agricultural employees went out on strike, sanctioned by the Union. New employees were hired in January 1979 to complete the season's lettuce harvest, but there was tremendous fluctuation in the availability of workers during the strike period.[3]

In mid-September 1979, Respondent sent recall notices to many

[2]"Stitchers"and "folders" also work on the truck which brings the cartons out to the field.

[3]Respondent contends that it knew that only a "small percentage" of the previously hired workers would be returning for the 1979-80 harvest. (R.T., Vol. III, p. 32, ll. 21-24). Indeed, Respondent had finished out the 1978-79 season with only five to six trios. (R.T., Vol. III, p. 101, ll. 16-21). One of these trios would return for the 1979-80 season. (R.T., Vol. III, p. 102, ll. 7-10)

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of the striking workers in the hope of filling the labor needs for the upcoming thinning season, but only a few returned.

The alleged unfair labor practices occurred on November 2, 1979, December 14, 1979, and December 15, 1979 involving various actions by Joe Colace, Jr. -- son of one of Respondent's co-owners (Joe Colace) -- and Respondent's Treasurer and "head" supervisor. Findings of Fact and Conclusions of Law and Analysis will be discussed for each allegation in seriatim.

IV.. November 2, 1979, Threat of Joe Colace, Jr. Not to Negotiate a Contract With the UFW.

A. Facts:

Jesus Villegas worked for Respondent from January 1977 through January 26, 1979, in the cutting and packing of lettuce and picking of melons. He was a member of the UFW and had been selected as a delegate from the lettuce crew for the UFW Ranch Committee at Colace Brothers in December 1978. Mr. Villegas joined the other workers in the strike of January 26, 1979, and served as the strike coordinator for the Colace Brothers employees.

Mr. Villegas recalled overhearing Joe Colace, Jr. making certain remarks about negotiations with the UFW. Some time in early November 1979, at approximately 7:30 a.m. to 8:30 a.m., Mr. Villegas was speaking with Maria Ramirez along Heber Road adjacent to one of Respondent's fields. Joe Colace, Jr. was some 30 to 50 feet away from Mr. Villegas speaking with pickets who were on the road along the edge of Respondent's fields. Workers were also in the vicinity, picking lettuce toward the end of the

rows, and preparing to turn and complete another "pass". In Mr. Villegas' own words in English, he recalled Joe Colace, Jr. to have told the strikers "Well, I never --never contract with the Union". (R.T., Vol. I, p. 35, ll. 14-20; p. 45, ll. 19-21.) The remarks were alleged to have been in a loud voice, in the presence of some 15-20 pickets and workers all of whom were in hearing range. When Mr. Villegas heard these remarks, he moved toward the pickets and approached Joe Colace,Jr. Mr. Villegas and Mr. Colace, Jr. did not exchange comments, and Mr. Colace, Jr. was not overheard to say anything further.

For Respondent, Joe Colace, Jr. specifically denied ever having made a statement to either workers or pickets that he would not sign or negotiate a contract with the UFW. (R.T., Volume III, p. 75, ll. 12-38); p. 76, ll. 1-12). Mr. Colace, Jr.'s version of the early November episode related an exchange between himself and striker Daniel Aguirre, a former Colace Brothers' employee. On that particular day, Mr. Colace, Jr. was supervising the thinning on Field Dahlia 7b, on Van Der Poel Road. Approximately 35 pickets were out that day. There was some tension as a few former seniority workers who had returned to work were in the field that day -- particularly Juan Marcial, Carmen Martinez, Alfonzo Lopez, and one worker nicknamed "Chino". Early that morning a portable toilet which was at the end of Respondent's field had been overturned. There was "quite a bit" of yelling between the workers and the pickets.(R.T., Volume 3, p. 70, ll. 3-24). Joe Colace, Jr. had brought out a movie camera

with a sound device to record some of the "violence". He recalled directing certain statements at striker, Mr. Aguirre -- a long time Colace Brothers employee who was "looked up to" by Mr. Colace. Mr. Colace, Jr. queried of Mr. Aguirre as to what right non-Colace Brothers' pickets had to yell obscenities at worker Juan Marcial. He told Mr. Aguirre that some of the pickets had never worked for Colace Brothers before, and that Juan Marcial had the right to work if he wanted to. He had suggested that his father and uncle had treated the workers fairly on previous occasions, and one time had voluntarily raised wages to the level of other companies even though there was no contractual obligation to do so. Worker Aguirre apparently made no response to Mr. Colace, Jr.'s commentary. (R.T., Volume 251, p. 120, ll. 1-19). Some of the workers were within 10 to 20 feet of Joe Colace, Jr. and had passed right by him. They were thus within hearing distance of his rather direct tone of voice, as were the nearby pickets.

While none of these events were recorded by Mr. Colace, Jr.'s camera, tractor foreman Gabriel Leyvas testified that he had accompanied Mr. Colace, Jr. to the lettuce thinning on November 2. His recollection confirmed Mr. Colace, Jr.'s version of the events of the day, and he further denied overhearing any remarks from Joe Colace, Jr. to the effect that Respondent would not sign or negotiate a contract with the UFW. (R.T., Vol. III, p. 82, ll. 7-12; p. 91, ll. 14-19).

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B. Analysis and Conclusions:

Section 1153(a) of the Act prohibits an agricultural employer from interfering with, restraining or coercing agricultural employees in the exercise of their Section 1152 rights. Expressions of any views, arguments, or opinions which contain a threat of reprisal or force (or promise of benefit) are not considered protected free speech under §1155 of the Act. Thus, an employer cannot threaten employees with discharge or layoff for participating in organizational activity. M. Caratan, Inc., 5 ALRB No. 16 (1979); Hemet Wholesale, 3 ALRB No. 47 (1979); National Tape Corporation, 187 NLRB No. 41, 76 LRRM 1008 (1970). An implication that the employer would not negotiate with the union to reach a mutually acceptable collective bargaining agreement is similarly a threat prohibited by the Act. Jasmine Vineyards, Inc., 3 ALRB No. 74 (1977).

The test is whether the statement amounts to a threat of force or reprisal within the control of Respondent. Bonita Packing Co., 3 ALRB No. 27 (1977). It is an objective standard to be applied, rather than the employee's subjective reaction. Jack Brothers and McBurney, Inc., 4 ALRB No. 18 (1978).

In the instant case, the statement by Joe Colace, Jr. that the Respondent (would) "never negotiate a contract with the 'UFW'", uttered in a loud and direct manner within hearing distance of workers and strikers might well constitute unlawful coercion as well as unlawful refusal to bargain in violation of Section 1153(e). The threat of reprisal is manifest as Joe Colace, Jr.--

son of one of Respondent's co-owners, and Treasurer and "head" supervisor of Colace Brothers -- would appear to be a primary Company spokesman with respect to the ongoing strike situation. While those on the picket line would be "warned" that the current crisis could continue indefinitely, the workers in the field would receive a message of the disastrous consequences awaiting them should they at some time choose to honor the strike.

However, I find that General Counsel has failed to prove by a preponderance of the evidence that Joe Colace, Jr. did in fact make the November 2, 1979 statement attributed to him by witness Jesus Villegas. I reach this conclusion based on the following considerations:

Joe Colace, Jr. specifically denied ever having stated to anyone, at any time, that Respondent would not negotiate with the UFW. Tractor foreman Gabriel Leyvas accompanied Mr. Colace, Jr. on the day in question and did not recall any statement along the lines described by Mr. Villegas. Both Mr. Colace, Jr. and foreman Leyvas did recall a discussion with striker Daniel Aguirre, in which Mr. Colace, Jr. referred to the past fair treatment of the workers by Respondent who had previously been under UFW contract.

Witness Villegas, the strike coordinator for Respondent's employees, was straightforward in his testimony, and highly credible. He was particularly precise when reciting the exact words that he had heard Joe Colace, Jr. state. However, he conceded that he was conversing with one Maria Ramirez when he overheard Mr. Colace, Jr.'s remarks. He was some 30 to 50 feet

away from Joe Colace, Jr. when the remarks were made. He then approached Mr. Colace, Jr., but no other remarks were heard, and he could not recount the context of the statement. No other witnesses appeared to testify for General Counsel -- not Mr. Ramirez or Mr. Aguirre, or any other of the members of the picket line. Perhaps not unexpectedly, none of the strikebreakers -- those working in the fields on that day -- were to testify either.

As suggested in Respondent's brief (P. 34), it is equally probable that the remarks overheard by Mr. Villegas could be either threatening or innocuous. Joe Colace, Jr. could have been repudiating all further dealings with the UFW. Alternatively, the phrase "no contract with the UFW" might have related to Respondent's prior fair treatment of the workers even when there was no contractual obligation to do so. Because Mr. Villegas' attention was diverted, because he was at a great distance from the source of the remarks, because neither he nor any other witness could illuminate the context of the remarks, I find that General Counsel has not met its burden of proving the unfair labor practice. See S. Kuramura, Inc., 3 ALRB No. 49 (1977).

Where,as here, the only sources of evidence on the issue are equally logical, and in direct conflict, I cannot conclude that an alleged threat was actually made. Desert Harvest Company, 5 ALRB No. 25 (1979). The Respondent had no prior history of unfair labor practices since the time of its first dealings with the UFW in 1976. Witness Joe Colace, Jr.'s testimony was direct, consistent, and demonstrated no particular anti-UFW bias. While

he conceded to having been upset with the stikers from other companies who allegedly turned over a portable toilet and harassed worker Juan Marcial, there is insufficient evidence on the record to conclude that this anger culminated in the threat articulated by Jesus Villegas. I therefore recommend that Paragraph 9 of the Amended Complaint embodying charge no. 79-CE-110-EC be dismissed.

V. Failure to Rehire 34 Workers for Lettuce Harvest Operations Beginning December 14, 1979.

A. Facts:

At the hearing, it was stipulated that a petition signed by 34 workers of Colace Brothers was delivered by a UFW paralegal to Respondent employee (bookkeeper) Virginia Peterson on December 4, 1979. (General Counsel's Exhibit #3). The petition contained the following statement in English and Spanish: "We the undersigned workers of Colace Company hereby offer to return to work and declare that we are available for work upon recall". Strike coordinator Jesus Villegas circulated the petition in the field where the picket line had been established and obtained all the signatures between December 3 and December 4. Mr. Villegas purpose in collecting signatures for the list was to enable the strikers to return to work, to demonstrate to the Respondent that the strikers were acting in "good faith". According to Mr. Villegas, the offer to return to work was unconditional and was delivered to the Respondent's employee some ten days before the start of the lettuce harvest. (R.T., Vol. I, p. 63, ll. 14-17; p. 60, l. 4; p. 61, ll. 23-25).

By letter from Counsel of 4 February 1980 (General Counsel's Exhibit #4), Respondent indicated that there were immediate openings in the lettuce harvest for two trios. The correspondence listed the names of six workers eligible for this first recall in order of seniority, and set forth the arrangements for reporting to work.

General Counsel alleges that the two-month lapse between the presentation of the petition and the offer to recall six workers constituted a discriminatory failure to rehire from the list of 34 workers. Since the harvest did not start until December 14 -- some ten days after Respondent's receipt of this petition, and Respondent made no offer to recall any workers on the list until over one month after the unfair labor practice charge had been filed and served, Respondent's conduct, it is alleged, was aimed at punishing the union members who had participated in the strike.

Respondent denies any discriminatory motivation with respect to the handling of the December 4 petition, but rather avers that the workers on the list were recalled by seniority as openings became available. Thus, Joe Colace, Jr. testified that the recruitment process for the 1979-80 lettuce harvest started in early November. He instructed foreman Jose Holguin to recruit approximately four trios, foreman Juan Fernandez was asked to look for approximately six to eight; and foreman Johnny Martinez, some eight trios. The needs were established by estimation of the number of employees likely to return from the 1978-79 harvest and consideration of the 1979-80 crop. As in the past, the foremen

were instructed to hire lettuce harvesting employees -- cutters and packers -- that were experienced and knew how to perform the duties of harvesting lettuce. Because Jose Holguin and Juan Fernandez worked with Respondent full-time, Joe Colace, Jr. was able to communicate with them on a daily basis and had learned that they both fulfilled their "quotas" by late November. Johnny Martinez was in Arizona, and spoke to Joe Colace, Jr. by telephone about once every other week, and also informed Mr. Colace, Jr. that he had fulfilled his recruiting responsibilities by late November, but that his people would not arrive until after the commencement of the harvest because of a prior commitment in Arizona. (R.T., Vol. III, p. 40, ll. 11-20).

An approximate date for the commencement of the lettuce harvest season was given as the day got closer -- some time in early December. When the December 4 petition was received, there were no openings in the lettuce harvesting operation for the 1979-80 season, even though the harvest had not actually commenced. Foreman Johnny Martinez was told not to hire anybody after December 4. The other two foremen had already fulfilled their responsibilities and thus were given no further specific instructions in this regard. As new people arrived during the first days of the harvest, Joe Colace, Jr. would check with the foremen to make sure that nobody had been recruited after December 4. In several instances, workers were turned away because they had been hired after December 4. (R.T., Vol. III, p. 49, ll. 5-15).

Because the first field was one of the poorest of the 1979-80 season, and because there was a steady influx of "new faces" as workers arrived during the early days of the harvest, it was apparent that the employment needs had been fulfilled during the first weeks of the harvest. As the crop increased, as some workers left for one reason or another, openings arose and were filled in the manner stated in Counsel's February 4, 1980 letter.

The pertinent time periods and recruitment needs were confirmed by Foremen Johnny Martinez and Juan Fernandez. Mr. Fernandez testified that he went to the Calexico-Mexicali border approximately four times in mid-November to seek workers and had secured his "quota" by the end of November. Many he knew from previous work experience with other companies, although he was unable to identify them by name, even after reviewing Respondent's payroll sheets (General Counsel's Exhibits #6A, 6B, 6C, 6D, 6E, 6F, 6G, 6H, 6I, 6J, 6K). Mr. Martinez and his crew had worked with Colace Brothers in February and March of 1979 and were told to return for the next season if they wished. He returned for the thinning in October, and was told in the latter part of that month to bring 8 or 9 trios to start work during the harvest. By telephone conversation in mid-November, Foreman Martinez confirmed with Joe Colace, Jr. that he had hired approximately 12 to 13 trios (to insure that a sufficient number would show up), and that they would be available sometime in the middle of December. Foreman Martinez had told his people in

November that they would have work at Colace Brothers after they had completed the November job in Arizona. The Colace Brothers' work would be "permanent", that is, would last the entire harvest season. Approximately 8 trios showed up commencing on or about 20 December. While Foreman Martinez left Colace Brothers by the end of December to fulfill a commitment elsewhere, with one or two exceptions his "recruitees" stayed on with Respondent for the duration of the harvest. (R.T., Vol. IV, p. 80-a, ll. 25-27).

B. Analysis and Conclusions:

Section 1153(c) of the Act prohibits discrimination in the hiring or tenure of employment or with respect to any term or condition of employment, "to encourage or discourage membership in any labor organization." The General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the refusal or failure to rehire. See Maggio Tostado, 3 ALRB No. 33 (1977), citing NLRB v Winter Garden Citrus Products Co-Operative, 260 F.2d 193 (5th Cir. 1958). The test is whether the evidence, which in many instances is largely circumstantial establishes by its preponderance that employees were not "recalled" because of their views, activities, or support for the union. Cf. Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977), 93 Cal. App. 3d 922 (hg den). Among the factors to weigh in determining General Counsel's prima facie case are the extent of the employer's knowledge of union activities, the employer's anti-union animus, and the timing of the alleged unlawful conduct.

In the instant case, involving the alleged failure to rehire

34 known union adherents, the first critical consideration is the nature of the strike commenced by Respondent's employees on January 26, 1979. Following NLRB precedent, if the strike is an unfair labor practice strike, the strikers are immediately entitled to reinstatement to their former jobs even if the employer has hired permanent replacements. NLRB v. Mackey Radio & Telegraph Co., 304 U.S. 333, 2 LRRM 610 (1938). Thus, upon receipt of the December 4, 1979 petition signed by 34 employees, Respondent would have been obliged to reinstate all 34 prior to or at the time of the commencement of the lettuce harvest on 14 December. It's failure to do so would constitute violations of Sections 1153(a) and (c) of the Act.

General Counsel has produced no evidence at the hearing to support its contention that the January 26, 1979 strike was an unfair labor practice strike, but rather argues in its brief, that this issue has been decided adversely against Respondent in Admiral Packing Co., 79-CE-36-EC, et al., (ALO decision of 4 March 1980). (General Counsel's Brief, p. 9, footnoe 3). That is, under NLRB precedent, an economic strike may be converted into an unfair labor practice strike by acts of the employer, thereby changing the status of the participants to unfair labor practice strikers and entitling them to immeidate reinstatement. NLRB v Pecheur Lozenge Co., 209 F.2d 393, 33 LRRM 2324 (2nd Cir. 1953), cert. denied, 347 U.S. 953, 34 LRRM (1954). Thus, where during an economic strike an employer refuses to bargain with the employee's representative, the strike becomes an unfair labor practice strike.

NLRB v Waukesha Lime & Stone Co., Inc., 343 F.2d 504, 58 LRRM 2782 (7th Cir. 1965). In the instant case, however, the above-referenced ALO decision is presently before the Board (see General Counsel's Brief, p. 9, footnote 3). I decline to take judicial notice of this decision, pursuant to ALRB Regulations Section 20286(a).

I further do not find factual basis in the record to support General Counsel's contention that the strikers became unfair labor practice strikers as soon as one new employee was hired after the strikers offered to return to work. (See General Counsel's Brief, pp. 9-10, citing NLRB v Plastilite Corp. (8th Cir. 1967) 64 LRRM 2741. While the payroll records do indicate various "new" workers employed during the first weeks of the harvest (December 14--December 31), the testimony is uncontroverted that all had been hired prior to 4 December 1979. (See discussion, infra.) Any workers that showed up who had been hired subsequent to 4 December 1979 were asked to leave. Therefore, I find that based on the current record, the 1979 strike at Respondent's ranches was an economic strike, and will apply NLRB and ALRB precedent applicable to economic strikes.

Since the strike activity is to be categorized as an economic strike, the employer is generally under an obligation to reinstate the strikers if vacancies exist. NLRB v Fleetwood Trailer Co., Inc., 389 U.S. 375, 66 LRRM 2737 (1967). The NLRB has defined the employer's obligations and the status of replaced economic strikers as follows:

> "[E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain the burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." Laidlaw Corp., 171 NLRB No. 175, 68 LRRM 1252, 1258 (1968), enforced, 414 F.2d 99, 71 LRRM 3054 (7th Cir. 1969), cert. denied, 397 U.S. 920, 73 LRRM 2537 (1970).

There is no real factual dispute on the record that the petition constituted an unconditional offer to return to work from 34 "former" employees of Respondent. The names on the petition referred to Respondent's employees who had been on the picket lines since January 26, 1979. While Respondent argues in its brief (Respondent's Brief, pp. 43-47) that the December 4 list was not an "unconditional" offer to return, I find no factual basis for this contention. There was no condition upon reinstatement of all workers (Valley City Furniture Co., 110 NLRB 1589 (1954)); no condition upon reinstatement of a union adherent (Atlan Daily World, 192 NLRB No. 30 (1971)); nor any condition upon the employer's agreement to acknowledge receipt of offer (Swearingen Aviation Corp. v. NLRB, 568 F.2d 458 (5th Cir. 1978)). Rather, the testimony of Jesus Villegas was unequivocal that the offer to return to work was made without any conditions attached, and Counsel's efforts to elicit such conditions on cross-exmination proved fruitless. (R.T., Volume I, pp. 60-65.) The words "upon recall" did not depend upon the occurrence of any event other than the employer's notification of the availability

of positions.

Unlike the Swearingen situation where the offer to return to work was conditioned upon acknowledgment that an earlier unconditional offer had been made, the workers here articulated no prerequisite to their return to work. Since the lettuce harvest was about to commence, it is not unlikely that the workers hoped to return to their former harvest jobs; but they neither "demanded reinstatement" to particular positions, nor insisted that all applicants be taken back. NLRB v Anchor Rome Mills, Inc., 228 F.2d 775 (5th Cir. 1956); American Optical Co., 138 NLRB No. 85 (1962), supra.

Any"confusion" Joe Colace, Jr. may have had upon receipt of the petition was not evidenced by any subsequent conduct of Respondent. In fact, he testified that upon receipt of the list, it was Respondent's position that he would recall workers in seniority orders "at any time there was an opening". (R.T., Vol. III, p. 45, ll. 14-23). By February 4, 1980, Respondent through Counsel, advised the UFW that it had openings in the lettuce harvest for two trios. (General Counsel's Exhibit #9). The letter suggested the six employees eligible for this first recall, and instructed them where to report for work. There were no other communications between the parties and/or their representatives between December 4, 1979, and February 4, 1980, and no indicia that the Respondent did not understand the "offer" contained in the December 4 list. I thus find that the December 4, 1979 list constituted a clear and unequivocal, and unconditional offer to

return to work, and that the named employees were entitled to be re-employed as discussed infra. See Routh Packing Co., 247 NLRB No. 53 (1980); Shelley and Anderson Furniture Co. v. NLRB, 497 F. 2d 1200, 1205 (9th Cir. 1970).

The sole factual question remaining revolves around whether or not the lettuce harvest positions were permanently filled prior to receipt of the December 4 petition.

The test for determining whether a worker has been permanently replaced is whether or not arrangements have been made with the replacement to fill the position. Superior National Bank & Trust Co., 246 NLRB No. 123, 102 LRRM 1685 (1979). The principle enunciated in H & F Bench Co., v NLRB, 456 F.2d 357 at 362 (2d Cir. 1972), enforcing 189 NLRB 720 (1977) suggests the standard: "whether the replacement would have reasonable grounds for indignation if he were subsequently denied the promised job". In the instant case, it is irrelevant that the strikers requested reinstatement before the replacements actually began to work. It was uncontroverted that commitments had been made by the end of November for more than sufficient trios to commence the harvest. There is no instance in the record of an employee having been hired after 4 December 1979 who was allowed to work the harvest. The payroll records submitted refer to "new" employees after the first day of the harvest season, but these references are consistent with Respondent's witnesses' testimony that not all the workers showed up on the very first day (see General Counsel's Exhibit 6A, 6B, 6C, 6D, 6E, 6F, 6G, 6H, 6I; R.T., Vol. II, pp 10-

11; R.T., Vol. III, pp 43-45).

Given the arrangements made by Foremen Martinez, Holguin and Fernandez, it is probable that the replacements would be indignant, -- and have reasonable grounds to be so-- if they were subsequently denied work in the lettuce harvest. Mr. Martinez' people came from Arizona with the promise of permanent work with Respondent. Mr. Fernandez obtained commitments from workers near the border, and some contacted him prior to the harvest commencement to ascertain the precise first day of work. Nor does the fact that two or three workers later joined Foreman Martinez at Martori Brothers suggest that the harvesters were hired for anything other than permanent jobs.

General Counsel has contended that Respondent did not permanently replace the 34 workers until well after receipt of the petition. Supporting this thesis are the following factors: The petition was received a good ten (10) days prior to the commencement of the harvest. A notice of recall -- relating to only six of the thirty-four employees--was not sent out until February 4, some six weeks after the commencement of the harvest, and nearly five weeks after Respondent had been served with unfair labor practice charges for the failure to rehire. Hiring practices were informal, and Respondent could not prove which employees had been hired as of any specific date. Payroll records would demonstrate that "new" employees were consistently arriving onto Respondent's fields for the first ten days of the harvest -- or a good three weeks following receipt of the petition.

One of the crew foremen -- Johnny Martinez -- would not arrive with his people until a week after the harvest commenced, and Mr. Martinez, and at least two others would leave Respondent's employ by the beginning of January because of a prior commitment.

Respondent's explanation for the delay in recalling the known UFW adherents, however, withstands close scrutiny:

The testimony of Joe Colace, Jr., and the two foremen -- Johnny Martinez and Juan Fernandez -- confirm that the recruitment efforts had all but ceased by the end of November. Because of the uncertainty of the labor force during the pendency of the strike, the recruitment began as early as October, when Martinez and his crew were completing the thinning of Respondent's lettuce. Those who were found to have been hired after December 4 -- only from Mr. Martinez's crew, since the other foremen had been working steadily with Respondent and thus were more formally monitored in their hiring practices -- were sent away. Mr. Martinez was told -- sometime during the first week of December -- not to hire anyone after 4 December. Foremen Holguin and Fernandez had already fulfilled their "quotas" and thus did not have to be made aware of the December 4 petition.

The low "yield" of the first ranch to be harvested plausibly explains the increase in the numbers of workers after the initial days of the harvest. Since the commencement date for the lettuce harvest varied with weather conditions, and neither Respondent nor the strikers knew exactly when the harvest would start, the staggered arrival of the work force is understandable.

The only employee who worked the harvest and testified -- Pedro Zaragoza -- stated that Foreman Holguin offered him work on December 13. He had not signed the December 4 petition. But Joe Colace, Jr. recalled meeting with Mr. Zaragoza during the first week of December to discuss Mr. Zaragoza's impending work. The former also recalled a discussion with Mr. Holguin during this time period regarding Pedro's return to the Respondent's fields. Holguin did not testify to corroborate this discussion, but the early Zaragoza-Colace Jr. meeting was never refuted, and thus, I am not persuaded that the hiring practices with respect to Mr. Zaragoza undermine Respondent's contentions in this regard.

Nor do I find that anti-union motivation constituted the "last straw which broke the camel's back" in causing the two-month delay before recall. See NLRB v Whitfield Pickle Co., 374 F. 2d 576, 582, 64 LRRM 2656 (5th Cir. 1967). While there is some question as to why Respondent did not convey its rehiring plans to the UFW prior to February 4, 1980,[4] I do not find that this omission constitutes an unfair labor practice. Respondent had previously "recalled" many striking employees during the August-September thinning season, with little success. The "recall" was made when vacancies became appparent. There is no prior history of unfair labor practices having been committed on Respondent's farms. Nor is there a pattern or series of events that gave rise to the instant charges. Where, as here, there is only a suspicion about Respondent's timing and the partial nature of the recall, said suspicion is not sufficient to sustain

a violation of Section 1153(a) and/or (c). While Respondent might have communicated the work status of the lettuce harvesters prior to February 4, 1980 -- even if only to communicate that sufficient personnel had been hired at least for the commencement of the harvest season -- said omission does not constitute an 1153(a) and/or (c) violation. I therefore recommend that the respective paragraphs of the Complaint be dismissed.

I find that although the strikers unconditionally applied for reinstatement, their positions were filled by permanent replacements as of December 4, 1979. Those employees on the list who have not yet been recalled would, of course, remain eligible for "recall" as vacancies are available consistent with the guidelines espoused in Laidlaw Corp., supra, at 103.

VI. Refusal to Reinstate Pedro Zaragoza as a Lettuce Harvester From December 15, 1979.

A. Facts:

Pedro Zaragoza was told to report to work in the lettuce harvest on December 13, 1979 when foreman "Holguin" came to his house in Mexicali. He had been a Colace Brothers' employee since 1973, and had worked continuously up until the 1979 strike in which Mr. Zaragoza had participated. He commenced work cutting and packing lettuce on December 14 -- the first day of the harvest. He worked a full day on the 14th without incident, but only some three hours on the next day. Mr. Zaragoza testified that he left the field early because he "felt bad". He apparently gestured to foreman-timekeeper Santiago Torres and "Holguin" that

he wasn't feeling well. His blood pressure was high, and his vision was somewhat blurred. Mr. Zaragoza then took his jacket and went to talk with the people who were on the picket line adjacent to Respondent's field, allegedly to seek a ride which was at Respondent's shop some 10-15 miles away. He stayed with the pickets approximately one and a half hours, rode to the "shop" and returned for another hour because the "shop" had been closed. When he finally was able to reach his car (the "shop" or yard had been padlocked) late in the afternoon to obtain his medicine, the other workers were leaving for the day. At that time -- approximately 6:00 p.m., Santiago Torres handed Mr. Zaragoza his paycheck, telling him that there would be no more work for him. Pedro Zaragoza responded that he felt badly but wanted to return another day. Santiago Torres suggested that Mr. Zaragoza talk with the general foreman, Bruno Vasquez, to see if he could work the next day. Mr. Vasquez told Mr. Zaragoza that he couldn't have any more work because he had gone out on the picket line, despite Pedro Zaragoza's protestations that such a reaction was unfair because of all the time he had spent working

[4]The issue is particularly troubling in light of Respondent's apparent suggestion that it had been "misled" by its failure to have received the "246" charge. (See Respondent's Brief, p. 56). Insofar as the February 4, 1980 letter is a response only to the charge filed, rather than to the December 4 petition, Respondent's conduct would be violative of Sections 1153(a) and (c). However, I credit Joe Colace, Jr.'s testimony in this regard to the effect that Respondent -- upon receipt of the December 4 petition -- had determined to "recall" the workers in order of seniority as openings became available (R.T., Vol. III, p. 45, ll. 14-23).

for Respondent.

Joe Colace, Jr. testified that Pedro Zaragoza was "replaced" because he had walked over the fence, and "apparently" had joined the strike. He recalls Pedro Zaragoza having completed one "pass" on the 15th of December, and as the workers approached the end of the field, words were exchanged with the nearby pickets. Pedro Zaragoza allegedly stood and talked with the strikers for some ten minutes and climbed over the fence and stood on the strike line. Joe Colace, Jr. could see Pedro Zaragoza with the strikers for a "good hour", and also observed him playing cards on the engine hood of one of the cars parked next to the picket line. He was replaced by a "floater" -- the odd person of the twenty-two member crew which worked in trios. Timekeeper Santiago Torres was ordered to ascertain Mr. Zaragoza's pay and later instructed Bruno Vasquez that Pedro Zaragoza had been replaced in the lettuce crew.

Mr. Colace, Jr. had no knowledge that Pedro Zaragoza was ill that day, nor did Foremen Santiago Torres or Bruno Vasquez. Nobody had seen any of Mr. Zaragoza's "gestures", and both Foremen Torres and Vasquez testified that Pedro Zaragoza had told them that he stopped working because the strikers were yelling at him and had threatened to damage his car and burn his home. Supervisor Torres further recalled that Pedro Zaragoza asked if there was a chance for him to return to work if he could be guaranteed that his car would not be damaged.

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B. Analysis and Conclusions:

The NLRB analogue to Section 1153(c) of the Act, prohibits discrimination to encourage or discourage union membership. This prohibition "includes discouraging participation in concerted activities." NLRB v. Erie Resiston Corp., 373 U.S. 221, 233, 53 LRRM 2121 (1963). Concerted activity may be either protected or unprotected. Generally, protected activities are those pursued in a peaceful manner by the employees to obtain or pursue their Section 7 (1152) rights. See Morris Developing Labor Law, Cumulative Supplement 1971-75, at 57. A peaceful economic strike is a typical protected activity. (See Russell Sportswear Corp. 97 NLRB 1116, 80 LRRM 1495 (1972)).

Here, Pedro Zaragoza engaged in protected concerted activity by apparently joining the picket line on December 15. Joe Colace, Jr. conceded that that was his reason for replacing Mr. Zaragoza and giving him his final paycheck that afternoon. Although Mr. Zaragoza denied that he left work to join the pickets, and averred that the real reason for his abrupt departure was his illness,[5] he never communicated same to any of Respondent's

[5]Mr. Zaragoza's testimony with respect to why he left in mid-day contradicted his declaration which was admitted into evidence. (Respondent's Exhibit No. 1). I find, however, that the inconsistencies of Mr. Zaragoza's testimony were attributable more to his sincere desire to maintain the good relationship which he had sustained with Respondent for the past six years, rather than any effort to mislead either myself or the Board. I base this conclusion on my observations of Mr. Zaragoza's demeanor, his testimony, and the thought that he was not motivated by self-interest (a favorable outcome at the hearing) in insisting that his true intent was other than what he had formerly stated under penalty of perjury. Since his subjective intent is in any event irrelevant to the General Counsel's case, I do not find this discrepancy to be critical.

foreman. He spent at least two to three hours with the pickets that afternoon, after having been previously on strike since January 26.

The difficulty in General Counsel's case, however, is the legal obligation of the Respondent given the conceded nature of the protected activity. Utilizing the identical standard as discussed with respect to the "246" charge, it is apparent that Mr. Zaragoza would be entitled to reinstatement only upon departure of the permanent replacements. Since there were no openings until February 4, 1980, and these were filled from the December 4 petition by seniority, Mr. Zaragoza would not be entitled to recall until the entire list has been exhausted. Insofar as Respondent's partial recall was appropriate and justified by the valid business consideration that permanent replacement harvest workers had already been recruited, then Mr. Zaragoza would have replacement rights subsequent to those on the petition.

While it is unclear whether Mr. Zaragoza unconditionally sought reinstatement on the 15th of December -- foreman Santiago Torres recalled that Mr. Zaragoza would return only if Respondent could guarantee that his car would not be damaged and that his house would not be burned, and General Foreman Bruno Vasquez could recall no such request -- he formally requested same, through service and filing of charge #79-CE-240-EC, on or about December 22, 1979. I find that he would be and is entitled to recall with Respondent upon the opening of a suitable vacancy. (Laidlaw Corp., supra, at 103). Said recall would follow that of

the workers named in the December 4 petition.

With the foregoing considerations, I would recommend dismissal of the charge filed in case "240".

VII. Recommended Order:

IT IS ORDERED that all allegations contained in the consolidated Complaints as amended are dismissed.

DATED: July 8, 1980.

STUART A. WEIN
Administrative Law Officer