Fallbrook, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, PEDRO RIVAS, GUADALUPE RUIZ, and AGUSTIN MADRID, Charging Party.	)	Case Nos. 80-CE-61-SD 80-CE-65-SD 80-CE-70-SD 80-CE-87-SD 80-CE-88-SD 80-CE-93-SD 80-CE-96-SD 81-CE-2-SD 8 ALRB No. 105

ERRATUM

The Notice to Employees in the above-captioned case refers erroneously in two places to interest "at 20 percent per annum." That Notice is hereby withdrawn and the attached Notice to Employees is hereby substituted therefor.

Dated: February 9, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative of our employees, the General Counsel of the ALRB issued a complaint which alleged that we, Ruline Nursery, had violated the law. After a hearing at which all parties had an opportunity to present evidence, this Board found that we violated the law by failing or refusing to bargain with the UFW, by unilaterally changing our employees' terms and conditions of employment without notifying or bargaining with the UFW, by delaying to rehire Miguel Pereda, Agustin Madrid, Pedro Rivas, and Guadalupe Ruiz, by refusing to rehire Agustin Madrid, and by failing to give Pedro Rivas, Guadalupe Ruiz, Agustin Madrid, Elias Gonzalez, Miguel Pereda, and Juana de Varela raises equivalent to those we gave other employees.

The Board has told us to post and publish 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 farm workers 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 it is true that you have these rights, we promise that:

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours, and conditions of employment,

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain with the UFW since July 1979.

WE WILL, if the UFW asks us to do so, rescind any of the changes we have previously made by raising wages, shortening the work day, and eliminating holiday and vacation pay, and we will reimburse with interest all of our present and former employees who suffered any loss in pay or other money losses because we unlawfully shortened the regular work day and eliminated holiday and vacation pay.

WE WILL NOT hereafter refuse or delay to rehire, or in any way discriminate against, any agricultural employee because he or she has engaged in union activities or has filed charges with the Board or given testimony at its proceedings.

WE WILL offer to reinstate Agustin Madrid to his former or substantially equivalent, employment, without loss of seniority or other privileges and we will reimburse him for any pay or other money he has lost because we refused to rehire him, plus interest.

WE WILL reimburse Agustin Madrid, Miguel Pereda, Pedro Rivas, and Guadalupe Ruiz for any pay or other money they lost because we delayed rehiring them, plus interest.

WE WILL reimburse Elias Gonzalez, Agustin Madrid, Miguel Pereda, Pedro Rivas, Guadalupe Ruiz, and Juana de Varela for pay and any other money they lost because we withheld wage increases from them, plus interest.

Dated: RULINE NURSERY

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1350 Front Street, San Diego, California 92101. The telephone number is 714-237-7119.

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

DO NOT REMOVE OR MUTILATE.

Fallbrook, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY,	)	Case Nos. 80-CE-61-SD
	)	80-CE-65-SD
Respondent,	)	80-CE-70-SD
	)	80-CE-87-SD
and	)	80-CE-88-SD
	)	80-CE-93-SD
UNITED FARM WORKERS OF AMERICA,	)	80-CE-96-SD
AFL-CIO, PEDRO RIVAS, GUADALUPE	)	81-CE-2-SD
RUIZ, and AGUSTIN MADRID,	)	
	)	
Charging Party.	)	8 ALRB No. 105

DECISION AND ORDER

On July 3, 1981, Administrative Law Officer (ALO) Beverly Axelrod issued the attached Decision in this proceeding. Thereafter, Respondent Ruline Nursery timely filed exceptions with a supporting brief, and the United Farm Workers of America, AFL-CIO(UFW) and the General Counsel each filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor 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, and conclusions of the ALO as modified herein, and to adopt her recommended Order, with modifications.

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[1/] All section references herein are to the California Labor Code unless otherwise stated.

The Makewhole Remedy

The most significant exception taken by Respondent concerns the ALO's recommendation that the makewhole remedy be applied for Respondent's admitted failure and refusal to bargain with its employees' certified representative, the UFW. Respondent contends that it was justified in refusing to bargain with the UFW because it was seeking judicial review of the Board's certification of the UFW.[2/] In compliance with J.R. Norton Company v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, we only impose the makewhole remedy in cases involving "technical" refusals to bargain, such as this, if the employer's litigation posture was not reasonable at the time of its refusal to bargain or the employer was not acting in good faith in seeking judicial review of the certification. (J.R. Norton Company (May 30, 1980) 6 ALRB No. 26.)

We first consider the reasonableness of Respondent's litigation posture in its challenge to our certification of the UFW. In Ruline Nursery (June 11, 1980) 6 ALRB No. 33, we found that Respondent failed to produce evidence supporting its allegations that various instances of misconduct occurred at the representation election which were of such a nature as to render the election invalid as an expression of free and uncoerced

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[2/] An order in a certification proceeding is not directly reviewable in the courts, since it is not a "final" order within the meaning of Labor Code section 1160.8. It is only by refusing to bargain with the certified union that an employer may obtain judicial review of the Board's certification and its finding that the refusal was an unfair labor practice. (Nishikawa Farms', Inc. v. Mahony (1977) 66 Cal.App.3d 781, 787.) Such employer conduct is known as a "technical refusal to bargain."

employee choice. We also found no merit in Respondent's legal argument that the election was conducted at a time that did not satisfy the requirement of section 1156.4, which provides, in pertinent part, that the Board shall not consider a representation petition as timely filed "... unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition." Respondent argued that the petition, which was filed on January 3, 1979, should have been dismissed because the applicable pre-petition payroll, covering a period ending December 24, 1978, was less than 50 percent of the employer's peak employment for calendar year 1979. As we stated in rejecting this argument, "the plain language of section 1156.4 requires that the two payrolls to be utilized when measuring peak and percentage of peak are those which fall within the same calendar year." (Ruline Nursery, supra, at p. 3.) For the reasons explained in that decision, subsection 1156.3(a) and 1156.3(a)(I)[3/] and

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[3/] Section 1156.3 sets forth requirements for a representation petition as follows:

> (a) A petition which is either signed by, or accompanied by authorization cards signed by, a majority of the currently employed employees in the bargaining unit may be filed in accordance with such rules and regulations as may be prescribed by the board, by an agricultural employee or group of agricultural employees, or any individual or labor organization acting in their behalf alleging all the following:
>
> (1) That the number of agricultural employees currently employed by the employer named in the petition, as

[Fn. 3 cont. on p. 4]

section 1157[4/] further clarify that the two payrolls compared are those which fall within the same calendar year.

Respondent's contention that the phrase "current calendar year" in section 1156.4 should be interpreted to mean the year in which the petition for certification is filed bespeaks ingenuity of legalistic argumentation rather than a serious attempt to clarify an otherwise obscure or complex statutory provision. Respondent's proposed interpretation would actually render the statutory scheme less clear and less orderly than it is under the straightforward interpretation which Respondent challenges.

In view of the clear language of the Agricultural Labor Relations Act (Act) as well as the insufficiency of the evidence Respondent presented, we conclude that neither Respondent's statutory construction argument nor its factual allegations about misconduct affecting the election make out a close case or raise "important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice." (J. R. Norton v. Agricultural Labor Relations Board, supra, at p. 39; see also

[Fn. 3 cont.]

> determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.....

[4/] Section 1157 provides in pertinent part as follows, with respect to the eligibility of employees based on the payroll on which their names appear:

> All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote.

D'Arrigo Brothers of California (May 30, 1980) 6 ALRB No. 27; Charles Malovich (May 30, 1980) 6 ALRB No. 29; High and Mighty Farms (May 30, 1980) 6 ALRB No. 31.) We conclude, therefore, that Respondent's litigation posture was not reasonable within the meaning of the Norton test.

Even if we took a wholly different view of the legal question raised by Respondent, or the evidence of election misconduct Respondent produced, and found that Respondent's litigation posture was reasonable, the evidence in this and previous cases that this Respondent has repeatedly tried to discourage its employees' exercise of protected organizational rights over several years would lead us to conclude that Respondent did not undertake its judicial challenge to the UFW's certification in good faith. In Ruline Nursery (Feb. 9, 1982) 8 ALRB No. 8, we found that Respondent violated section 1153(c) and (a) of the Act by changing its mode of operation from year-round to seasonal, and then discriminatorily laying off and recalling employees most supportive of the UFW, in order to overcome the effective unionization of its workforce. Similarly, in the present case we concur with the ALO that Respondent treated several of the same pro-UFW employees in illegally discriminatory ways. In Ruline Nursery (Aug. 21, 1981) 7 ALRB No. 24, the ALO concluded that Respondent had violated section 1153(a) by discharging a supervisor for remaining neutral during the UFW's organizational campaign rather than opposing the Union. We did not dispute the ALO's view of the facts, but we held that as a matter of law the discharge of a

supervisor constitutes an unfair labor practice only in certain special circumstances, which were not present in that case. In Agricultural Labor Relations Board v. Ruline Nursery Company (1981) 115 Cal.App.3d 1005, the Fourth District Court of Appeals, Division One, upheld a Superior Court's grant of a preliminary injunction sought by General Counsel against Respondent, enjoining Respondent from issuing disciplinary notices to certain employees and a discharge notice to one employee, for absences from work which resulted from the employees' attendance at an unfair labor practice hearing where they testified against Respondent.

We believe this history of violations of the Act and hostility to its purposes is indicative of Respondent's attitude toward the UFW and toward its employees' activities in support of the Union. It supports our conclusion that, in seeking judicial review of the UFW's certification, Respondent was motivated by a desire to delay bargaining and to undermine the UFW and was not acting in good faith. (See Holtville Farms, Inc. (July 8, 1981) 7 ALRB No. 15.) This conclusion is further buttressed by our evaluation of Respondent's litigation posture as lacking in reasonableness, for, as we stated in J.R. Norton, supra, 6 ALRB No. 26 at p. 3, "the good faith aspect requires consideration both of the employer's beliefs as to the validity of its objection and of the employer's motive for engaging in the litigation." Finding that Respondent's litigation posture was not reasonable and that its challenge to certification was not undertaken in good faith, we conclude that

its violation of section 1153(e) through failing and refusing to bargain with the UFW warrants imposition of the makewhole remedy for the purpose of "... making employees whole for the loss of pay resulting from the employer's refusal to bargain...." (Labor Code section 1160.3.)

Unilateral Changes in Terms and Conditions of Employment

We find no merit in Respondent's exceptions to the ALO's conclusion that it violated section 1153(e) and (a) by making three changes in its employees' terms and conditions of employment without giving the UFW notice of the changes or an opportunity to bargain about them.

The record evidence shows that on or about January 1, 1980 the length of the normal work day for employees paid on an hourly basis was shortened from nine hours to eight hours; that on the same day Respondent raised the wages of employees who had previously been earning less than the minimum wage which that day became mandatory under Federal law to said minimum wage, and raised other employees' wages proportionately; and that, as of January 7, 1980, Respondent ceased to pay holiday pay to any hourly-paid employee, and as of January 14, 1980 ceased to pay vacation pay to any hourly-paid employee. Respondent admits that it made these changes without giving the UFW notice or an opportunity to bargain, but it offers three defenses to the accusation that the changes constituted violations of the Labor Code.

Respondent's first defense is that it was not required to bargain with the UFW because it was engaged in challenging

the validity of the election on which the UFW's certification was based. As we pointed out in D'Arrigo Brothers Company (June 22, 1982) 8 ALRB No. 45, an employer has a continuing duty to bargain with a certified bargaining representative during the period of time when it is challenging certification. (NLRB v. Winn-Dixie Stores, Inc. (1974) 211 NLRB 24 [86 LRRM 1418].) The good faith (or, as here, the lack thereof) motivating an employer's challenge to certification is, as the ALO correctly observed, an issue bearing on the appropriateness of the makewhole remedy, but is not germane to the question of whether the employer violated section 1153 (e) by making unilateral changes in terms and conditions of employment. We concur in the ALO's conclusion that Respondent's challenge to the UFW's certification does not justify or excuse Respondent's failure and refusal to bargain over changes in employees' terms and conditions of employment.

Respondent's second defense is that it had no obligation to negotiate with the UFW regarding these changes because the changes took place after the election but before the certification of the UFW as the employees' bargaining agent was issued by this Board. The ALO correctly rejected this defense by pointing out that, as we held in Highland Ranch and San Clemente Ranch (Aug. 16, 1979) 5 ALRB No. 54, mod. and affd. as modified, 29 Cal.3d 874, (relying on Mike O' Connor Chevrolet (1974) 209 NLRB 701 [85 LRRM 1419], revd. on other grounds (8th Cir. 1975) 512 F.2d 684 [88 LRRM 3121]):

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> ... absent compelling economic considerations for doing so, an employer acts at its peril in making changes in existing terms and conditions of employment while the certification issue is pending before the Board.

Respondent did not present any evidence that "compelling economic considerations" necessitated making these changes without notice to the Union. Accordingly we reject this defense.

Respondent's third defense is that each of the three charges which alleged the changes at issue here was time-barred by section 1160.2, which provides, in pertinent part, that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.,.." The charges were filed in November and December of 1980, eleven months or more after the effective dates of Respondent's unilateral changes in its employees' terms and conditions of employment. Respondent further argues that these changes were not sufficiently related in time or nature to alleged violations which were timely charged for them to have properly withstood Respondent's motion to the ALO to dismiss them from the complaint.

The ALO correctly relied on our ruling in Perry Farms, Inc. (Apr. 26, 1978) 4 ALRB No. 25, that "... the statutory limitation [of section 1160.2] is not jurisdictional, but must be the subject of an affirmative defense." We reaffirmed this position in George Arakelian Farms (May 20, 1982) 8 ALRB No. 36 in accordance with the holdings of the National Labor Relations Board (NLRB) (whose applicable precedents section 1148 direct us to follow) in AMCAR Division, ACF Industries, Inc. (1978)

234 NLRB 1063 [98 LRRM 1287] affirmed Amcar Division, Inc. v. NLRB (8th Cir. 1979) 592 F.2d 422 [100 LRRM 2710]; Strick Corporation (1979) 241 NLRB 210 [100 LRRM 1491]; and Crown Cork and Seal Company, Inc. (1981) 255 NLRB 14 [107 LRRM 1195]. The NLRB cases cited here make it clear that the burden of proving this defense is on a Respondent which asserts it. Such proof consists of establishing that the charging party had actual or constructive notice of the facts constituting the alleged violation more than six months before filing the charge.

We agree with the ALO that, with respect to charge SO-CE-96-SD (alleging the change in wages) and charge 80-CE-93-SD (alleging the change in work hours), Respondent failed to produce evidence adequate to show that the respective Charging Parties knew or should have known of the changes alleged as violations more than six months before filing the charges. As to charge 30-CE-87-SD (alleging changes in vacation and holiday pay), we agree with the ALO that this change was a continuing violation of the Act so that, as we have previously stated, addressing a discriminatory hiring policy initiated more than six months before the filing of charges,

> The issue is not simply whether Respondent committed an unfair labor practice by initiating the policy, but whether it violated the Act by maintaining and giving effect to that policy. (Julius Goldman's Egg City (Dec. 1, 1980) 6 ALRB No. 61.)

Here, Respondent maintained and continued to give effect to its unilateral abolition of holiday and vacation pay for hourly-paid employees up to the date the charge was filed. It thereby committed a continuing violation of section 1153(e). We agree

with the ALO that the timing of these changes, at or about the very time the UFW was elected by Respondent's agricultural employees to be their collective bargaining representative, taken together with the substantial evidence of Respondent's anti-union animus in this record and in previous cases, indicates that the changes were imposed in retaliation for the employees' pro-union vote. The changes therefore violated section 1153(c) and (a), as charged, as well as section 1153(e). As Respondent had adequate notice from charge 80-CE-87-SD that the underlying facts would be litigated, and as those facts were, to the extent not established by stipulation between the parties, fully litigated at the hearing, no violation of due process arises from finding, and we do find, that the changes violated subsection 1153(e) in addition to subsections 1153(c) and (a). (Prohoroff Poultry Farms (Nov. 23, 1977) 3 ALRB No, 87.) Alleged Violations of Section 1153(a)

Respondent excepts to the ALO's conclusion that it violated section 1153(a) in two incidents involving abuse or mistreatment of employees by supervisory personnel. In one incident, employees Juana De Varela, Justina Wichware and Maria Gonzalez were splashed during their lunch break near a spillway by a car driven by supervisor Luz Escobedo in which superintendent Jack Jester was a passenger. In the other incident, Jester yelled harshly at Justina Wichware and Guadalupe Ruiz while they were stacking azalea plants on shelves in a cooler. We find merit in the exceptions.

The record evidence establishes that the incidents took

place substantially as described in the testimony of the affected employees. That evidence, however, contains no clear indications that the mistreatment suffered by the employees in these incidents was related to protected activities on their part. While the employees might have inferred that the supervisors would not have treated them so poorly or would have apologized for such treatment if they, the employees, had not had any involvement in pro-union activities, such inferences would have arisen from a context created by Respondent's past anti-union behavior and not, according to the employees' own testimony, from anything said at the time of either incident. As no clear nexus was established linking the supervisors' regretable conduct to the employees' organizational attitudes or activities, we find that General Counsel has not met its burden of proving that Respondent in these incidents was acting in a way that tended to restrain, coerce or interfere with employees in the exercise of protected rights. Accordingly these allegations are dismissed.

Violations of Section 1153(c) and (d)

Pedro Rivas and Guadalupe Ruiz. Respondent excepts to the ALO's finding that it failed to rehire former employees Pedro Rivas and Guadalupe Ruiz when they applied for work on July 22, 1980 and August 13, 1980, because of their pro-UFW activities and their filing of unfair labor practice charges against Respondent. This exception lacks merit.

The record establishes that Respondent's policy was to rehire former employees ahead of applicants with no seniority, and that work was available at least as early as July 29, 1980,

on which date Josefina Lomeli and Ofelia Calderon, both of whom had less seniority as employees of Respondent than either Pedro Rivas or Guadalupe Ruiz, rejoined Respondent's workforce pursuant to recall notice sent them on July 28. Record evidence further establishes that Mr. Rivas and Ms. Ruiz were qualified for the available work and that several other former employees with less seniority than the alleged discriminatees were rehired between July 29 and September 29, 1980, the date Respondent finally sent recall notices to Mr. Rivas and Ms. Ruiz. Many of the employees hired during this period had applied on a day when no work was available and had been contacted by Respondent a short time later when work needs developed.

Respondent argues that Mr. Rivas and Ms. Ruiz had previously failed to respond to a recall notice and had thereby created the impression that they were no longer interested in working for Respondent, so that Respondent justifiably disregarded the seniority they had previously accrued. But, as the ALO points out, the two applications Mr. Rivas and Ms. Ruiz made for work should have been sufficient to negate any assumption that they were not interested in working for Respondent. The only plausible explanation, then, for Respondent passing over these tried and qualified former employees in favor of newcomers is that Respondent wanted to keep out of its workforce individuals known to be supportive of the UFW who had demonstrated willingness to seek redress of unlawful treatment through this Board's procedures. We conclude, therefore, that Respondent discriminated against Mr. Rivas and Ms. Ruiz for these reasons, in violation of section

1153(c) and (d) and, derivatively, section 1153(a). We shall order that Respondent make the discriminatees whole for losses they suffered as a result of this unfair labor practice from July 29, 1980, to the days they returned to work for Respondent, i.e., October 6, 1980, for Ms. Ruiz and October 7, 1980, for Mr. Rivas.

Layoff and Recall of Pedro Rivas, Elias Gonzalez, Miguel Pereda, Victorino Olivas and Agustin Madrid

Respondent excepts to the ALO's finding that it violated section 1153(c), (d), and (a) by laying off the five male employees named above during October and November 1980, while retaining or hiring several other employees, all female, many of whom had less seniority than the alleged discriminatees. We find merit in this exception.

Respondent presented substantial evidence that it customarily assigned certain kinds of work to male employees and other kinds to female employees. It also produced evidence that during October and November 1980, most of the work needing to be done involved tasks ordinarily assigned to female employees. The ALO did not find this evidence sufficient to justify Respondent in laying off male employees with more seniority in favor of female employees, some of whom had less seniority than some of the men they were replacing. We disagree with the ALO on this point. We find that Respondent's decision to have women rather than men do the work which was necessary during this period was not based on an intent to discriminate against pro-union employees and did not have a discriminatory impact on them.

It was the sort of decision which for purposes of the Act lies within the range of management perogatives. Without assessing the legality of Respondent's sex-based choice under other statutes, we hold that it did not violate the Act. If an employer wishes to follow arguably sexist stereotypes in its work assignments, the Act does not prohibit its doing so, unless discrimination based on organizational or pro-union sympathies or behavior is also present. Accordingly, this allegation is dismissed.

Delayed Rehiring of Miguel Pereda and Agustin Madrid

Respondent excepts to the ALO's finding that it discriminated against Miguel Pereda and Agustin Madrid in violation of section 1153(c), (d), and (a) by failing to rehire them until several days after it rehired four other male employees who had less seniority than either Pereda or Madrid. Respondent offered no explanation for its failure to rehire Mr. Pereda and Mr. Madrid ahead of the lower seniority employees. In the absence of any such explanation, and taking into account Respondent's history of anti-union animus and its knowledge that Pereda and Madrid were UFW supporters and had filed charges against Respondent with this agency, we concur with the ALO's inference that Respondent failed to rehire Mr. Pereda and Mr. Madrid in the proper order of seniority because of their union support and their recourse to our procedures. We conclude that Respondent thereby violated section 1153(c), (d), and (a).

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Respondent excepts to the ALO's finding that it violated sections 1153(c), (d), and (a) by the terms of the recall notices it sent to each of the five men named above in November 1980, which stated, in part, "work will be available... through December 19, 1980." The ALO rejected General Counsel's contention that inclusion of the December 19 cutoff date in the letters was intended to discourage the five men from returning to work. As the ALO pointed out, the men had written a letter to Respondent's owner on October 21, 1980, asking that when he recalled them he tell them how long they would be able to work. The ALO based her finding of a violation on the fact that work actually remained available at Respondent's operation, and was performed by twelve employees with less seniority than the five alleged discriminatees, beyond December 19, rendering false Respondent's statement that December 19 would be the last day.

Respondent's exception has merit. General Counsel produced no evidence that Respondent set December 19 as a cutoff date in its letter to the five named former employees with knowledge that work would remain available beyond that date. The record establishes that Respondent's business tends to increase dramatically in the Thanksgiving-to-Christmas holiday season. At the beginning of that season Respondent does not know with certainty how many orders it will be receiving at the season's peak, nor exactly when the orders will stop coming in large numbers. The December 19 date may well have represented

Respondent's best estimate, as of mid-November, of when the busy season would significantly taper off. That this estimate later proved to have been inaccurate is not in itself evidence that the estimate was intentionally false or that Respondent was attempting by it to discourage the five men from rejoining its work force. General Counsel has not met its burden of proving that Respondent in this instance was engaging in conduct that reasonably tended to restrain, coerce or interfere with employees in the exercise of protected rights or that Respondent was discriminating against the five named former employees. Accordingly, this allegation is dismissed.

Failure to Raise Wages of Guadalupe Ruiz, Pedro Rivas, Elias Gonzalez, Mrguel Pereda, Juana de Varela and Agustin Madrid

Respondent excepts to the ALO's finding that it violated section 1153(c), (d), and (a) by failing to give wage increases to the above named employees when it rehired them in October of 1980, pursuant to the proposed order ALO Arie Schoorl issued September 9, 1980 in Case No. 79-CE-20-SD, which this Board later adopted in Ruline Nursery, supra, 8 ALRB No. 8. This exception lacks merit.

Respondent argues that mere inadvertence on its part explains its failure to pay these employees at the same increased rate which it granted to all other employees as of January 1, 1980 We do not find this a persuasive explanation of what is, on its

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face, a clear disparity of treatment[5/] to the disadvantage of these six former employees, who had been discriminatorily laid off by Respondent in 1979. Respondent's president Rufus Orson testified that he had raised the wages of all employees by an equal percentage on January 1, 1980 "in order to be fair across the board," He also testified that he simply did not think about raising wages of those who happened not to be working on January 1, 1980, but returned to work for Respondent later in the year, and that his secretary similarly overlooked making such adjustments. The ALO discredited Mr. Orson's testimony on this allegation, and we find nothing in the record to suggest that her credibility resolution against him was erroneous.[6/] We concur, therefore, with her inference that intentional discrimination, and not inadvertence or forgetfulness, was the cause of the discriminatory treatment. Accordingly, we conclude that in failing to raise the wages of these six employees Respondent violated subsection (c), (d), and (a) of section 1153.[7/]

[5/] The fact that one special status employee, Kenny Church, also did not receive a wage increase, does not negate the disparity of treatment between the six named employees and all other regular status employees.

[6/] To the extent that credibility resolutions are based upon the demeanor of the witnesses, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho dos Rios (Apr. 26, 1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [25 LRRM 1531].!We have reviewed the record and find the ALO's resolutions of witness credibility to be supported by the record as a whole.

[7/] We note that the backpay to which these six discriminatees are entitled pursuant to our remedial Order in Ruline Nursery, supra,

[Fn. 7 cont. on p. 19]

Failure to Rehire Agustin Madrid

Respondent excepts to the ALO's finding that it violated section 1153(c), (d), and (a) by refusing to rehire Agustin Madrid on December 12, 1980 because of his support for the UFW and his having testified against Respondent in an ALRB hearing. This exception is without merit.

After working for Respondent from November 25 to December 6, 1980, Mr. Madrid was apprehended and deported by agents of the Immigration and Nationalization Service (INS). The ALO credited Mr. Madrid's testimony that on returning to Respondent's operation on December 12 he complied with Respondent's rule which required employees either to give advance notice of absences or to explain, upon their return from an absence, why they had been unable to give such notice. Nothing in the record indicates that her credibility resolution should not be upheld. Record evidence establishes that two new workers were hired in the week following December 12, which was at the height of Respondent's busiest season. Respondent offered no reason for

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[Fn.7 cont,]

8 ALRB No. 8, includes the amount of any raises received by the rest of Respondent's workforce during the period(s) the six were unlawfully excluded from employment as a result of Respondent's unfair labor practice.

We dismiss as without merit Respondent's exception to the ALO's refusal to dismiss without prejudice, pending compliance proceedings in Ruline Nursery, supra, 8 ALRB No. 8, the allegation on which this finding of a violation was based. We agree with the ALO that Respondent's suggestion that the issue could be resolved at the compliance state in the instant matter, if not disposed of at the compliance stage of the earlier Ruline case, would make compliance proceedings the practical equivalents of unfair labor practice hearings instead of supplements to those hearings, and would needlessly confuse this agency's procedures.

not rehiring Mr. Madrid other than his alleged failure to explain why he had not given notice of his inability to report because of having been apprehended by the INS—an allegation the ALO discredited. In view of the apparent availability of work at the time of Mr. Madrid's return and application therefor, the lack of any credited reason for not rehiring Mr. Madrid, and Respondent's established anti-union animus, we conclude, as did the ALO, that Respondent did not rehire Mr. Madrid because he was a UFW supporter and had testified against Respondent in proceedings under the Act. Respondent thereby violated section 1153 (c), (d), and (a).

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Ruline Nursery, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing or delaying to rehire or hire or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment because he or she has engaged in union activity or filed charges or given testimony under the Agricultural Labor Relations Act (Act) or engaged in other concerted activity protected by section 1152 of the Act.

(b) Failing or refusing to meet and bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW) as exclusive collective bargaining representative of its agricultural employees.

(c) Changing its agricultural employees terms or conditions of employment without first giving the UFW notice thereof and an opportunity to bargain over the proposed change.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Make whole Agustin Madrid, Miguel Pereda, Pedro Rivas, and Guadalupe Ruiz for all losses of pay and other economic losses they have suffered as a result of the discriminatory delays in rehiring them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(b) Make whole Elias Gonzalez, Agustin Madrid, Miguel Pereda, Pedro Rivas, Guadalupe Ruiz, and Juana de Varela for any losses they may have suffered as a result of Respondent's withholding wage increases from them in October 1980 and thenceforth,

(c) Offer Agustin Madrid immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights or privileges, and make him whole for any losses he may have suffered due to Respondent's refusal to rehire him in December 1980, such amounts to be computed as indicated in paragraph 2(a), above.

(d) Upon request, meet and bargain in good faith

with the UFW as the certified exclusive collective bargaining representative of its agricultural employees and embody any understanding reached in a signed agreement.

(e) Make whole all of its present and former agricultural employees for all losses of pay and other economic losses suffered by them as a result of its failure and refusal to bargain in good faith with the UFW, such amounts to be computed as indicated in paragraph 2(a), above, and the period of said obligation to extend from July 31, 1980 until the date on which Respondent commences good faith bargaining with the UFW which results in either a contract or a bona fide impasse.

(f) Upon the UFW's request, rescind the unilateral changes which it instituted in January 1980, in the length of the normal workday, in wages for hourly paid employees, in holiday pay, and in vacation pay, and thereafter meet and bargain collectively in good faith with the UFW over any proposed changes in its employee's terms and conditions of employment.

(g) Make whole all of its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's discontinuance of paid vacations and holidays, such amounts to be computed as indicated in paragraph 2(a), above.

(h) Make whole all of its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's shortening of the workday, such amounts to be computed as indicated in paragraph 2(a), above.

(i) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the makewhole amounts due under the terms of this Order.

(j) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(k) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from January 1, 1980, until the date on which the said Notice is mailed.

(l) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(m) Provide a copy of the attached Notice to each agricultural employee hired during the 12-month period following the date of issuance of this Order.

(n) 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 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 in order to compensate them for the time lost at this reading and during the question-and-answer period.

(o) 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 therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the UFW as the exclusive collective bargaining representative of the agricultural employees of Respondent be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: December 31, 1982

ALFRED H. SONG, Chairman

HERBERT A. PERRY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFW) , the certified bargaining representative of our employees, the General Counsel of the ALRB issued a complaint which alleged that we, Ruline Nursery, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by failing or refusing to bargain with the UFW, by unilaterally changing our employees' terms and conditions of employment without notifying or bargaining with the UFW, by delaying to rehire Miguel Pereda, Agustin Madrid, Pedro Rivas, and Guadalupe Ruiz, by refusing to rehire Agustin Madrid, and by failing to give Pedro Rivas, Guadalupe Ruiz, Agustin Madrid, Elias Gonzalez, Miguel Pereda and Juana de Varela raises equivalent to those we gave other employees.

The Board has told us to post and publish 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 farm workers 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 it is true that you have these rights, we promise that:

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours, and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain with the UFW since July 1979.

WE WILL, if the UFW asks us to do so, rescind any of the changes we have previously made by raising wages, shortening the work day and eliminating holiday and vacation pay, and we will reimburse with interest at 20 percent per annum all of our present and former employees who suffered any loss in pay or other money losses because we unlawfully shortened the regular work day and eliminated holiday and vacation pay.

WE WILL NOT hereafter refuse or delay to rehire, or in any way discriminate against, any agricultural employee because he or she has engaged in union activities or has filed charges with the Board or given testimony at its proceedings.

WE WILL offer to reinstate Agustin Madrid to his former or substantially equivalent employment, without loss of seniority or other privileges and we will reimburse him for any pay or other money he has lost because we refused to rehire him, plus interest computed at 20 percent per annum.

WE WILL reimburse Agustin Madrid, Miguel Pereda, Pedro Rivas, and Guadalupe Ruiz for any pay or other money they lost because we delayed rehiring them.

WE WILL reimburse Elias Gonzalez, Agustin Madrid, Miguel Pereda, Pedro Rivas, Guadalupe Ruiz, and Juana de Varela for pay and any other money they lost because we withheld wage increases from them.

Dated: RULINE NURSERY

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1350 Front Street, San Diego, California 92101. The telephone number is 714-237-7119.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Ruline Nursery
(UFW, Pedro Rivas, Guadalupe Ruiz, and Agustin Madrid)

8 ALRB No. 105
Case Nos. 80-CE-61-SD, et al.

ALO DECISION

The ALO concluded that Respondent violated section 1153(e) by failing and refusing to negotiate with its agricultural employees' certified representative, the United Farm Workers of America, APL-CIO (UFW). She recommended that the makewhole remedy be imposed for this violation, as she found that, although Respondent was claiming the certification of the UFW was invalid and was challenging the certification through litigation, its litigation posture was not reasonable and its challenge to certification was not undertaken in good faith. The ALO found that Respondent also committed per se violations of section 1153(e) by unilaterally making changes, without giving the UFW notice or an opportunity to bargain, in the following terms and conditions of employment: wages, length of the workday, holiday and vacation pay. The ALO found that Respondent also violated section 1153(c) by these changes, as it implemented them in retaliation for the employees' vote to be represented by the UFW. The ALO concluded that Respondent violated section 1153(a) in two instances when supervisors treated certain employees in rude and offensive ways. She concluded that Respondent committed violations of section 1153(c), (d) , and (a) by delaying to rehire two pairs of employees; by refusing to rehire one employee; by laying off five male employees while employing less senior female employees; by including in the male employees' recall notice an inaccurate date for the conclusion of the work for which they were being recalled; and by failing to give six employees wage increases given to all other employees.

BOARD DECISION

The Board concurred with the ALO that Respondent violated section 1153(e) by its failure and refusal to bargain with the UFW, and that imposition of the makewhole remedy for this violation is warranted because Respondent in its technical refusal to bargain did not have a reasonable litigation posture and was not acting in good faith. The Board also agreed with the ALO that Respondent's unilateral changes in wages and in the length of the workday, and its unilateral abolition of holiday and vacation pay constituted violations of section 1153(e) and (c). The Board further agreed with the ALO that Respondent committed a violation of section 1153(c), (d), and (a) by delaying to rehire two pairs of employees, by refusing to rehire one other employee and by failing to give six employees wage increases given to other employees. The Board reversed the ALO as to the alleged violations of section 1153(a) in incidents involving rudeness by the supervisors to certain employees; the Board found insufficient evidence linking the unfavorable treatment to the employees' support for the union

or protected activities. The Board also disagreed with the ALO as to the layoff of five male employees while less senior females were employed, finding that Respondent offered an adequate business justification to establish that this difference in treatment was not based on union or organizational considerations forbidden by the Act. The Board also reversed the ALO's conclusion that Respondent violated section 1153(c), (d), and (a) by including in the recall notices it sent these five male employees an erroneous date for the prospective termination of the employment it was offering them. The Board found that General Counsel produced no evidence that the date was intentionally inaccurate or that by including the date Respondent interfered with the employees' rights or discriminated against them.

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY, Respondent, and UNITED FARM WORKERS OF AMERICA, ALF-CIO, PEDRO RIVAS, GUADALUPE RUIZ, and AGUSTIN MADRID, Charging Parties.	)	CASE NOS. 80-CE-61-SD 80-CE-65-SD 80-CE-70-SD 80-CE-87-SD 80-CE-88-SD 80-CE-93-SD 80-CE-96-SD 81-CE-2-SD

Martin Fassler, Esq.
of Sacramento California, for
the General Counsel

Law firm of Thomas E. Campagne,
a Professional Corporation, by
Thomas E. Campagne, Esq.,
and Thomas M. Giovacchini, Esq.
of Fresno, California, for
the Respondent

Beverly Axelrod, Esq., of San
Francisco, California,
Administrative Law Officer

DECISION

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I. STATEMENT OF THE CASE

BEVERLY AXELROD, Administrative Law Officer: These cases were heard before me in San Diego, California on March 24, 25 26,30,31 and April 1, 2, 3, 1981. The order consolidating cases was issued December 22, 1980. The Complaint was issued on December 22, 1980 and amended on March 24 and 25, 1981. The Amended Complaint[1/] alleges violations of §§1153(a) , (c) (d) and (e) of the Agricultural Labor Relations Act (herein called the Act) by Ruline Nursery (herein called Respondent) . The Complaint is based on charges filed in 1980 and 1981 by the United Farm Workers of America, ALF-CIO (herein called the Union) and by three employees: Pedro Rivas, Guadalupe Ruiz, and Agustine Madrid. Copies of the charges were duly served upon Respondent. A more detailed discussion of the procedural history of this case is presented in Section IV of the Decision, infra, in which Respondent's procedural challeges are considered.

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

After careful consideration of the entire record, including my evaluation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law:

II. JURISDICTION

Respondent Ruline Nursery is a sole proprietorship owned and operated since 1956 by Rufus Orson. It is engaged in agriculture in San Diego County, California, within the meaning of §1140 (c) of the Act.

The Union is a labor organization within the meaning of §1140 (f of the Act.

Charging Parties Pedro Rivas, Guadalupe Ruiz and Agustin Madrid were at all material times agricultural employees within the meaning of §1140 (b) of the Act.

III. SUMMARY OF THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges ten violations of the Act by Respondent:

1. (Paragraph 15): Refusal to meet with the Union to bargain for a contract, in violation of §§1153 (a) and (e) of the Act.

2. (Paragraph 16): Refusal to rehire Guadalupe Ruiz and Pedro Rivas in July, 1980, because of their union activities and

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[1/] Where not specified, references to "Complaint" are to the Amended Complaint.

because of their activities before the Agricultural Labor Relations Board (herein ALRB or Board) , in violation of §§1153 (a) , (c) and (d) of the Act.

3. (Paragraph 17): Discrimination against Elias Gonzalez, Miguel Pereda, Victorino Olivas, Pedro Rivas and Agustin Madrid in October and November, 1980 by laying them off and delaying their recall because of their union and ALRB activities, in violation of §§1153 (a) , (c) , and (d) of the Act.

4. (Paragraph 18): Refusal to rehire Agustin Madrid in December, 1980 because of his union and ALRB activities, in violation of §§1153(a),(c) and (d) of the Act.

5. (Paragraph 19): Refusal of a pay increase to Guadalupe Ruiz in November, 1980 because of her union and ALRB activities, in violation of §§1153(a) ,(c) and (d) of the Act.

6. (Paragraph 20): Unlawful interference with and assault upon Juana De Varela, Justina Wichware, and Maria Gonzalez in October, 1980 because of their union activities and support, in violation of §1153 (a) of the Act.

7. (Paragraph 21): Unlawful threats against Justina Wichware and Guadalupe Ruiz in November, 1980 because of their union activities and support, in violation of §1153(a) of the Act.

8. (Paragraph 22): Unilateral changes in vacation and holiday pay and schedules in June, 1980, without notice to or bargaining with the Union and in retailiation for union activities by employees, in violation of §§1153(a),(c) and (e) of the Act.

9. (Paragraph 23): Unilateral changes in hours beginning in January, 1980, without notice to or bargaining with the Union, in violation of §§1153(a) and (e) of the Act.

10. (Paragraph 24): Unilateral wage increases in January, 1980 without notice to or bargaining with the Union, in violation of §§1153 (a) and (e) of the Act.

Respondent denies that its actions violated the Act. In addition, Respondent asserts that the allegation contained in Paragraphs 16,17,18,22,23 and 24 of the Complaint should be dismissed on procedural grounds.

In section IV of this Decision, infra, Respondent's procedural challenges are considered. In Section V, background facts concerning the operation of Respondent's nursery are presented and in the remaining Sections of the Decision findings of facts and conclusions of law are discussed as to each of the alleged unfair labor practices.

IV. PROCEDURAL ISSUES A.

The Charges;

A total of eight charges were filed and duly served on Respondent:

1. Charge 80-CE-61-SD (GCX:lA)[2/]. The Union filed this charge on August 19, 1980 alleging a violation of §§1153(a) and (e) of the Act because of Respondent's refusal to meet and bargain with the Union, the duly certified bargaining representative of Respondent's employees. The charge alleged that since late 1978 Respondent had waged an "anti-union campaign through layoffs, discharges and warnings", and that the refusal to meet and bargain was part of the anti-union campaign.

2. Charge 80-CE-65-SD(GCX:IB). Pedro Rivas filed this charge on September 11, 1980 alleging a violation of §§1153(a), (c) and (d) of the Act for refusal to rehire Pedro Rivas and Guadalupe Ruiz in July, 1980 because of their union and ALRB activities.

3. Charge 80-CE-70-SD (GCX:1C). The Union filed this charge on October 6, 1980 alleging violations of §§1153(a) and (d) of the Act for threatening and assaulting Juana De Varela, Justina Wichware and Maria Gonzalez in October, 1980 because of their union and ALRB activities. The assault was alleged to consist of "speeding by them in a car and thereby causing water to be splashed on the three workers."

4. Charge 80-CE-87-SD (GCX:1D). Pedro Rivas filed this charge on November 6, 1980 alleging a violation of §§1153(a), (c),(d) and (e) of the Act. The allegation stated that "Beginning in or about early 1979 to date the company has unlawfully and discriminatorily instituted changes in the company's vacation and holiday policies" without notice to the Union and in retaliation for union and ALRB activities.

5. Charge 80-CE-88-SD (GCX:1E) . Guadalupe Ruiz filed this charge on November 6, 1980 alleging violations of §§1153(a) and (d) of the Act for threatening Guadalupe Ruiz and Justina Wichware in November, 1980 because of their union and ALRB activities.

6. Charge 80-CE-93-SD(GCX:1F). Pedro Rivas filed this charge on November 6, 1980 alleging violations of §§1153(a) and (e) of the Act. The allegation stated that "Beginning in or about early 1980 to date Rufus Orson has instituted unilateral changes: concerning work hours and clean-up time compensation, without notice to the Union.

[2/] References to General Counsel's exhibits will be given "GCX". References to Respondent's Exhibits will be given as "RX". References to the Reporter's Transcript will be given by listing the volume in Roman Numerals, followed by page numbers.

7. Charge 80-CE-96-SD (GCX:1G). The Union filed this charge on Decmeber 2, 1980 alleging a violation of §§1153(a) and (e) of the Act because "On or about January 1980 the employer illegally instituted unilateral changes by raising wages of employees" without notice to the Union.

8. Charge 81-CE-2-SD (GCX:1H). Agustin Madrid filed this charge on January 14,1981 alleging a violation of §§1153(a), (c) and (d) of the Act for unlawfully terminating Agustin Madrid on December 12, 1980 because of this union and ALRB activities.

B. The Complaint:

On December 22, 1980 the Regional Director issued the original complaint in this case (GCX:1(I)). During the first two days of hearing the General Counsel moved to amend the Complaint (GCX 8;Tr.11:11), and these motions were granted (Tr. 1:18,42; Tr.II:14). A copy of the Amended Complaint (GCX:1(L) was filed and served on Respondent at the hearing on March 30, 1981 (Tr.IV:l).

C. Respondent's Challenges to the Amended Complaint.

Respondent timely moved to dismiss the allegations in several of the paragraphs of the Amended Complaint, on a variety of procedural grounds. I deal with each of these challenges in turn.

1. Paragraph 17

Paragraph 17 of the Amended Complaint alleges that in October and November of 1980 Respondent discriminated against employees Elias Gonzalez. Miguel Pereda, Victorino Olivas, Pedro Rivas and Agustin Madrid by laying them off, delaying their recall, withholding pay increases and offering less attractive conditions of work than previously, all because of their union and ALRB activities. These actions are said to violate §§1153(a), (c) and (d) of the Act. (See Paragraphs 25,26,and 27 of the Amended complaint.

None of the charges filed in this case referred specifically to these incidents, and the original Complaint did not contain these specific allegations. General Counsel moved at the outset of the hearing to add these allegations to the Complaint, (GCX:8,Tr.I:11) [3/]. Respondent argues that the amendment adding these Paragraph 17 allegations was not within the permissible scope of amending a complaint under the Act. I

[3/] In the written Motion to amend and in the discussion at the hearing, these allegations were contained in Paragraph 16; they were eventually re-numbered in the final copy of the Complaint and are now contained in Paragraph 17 of the Amended Complaint (GC:1(L).

find, however, that Respondent's argument fails on two grounds. First, for the reasons discussed below I find and conclude that the amendment was permissible under the legal standards set out in the Act and in the decisions of the Board. Secondly, I find that there was no prejudice to Respondent.

Section 1160.2 of the Act states broadly that a complaint "may be amended by the member, agent [of the board], or agency conducting the hearing or the Board in its discretion, at any time prior to the issuance of an order based there-on". The Board has held that this section gives the General Counsel_ broad authority to make amendments provided there is no prejudice to the Respondent. In Porter Berry Farms, 7 ALRB No. 1, p.2, the Board held:

> "Once the Board's jurisdiction has been invoked by the filing of a charge, its General Counsel is free to make full inquiry under its broad investigatory power in order to properly discharge its duty of protecting public rights. Where, as here, the charge and the original complaint include an alleged violation of section 1153 (a), the complaint may be amended to include other violations of section 1153(a), so long as the parties receive adequate notice of the new allegations. As Respondent was given adequate notice and opportunity to defend against the new allegations, we conclude that the amendment of the complaint to include additional violations of section 1153(a) was proper." (Citations omitted).

In John Elmore, Inc. 4 ALRB No. 98, pp.2-3, the Board stated that the broad policy allowing amendments extends even to a situation, not present here, where the amended allegations occur otuside the six-month time limit in §1160.2. The only requirement set out in either the Porter Berry or John Elmore cases is that the amendment be related to the other charges in the case. The Board has further held in a line of cases that the Hearing Officer and the Board can consider matters not even pleaded in the complaint, provided the matters are related to the other charges and were fully litigated so that the Respondent was not prejudiced by consideration of the matter. Anderson Farms Co., 3 ALRB No. 67? Prohoroff Poultry Farms, 3 ALRB No. 87; Highland Ranch and San Clemente Ranch, 5 ALRB No. 54

Under these standards, I find that the amendment here was well within the amendment policy permitted under the Act. The first charge filed in the case, 80-CE-61-SD (filed August 19, 1980), alleged that Respondent had conducted an anti-union campaign including layoffs, discharges and warnings. Paragraph 16 of the original Complaint (GCX:1L) alleged unlawful layoffs

and offers of less substantial work. Other charges[4/] alleged violations of §§1153(a),(c) and (d) of the Act, the same sections alleged to be violated by the Paragraph 17 allegations. These other charges alleged a pattern of anti-union actions by Respondent beginning in 1979 and early 1980 and continuing through December, 1980, a time span within which the October and November 1980 allegations of Paragraph 17 are encompassed. Two of the five alleged discriminatees named in Paragraph 17 are also named as discriminatees in other paragraphs of the complaint.[5/]

In sum, I find and conclude that the amendment was related to the other charges, was close in time to the other charges, and was within the discretion allowed to the General Counsel in amending a complaint.

As a second ground for finding the amendment permissible, I find that there was no prejudice to Respondent. The amendment was made at the outset of the hearing, before any testimony was taken. The matter was fully litigated at the hearing. Counsel for Respondent did not request additional time to prepare to meet these allegations. At one point in the hearing, regarding another amendment to the Complaint, I specifically stated that Respondent could have additional time, if requested, to meet that amendment. (Tr.11:14). I am sure that Respondent's able counsel was aware of the option of requesting additional time to meet the Paragraph 17 allegations as well, if Respondnet needed such time. Here, as in John Elmore, Inc., supra, at p. 3,"no motion was made by Respondent [for additional time to meet amended allegation], and as the issues relating to the allegations were fully litigated at the hearing,[it was proper to make] findings of fact and conclusions of law there-on." In the absence of any prejudice to Respondent, I find and "conclude that the amendment adding Paragraph 17 was permissible and proper. John Elmore, Inc., supra; Porter Berry Farms, supra; Morika Kuramura, 3 ALRB No. 79.[6/]

2. Paragraph 16,17 (a)-(c) and 18.

Respondent timely moved to have the allegations in Paragraphs 16,17 (a) - (c), and 18 of the Amended Complaint dismissed. Paragraph 16 alleges that in July and August, 1980 Respondent discriminatorily refused to rehire employees Guadalupe Ruiz and Pedro Rivas, Paragraph 17 (a) - (c)alleges that in October and November, 1980, Respondent discriminatorily laid off and delayed recalling employees Elias Gonzalez, Miguel Pereda, Victorino Olivas, Pedro Rivas, and Agustin Madrid. Paragraph 18 alleges that on December 12, 1980 Respondent discriminatorily refused to rehire Agustin Madrid.

4/ See Section IV (A) of this Decision, supra, for a summary of the charges.

5/ Pedro Rivas is named in Paragraph 16; Agustin Madrid is named in Paragraph 18.

6/ Respondent's challenge to Paragraph 17 on a second procedural ground is considered in Section IV(C)(2) immediately, infra.

Respondent's argument for dismissal is based on the fact that in a previous unfair labor practices hearing before the Board involving Respondent, Case No. 79-CE-20-SD, et al, the Administrative Law officer there found that Respondent had discriminatorily laid off these same employees. The acts alleged in Case No. 79-CE-20-SD occurred in 1979 and early 1980, prior to the acts complained of in Paragraphs 16, 17 and 18 of the instant case.

Respondent argues that if the Board affirms the decision of the Administrative Law Officer in the previous case, there will be a back-pay compliance hearing in that case and at that compliance hearing the Hearing officer might determine the propriety of subsequent layoffs (such as the one complained of in the instant case) in making his or her back-pay determination. Respondent further argues that the dismissal of the allegations in the instant case should be without prejudice, and the allegations could be brought in a subsequent complaint should there be no compliance hearing. Respondent cites no cases or authorities in support of its argument that I should not hear a specific unfair labor practice allegation, properly pleaded and before me, on the chance that there might be a compliance hearing in another case and that such a hearing would, as a collateral matter, deal with some of the issues before me.

I find several weaknesses in Respondent's argument. First, if there were no compliance hearing the result would be a greater overall drain on the Board's resources. I would have had to conduct an extensive hearing in any event on the other allegations in this case besides those in Paragraph 16-18, and this hearing would have involved many of the same people named in Paragraphs 16-18. If there were no compliance hearing, yet another complaint would have to be litigated. Second, a compliance hearing on back-pay would not determine the substantive legality of subsequent layoffs. The back-pay hearing would not be dealing with the same legal determinations that must be made in a full hearing of the case. Finally, it would not make sense to have a backpay determination take legal precedence over a determination made at a full hearing. The nature of a back pay hearing is an implementation hearing; the determinations of legality have already been made in the full hearing. The Decision in Case No. 79-CE-20-SD dealt with the legality of layoffs in 1979; no legal determinations were made about any matters occurring in the July-December, 1980 period. These latter allegations are properly before me for full hearing, and I find and conclude that it is appropriate for me to hear them. To the extent that I may have discretion in this matter, for the reasons stated above I choose to exercise my discretion to hear these allegations.

3. Paragraphs 22, 23 and 24; Six-Month Limitation Period.

Respondent timely moved to dismiss the allegations in

Paragraphs 22, 23 and 24 of the grounds that the charges relating to those allegations were filed after the six-month limitations period specified in §1160.2 of the Act had passed. (Tr. I:43-44).

The allegations in Paragraph 22 of the Amended Complaint were contained in Paragraph 19 of the original Complaint. That paragraph alleged: "Beginning on or about January 1980, respondent has unilaterally instituted changes in the company's vacation and holiday policies without negotiating with the UFW with respect to said changes. The changes were instituted in an effort to retaliate against the employees for having engaged in UFW activities and exercising their rights under the ALRB." This was said to violate §1153(a) of the Act, Paragraphs 22, 23,and 25 in the original Complaint, (GCX:II); renumbered as Paragraphs 25, 26 and 28 in the Amended Complaint, (GCX:1L). The charge relating to this allegation is Charge 30-CE-87-SD, filed by Pedro Rivas on November 6, 1980. During the hearing, the General Counsel moved to amend the allegation (now re-numbered as Paragraph 22 in the Amended Complaint), to read: "Beginning in or about June, 1980, respondent has unilaterally instituted changes...".

Paragraph 23 alleges that "Beginning in or about January 1980, respondent has unilaterally instituted changes in employment conditions by reducing the employee's work hours...". This is said to violate §§1153 (a) and (e) of the Act, (Paragraphs 25 and 28 of the Amended Complaint). This allegation is based on Charge 80-CE-93-SD, filed by Pedro Rivas on November 6, 1980.

Paragraph 24 alleges that "In or about January 1980, respondent unilaterally increased the wages of employees without negotiating said increases with the UFW". This is said to violate §§1153(a) and (e) of the Act, (Paragraphs 25 and 28 of the Amended Complaint). This allegation is based on Charge 80-CE-96-SD, filed by the Union on December 2, 1980.

Section 1160.2 of the Act states that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made,...". The ALRB has followed the National Labor Relations Board's (NLRB) interpretation of the comparable provision in the National Labor Relations Act (NLRA); specifically, the ALRB has held that the six-month limitation period does not begin until the charging party had actual or constructive notice of the action complained of.

The ALRB has set out the applicable standards in Bruce Church, Inc., 5 ALRB No. 45, and Montebello Rose Co., Inc. et al., 5 ALRB No. 64. In Bruce Church the Board stated:

> "Under NLRA precedent, the six-month period does not begin to run until the aggrieved party

> knows, or reasonable should have known, of the illegal activity which is the basis for the charge." (5 ALRB No. 45, p.7).

In Montebello Rose Co. the Board held:

> "Section 1160.2, like its counterpart, Section 10(b) of the National Labor Relations Act, is a statute of limitations designed to prevent the litigation of stale claims. Local Lodge 1424 v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 42 LRRM 3212(1960). General principles applicable to statutes of limitations govern the use of this provision. Following these general principles, the National Labor Relations Board and the courts have held that the limitations period begins to run only 'when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation .' NLRB v. Allied Products Corp., 548 F. 2d 644,650,94 LRRM 2433 (6th Cir.1977). The National Labor Relations Board, for example, does not begin the six-month period until the charging party has actual or constructive notice of the unlawful conduct in refusal to bargain cases dealing with unlawful unilateral changes. S & W Motor Lines, Inc. 236 NLRB No. 113, 98 LRRM 1488 (1978); Southeastern Michigan Gas Co. 198 NLRB 1221, 81 LRRM 1350 (1972), enf'd 485 F. 2d 1239, 85 LRRM 2191 (6th Cir. , 1973)."

(5 ALRB No. 64, pp. 12-13 (footnotes omitted)).

The NLRB has held that the Respondent has the burden or proving that the charging party had actual or constructive notice of the acts complained of. ACF Industries, Inc., 234 NLRB No- 158, 98 LRRM 1287, aff'd Amcar Division v. NLRB 100 LRRM 3074 (8th Cir., 1979); Strick Corporation, 241 NLRB No. 27, 100 LRRM 1491. These NLRB cases reason that the limitation period is an affirmative defense, and therefore the burden is on the Respondent to prove that defense. The ALRB, in Perry Farms, Inc., 4 ALRB No. 25, p. 2. fn.l had held that "The law is clear... that the statutory 1 imitation s{ of Section 1160.2 of the Act] is not jurisdictional, but must be the subject of an affirmative defense."

Applying the above standards, I will begin with the Paragraph 24 allegation, that Respondent unilaterally increased wages. It was stipulated that on January 1, 1980 Respondent increased wages for its employees. (Tr.I:2). The charge

relating to this allegation, Charge 80-CE-96-SD (GCX:lG) was filed by the Union eleven months later (December 2, 1980). However, it was also stipulated that "Ruline Nursery did not notify the UFW [Union] about these changes [in wages] or discuss them with the UFW prior to their implementation." (Tr.I:3). Respondent introduced no evidence or testimony to show that the Union received either actual or constructive notice of the wage changes prior to six-months before it filed the charge. Since it is stipulated that Respondent did not notify the Union of the changes, under the standards discussed above Respondent has the burden of showing that the Union recieved either actual or constructive notice of the wage changes earlier than six months before the charge was filed. Respondent has not met this burden with any showing at all, and I, therefore, find and conclude that the Paragraph 24 allegation is not time-barred by the six-month limitation in §1160.2 of the Act.

I turn next to the Paragraph 23 allegation, that Respondent unilaterally shortened the work day. It was stipulated that on January 1, 1980 Respondent shortened the workday from nine hours to eight hours(Tr.I:3). The charge relating to this allegation, 80-CE-93-SD, was filed by Pedro Rivas some eleven months later (November 6, 1980). It was also stipulated at the hearing that Respondent "did not notify the UFW about this change or discuss it with the UFW prior to its implementation." (Tr.I:3).

The determination of when the six-month time limit began to run for the Paragraph 23 allegation thus depends upon when the charging party, Pedro Rivas, knew of the shortening of the work week; specifically, whether he knew by May 6, 1980, six months before he filed the charge. In this regard, Respondent states in its Brief that "Pedro Rivas, on cross-examination, admitted that he first learned about the alleged change in hours when he returned to work around January, 1980, more than six months prior to the filing of unfair labor practice charge -80-CE-93-SD." (Post-Hearing Brief for Respondent, p.4). However, I believe that this mis-characterizes the testimony of Mr. Rivas, and that other evidence in the case indicates that Mr. Rivas may not have found out about the change until as late as October, 1980, one month before he filed the charge.

The transcript of Mr. Rivas'testimony on this point is vague; however, my observation of the testimony and demeanor of the witness leads me to believe that Mr. Rivas was positive that he learned about the workday changes when he returned to work, but that he did not remember the date he returned to work. This is consistent with his testimony:

> "Q.: (By Respondent's Counsel). Mr. Rivas, as I was saying, you understand that this is a charge that you filed with the ALRB, isn't that correct?

A. Yes.
Q. And you understand that the charge alleges that [Respondent] made changes in its hours of employment and in the clock system..
A. Yes.
Q. ...at[Respondent]? When did you first learn about these changes?
A. I came to find out when I returned to work. Everytime I was laid off and then when I would come back.
Q. Now when did you return to work?
A. I don't have the dates in my mind.
Q. Was it in January of 1980?
A. Probably, but I don't remember the dates.
Q. Could it have been in February of 1980?
A. I don't remember the date.
Q. Could it have been any later than May of 1980?
A. I don't remember the date.
Q. Okay. "

(Tr.II:50-51).

General Counsel's Exhibit No. 10, on page four (4)[7/] contains the following stipulation:

> "Each of the following persons was re-employed at Ruline on the dates listed below, at the same rate which he or she was earning when last employed by Ruline Nursery in the summer of 1979. The hourly rate at which each such person was paid is set out in parentheses next to his or her name:
>
> . . .
> Pedro Rivas ($3.60) October 6, 1980
> . . . ".

This stipulation would indicate that Mr. Rivas returned to work on October 6, 1980.

Respondent's Exhibit No. 5, an employee work and senority list, begins in July 1980; it indicates that Mr. Rivas (RX:5, line 5), did not work in July, August or September, 1980. The Exhibit shows his first date of work within this period to be October 6, 1980. Respondent did not choose to introduce any employment records showing whether Mr. Rivas had worked in 1980 prior to July, 1980.

Based on the above testimony, stipulations, and evidence,

[7/] Page four was the only page admitted. (Tr.VI:9). The document,GCX:10, contains handwritten additions and changes. These were specifically stipulated to by counsel for Respondent. (Tr.VI: 7-9). The corrected form of the stipulation reads as is shown in text(See Tr.VI:7-9).

I find that there has been no showing that Mr. Rivas learned about the reduction in work hours more than six months before he filed Charge No. 80-CE-93-SD, and that the evidence indicates he did not find out about the reduction until October, 1980, one month before he filed the charge. I, therefore, conclude that the six-month time limitation in §1160.2 of the Act does not bar the allegation in Paragraph 23 of the Complaint.

Regarding the Paragraph 22 allegation, that Respondent unilaterally changed its vacation and holiday policy, the evidence shows that in 1979, Respondent, with some exceptions, ended its practice of giving paid vacations and holidays; the testimony also indicates that Mr. Rivas knew of this change in December, 1979 (Tr. 11:53), eleven months before the charge was filed by him in November, 1980. However, the evidence also shows that this allegation was an alleged continuing violation, lasting through 1980. In this regard, it should be noted that the allegations of Paragraph 22 are said to violate §§1153(c), (d), and (e) of the Act. In Julius Goldman's Egg City, 6 ALRB No. 61, p. 5, involving a §1153 (c) violation, the Board held:

> "We conclude that Respondent's conduct in maintaining and giving effect to a discriminatory hiring policy was a continuing violation of the Act which occurred within the six-month period immediately preceding the filing of the charge...
>
> In the instant case, Respondent inaugurated a discriminatory rehire policy in the fall of 1977, when it began to rehire its returning strikers as new employees, thus stripping them of their seniority rights. The fact that Respondent initiated this policy more than six months before the filing of the charge does not mean that the charge was time barred. The issue is not simply whether Respondent committed an unfair labor practice by initiating the policy, but whether it violated the Act by maintaining and giving effect to that policy."

The §1153 (c) and (d) violations are clearly a continuing one under the Julius Goldman case because, as is set out fully in Section VIII(H) of this Decision, infra, Respondent continued to maintain and give effect to the changed vacation policy through 1980. Thus the allegation that the actions desecibed in Paragraph 22 violated §1153(c) and (d) is timely before me. Further, since these actions were fully litigated at the hearing, I can make a determination whether they constituted a violation of §1153(e) as well. The Board has held that in some circumstances a complaint may be amended to include pre-six-month events, John Elmore, Inc., 4 ALRB No. 98. The

Board has also held that where a matter is fully litigated, unfair labor practice findings may be made even as to unpleaded allegations, Anderson Farms Co., 3 ALRB No. 67; Prohoroff Poultry Farms, 3 ALRB No. 87; Highland Ranch and San Clemente Ranch, 5 ALRB No. 54. Here, not only was the matter fully litigated, but Respondent had specific notice through the charge and the original complaint. The charge complained of vacation and holiday changes beginning in "early 1979 to date". In the original complaint the General Counsel pleaded the time period as beginning January 1, 1980, and in the Amended Complaint this was shortened to June, 1980. Respondent has thus been on notice since the filing of the charge, four months before the hearing, that the vacation and holiday policy was being challenged. The facts have been fully litigated to determine if there has been a violation of §1153(c) and (d) of the Act. There is thus no prejudice to Respondent in my making a finding whether these same facts also constitute a violation of §1153 (e). For these reasons, I find and conclude that the allegations of Paragraph 22 of the Amended Complaint are not barred by the six-month time limitation in §1160.2 of the Act.

4. Paragraphs 22, 23 and 24: Union Certification.

Respondent timely moved to dimsiss the allegations in Paragraphs 22, 23 and 24 of the ground that the refusals to bargain alleged therein (unilateral changes in vacations, work hours, and wages) took place before the Union was certified by the board as the bargaining agent for Respondent's employees.(Tr.I:44). Although not strictly a procedural ground, I will deal with this issue here.

The facts concerning this challenge are undisputed. As more fully described in Section V of this Decision, infra, the Union filed an election petition at Respondent's business on January 3, 1979, and an ALRB election was conducted on January 10, 1979. The Union won the election. Respondent then filed objections to the election with the Board. A hearing was held, and in December, 1979 the hearing officer dismissed Respondent's objections. Respondent filed exception to the Hearing Officer's decision. In June, 1980 the Board affirmed the hearing officer's decision and certified the election results.

It is also undisputed that the Paragraph 22-24 allegations refer to alleged unilateral changes made by Respondent in or about January, 1980. The Union won the election in January, 1979, but was not certified until June, 1980. Respondent argues that it had no obligation to bargain about unilateral changes with the Union until the Board certified the Union in June, 1980, and therefore the allegations in Paragraph 22, 23 and 24 must be dismissed. Respondent's argument, however, is directly contrary

to the Board's holding in Highland Ranch and San Clemente Ranch, 5 ALRB No. 54, pp. 7-8:

> "The prohibition against bargaining with an uncertified union in Section 1153(f) [of the Act] is not a license for an employer to make unilateral changes in working conditions between an election and certification. We believe the federal precedent is applicable. While there is no legal obligation to enter into the comprehensive negotiations contemplated by Section 1155.2(a), 'absent compelling economic considerations for doing so, an employer acts at its peril in making changes' in existing terms and conditions of employment while the certification issue is pending before the Board. Thus information to and consultation with the union prior to such changes may be found to have been required by a subsequent certification of the union as the exclusive bargaining agent." [8/]

I, therefore, decline to dismiss the allegations of Paragraphs 22, 23 and 24 on the sole ground that the allegations occurred after the Union won the election but before the Board certified the Union.

V. THE NURSERY

In this Section gerneral facts are presented concerning the operation of the nursery, the history of Union activities at the nursery, previous ALRB cases involving the nursery, and the alleged discriminatees. Additional facts, specific to the alleged unfair labor practice allegations, are presented in the subsequent Sections of this Decision in which those allegations are considered.

A. Operation of the Nursery.

Respondent Rulien Nursery is a sole proprietorship owned and operated by Rufus Orson since 1956. Respondent grows azaleas and poinsettias as its main crops, along with a variety of minor crops including cyclamen, hydrangea, cineraria and gloxinias. Respondent also has some acreage in which avocados are grown. The azalea operation requires maintaining the azaleas during the year, with peak activity occurring during

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[8/] This case is currently under review by the California Supreme Court. General Counsel states in its Brief that oral argument took place on April 7, 1981.

propagation (April through June), and around the four holiday periods when Respondent ships its azaleas (Christmas, Valentine's Day, Easter, and Mother's Day). The poinsettia operation is similar, with peak activity during propagation (April) and pinching (August and September) and during the two holiday periods when the poinsettias are shipped(Thanksgiving and Christmas).

B. Respondent's Supervisors.

Respondent admits that the following persons are supervisors at Respondent's nursery within the meaning of §1140.4 (j) of the Act: Rufus Orson, Jack Jester, Lucy(Luz) Escobedo, Lucio Corona, Baudelio Casteneda, and Socorro Sandoval (See Brief for Respondent, pp. 12-15).

The line of authority at the nursery is as follows:

Mr Rufus Orson is the owner-operator of Respondent's business and has overall authority for the business.

Mr. Jack Jester is Respondent's overall superintendant, in charge of all crops. He is the General Manager at the business, second in authority to Mr. Orson. He is in charge of day-to-day operations, and has authority to hire and fire employees, and to direct them in their work.

Ms. Lucy Escobedo is a general supervisor, under Mr. Jester's authority. She assists in general supervision of the employees, and is in charge of shipping. She has the power to hire and fire employees, and to direct them in their work.

Mr. Lucio Corona is in charge of the avocado operations at Respondent's business. He has authority to hire and fire employees, subject to the approval of Mr. Jester, and he directs employees in their work.

Mr. Baudelio Casteneda, until he left Respondent's business in 1980, was in charge of the azalea operations. He had authority to hire and fire employees, subject to the approval of Mr. Jester, and he directed employees in their work.

Mr. Socorro Sandoval is in charge of maintenance at the nursery. He has authority to hire and fire employees, subject to Mr. Jester's approval, and the directs employees in their work.

C. Summary of Union Activities and Previous ALRB Litigation.

In November and December, 1978, the Union conducted an organizing campaign at Respondent's business. On January 3, 1979 a certification petition was filed by the Union, and on January 10, 1979 an election was held. The Union won the election, receiving

14 votes to 4 votes for no union.[9/] Respondent filed some 49 objections to the election. Of these, 37 were dismissed by the Board in April, 1979, and the remaining 12 were set for hearing. On November 26, 1979 the hearing officer dismissed these remaining 12 objections. Respondent filed exceptions, and the Board affirmed the hearing officer's decision in June, 1980, certifying the results of the election on June 11, 1980. The Decisions of the Hearing Officer and the Board are found at Ruline Nursery, 6 ALRB No. 33 (1980).

Subsequent to the January 10, 1979 election, a number of charges were filed against Respondent alleging unfair labor practices (not including the eight charges in the instant case). these charges included:

Charge 7 9-CE-3-SD, filed January 18, 1979.{GCX:4B). Charging parties: Maria Gonzalez, Juana De Varela, Justina Wichware, Reynalda Garcia. Alleged discriminatory refusal to hire.

Charge 79-CE-6-SD, filed February 22, 1979. (GCX: 4C). Charging parties: Miguel Pereda, Victorino Olivas, Guadalupe Ruiz. Alleged discriminatory layoffs.

Charge 79-CE-9-SD, filed March 16, 1979. (GCX: 4D). Charging party: Elias Gonzalez. Alleged discriminatory change in conditions of employment.

Charge 79-CE-20-SD, filed June 22, 1979. (GCX:4E). Charging party: Elias Gonzalez. Alleged discriminatory changes in working conditions.

Charge 79-CE-21-SD, filed June 26, 1979. (GCX:4F). Charging party:Pedro Rivas. Alleged discriminatory change in working conditions.

Charge 79-CE-22-SD, filed July 2, 1979. (GCX:4G). Charging parties: Pedro Rivas, Maria Gonzalez, Elias Gonzalez, Juana De Varela, Guadalupe Ruiz, Miguel Pereda, Victorino Olivas. Alleged discriminatory layoffs.

Charge 79-CE-23-SD, filed July 2, 1979.(GCX:4H). Charging party: Pedro Rivas. Alleged discriminatory change in conditions of employment.

In June, 1979, a hearing was held on Charge 79-CE-8-SD (not one of those listed above), alleging discriminatory discharge of Supervisor Raul Vega because of Vega's union sympathy. On April 14, 1980, ALO Kenneth Cloke issued his Decision,(GCX:5). ALO Cloke found that Respondent had illegally discharged Supervisor Vega. Exceptions were filed to this Decision, and the

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[9/] Seven other ballots were challenged, but these were not considered since they did not affect the results. Ruline Nursery, 6 ALRB No. 33.

Case is now awaiting decision by the Board.

In October, 1979, a hearing was held before ALO Arie Schoorl on Case Nos. 79-CE-20-SD,79-CE-21-SD, 79-CE-22-SD, and 79-CE-23-SD.12/ On September 19, 1980, ALO Schoorl issued his Decision, (RX:2). He found, inter alia, that Elias Gonzalez, Agustin Madrid, Victorino Olivas, Miguel Pereda, Pedro Rivas, Guadalupe Ruiz, Juana De varela, and Justina Wichware had been discriminatorily laid-off, and he ordered that they be reinstated and made whole for any losses. Exceptions were filed to this Decision, and the case now awaits decision by the Board.

D. Details of Respondent's Previous ALRB Litigation.

There has been frequent reference by both parties at the hearing in this case, and in the Post-Hearing Briefs, to the prior ALRB litigation involving Respondent. Respondent has introduced into evidence,(RX:2), ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. The General Counsel has introduced into evidence, (GCX:5) , the Decision of ALO cloke in Case No. 79-CE-8-SD. Eight previous charges have been introduced into evidence, (GCX:4(A)-(H)). Respondent asserts that some of this prior litigation is relevant to its procedural challenges to the complaint and to its good faith in refusing to bargain with the Union. Not all of the previous litigation is relevant to the allegations of this case; however, I will here give a more detailed history of the previous litigation so that a comprehensible chronology of that litigation cna be understood. I will note in the other sections of this Decision when any specific aspect of the previous litigation is relevant to a particular allegation in this case. Other than where specifically stated, I am not relying on or considering the previous litigation in making my determinations in this case, and I am here setting forth details to that litigation only as background to the instant case.

The election at Respondent's business took place on January 10, 1979. Case No. 79-RC-l-SD,(reported at 6 ALRB No. 33), involved Respondent's exceptions to the election. Respondent filed 49 exceptions, of which the Board found 12 merited hearing. ALO Matthew Goldberg conducted a hearing and found no merit to Respondent's exceptions. ALO Goldberg found that the bulk of Respondent's exceptions were based solely on the testimony of Respondent's observer at the election, Rebecca Ponce. Ms. Ponce alleged various comments and actions by Board agents indicating bias toward the Union. The agents denied the actions took place. In making his findings of fact and conclusions of law, ALO Goldberg relied primarily on credibility resolutions. In this regard he stated:

10/ Along with three other cases, Nos. 80-CE-7-SD, 80CE-8-SD and 80-CE-10-SD.

> " I found the overall credibility of Rebecca Ponce to be highly suspect. Her demeanor indicated that she was not being entirely candid. While testifying on this particular subject, her discomfort was apparent, as she visibly flushed when questioned concerning it. Her accounts of other matters, as will be more fully discussed below, were not internally consistent. At times, she was somewhat evasive in her responses. Ponce openly admitted that she did not like the union, indicating an arguably biased perspective. She also lives in company housing provided by the employer as part of the benefits of her employment relationship."

6 ALRB No. 33, Decision of Hearing Officer, p. 4.

ALO Goldberg also found that a number of the alleged exceptions would not warrant the setting aside of the election even if they were proved.

One issue which ALO Goldberg ruled on was the questions of whether the election petition had been filed at a time when there was more than 50% of Respondent's peak employment. The petition had been filed on January 3, 1979, and the issue was whether calendar year 1978 or 1979 should apply under the applicable section of the Act, §1156.4. ALO Goldberg held that regardless of which year applied, the petition met the requirement since there were more than 50% of the employees in either case. The Board affirmed the ALO on all of Respondent's exceptions; on the issue of peak, it affirmed holding that calendar year 1978 applied because the payroll period immediately preceding the filing of the petition was the period December 11-27, 1978, thus falling within the 1978 calendar year.[11/] 6 ALRB No. 33, pp.2-4.

Case No. 79-CE-8-SD involved the charge that Respondent fired Supervisor Raul Vega after the Union election in January, 1979 because Vega had, by keeping neutral, not discouraged the union activities among the employees; and that Vega's firing was in keeping with Respondent's efforts to prevent the Union from organizing at Respondent's premises. In his Decision, (GCX:5), ALO Kenneth Cloke made, inter alia, the following findings of fact and conclusions of law:

> " Shortly before the Act became law in 1975, [Rufus] Orson called a meeting with [supervisor Vega], at which [he was] in-

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[11/] Section 1156.4 states that a petition is not timely filed "unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

> structed to discharge potential union adherents, which he did. After the ALRA became law, Orson [and the supervisor] held several meetings concerning the union, at which [Vega] reported on union activity he had observed. Lists were prepared of workers who supported the union, pro-union workers were fired on pretext, and employees who did not support the union were rewarded with a new payscale." (GCX:5, pp.4-5).
>
> "I conclude, that while cause may have existed for the discharge of Raul Vega on any number of earlier occasions, and while Respondent might have fired him, under existing law, 'for no reason at all', the actual reason for his discharge was pretextual". (GCX:5,pp. 43-44).

Case No. 79-CE-20-SD et. al. involved charges that Respondent conducted an anti-union campaign which involved changing the working conditions of employees, laying them off, refusing to rehire them, and intimidating them, all because of their union sympathies and activities. The actions complained of occurred in June and July, 1979. Administrative Law officer Arie Schoorl issued a lenghty Decision in that case on September 19, 1980,(RX:2).

The alleged discriminatees in Case No.79-CE-20-SD et.al. included the alleged discriminatees in the instant case:

> "General Counsel alleges that since the UFW's election victory the Respondent has been engaged in a compaign to rid itself of the pro-union employees it employed in January 1979, almost all of whom had voted for the UFW. General Counsel alleges that this campaign has been directed principally against 12 employees who are Elias Gonzalez, Maria Gonzalez(the Gonzalez are husband and wife), Justina Wichware, Elvira Martines, Victorino Olivas, Juana De Varela, Yolando Navarro, Maria Cortes, Jose Oliveros, Guadalupe Ruiz, the daughter of Elias and Maria Gonzalez, Pedro Rivas, and Miguel Pereda" (RX: 2,p.4) .

ALO Schoorl reviewed Respondent's actions against the Union since 1975: He concluded:

> "Union animus on the part of Respondent is clearly shown by the totality of its acts and conduct directed toward eliminating actual

> and potential union activists from its work force during the period from 1975 to 1978 and also by Respondent's acts and conduct during the two-month perior just before the ALRB election in January 1979, as characterized by the actions and comments of Rufus Orson and Luz Escobedo regarding the UFW.
>
> In addition to union animus, the tactics utilized from 1975 to 1978 clearly reveal that Respondent engaged in a practice, making use of surreptitious means, to rid itself of any actual of potential UFW advocates. Respondent utilized this practive from 1975 through 1978, which creates a strong inference that Respondent continued to use such surreptitious means against the UFW influence and infiltration in the succeeding year 1979. This inference was made even stronger by Respondent's action during the course of the hearing, in discharging Justina Wichware, an employee of thirteen years service, and Victorino Olivas, an employee with four years service, based on obviously pretextual grounds." (RX:2,pp.10-11).

ALO Schoorl found that the named employees had been illegally discharged and he recommended that they be reinstated with back pay.

One aspect of Case No. 79-CE-20-SD et al. involved the General Counsel obtaining a temporary restraining order and preliminary injunction from the Superior Court. In February, 1980, three employees testified under subpoena at the hearing before ALO Schoorl in Case No. 79-CE-20-SD et al.: Justina Wichware, Victorino Olivas, and Elvira Martinez. These employees were all issued disciplinary notices by Respondent for missing work allegedly without giving Respondent notice, on the days they were at the hearing. One employee, Victorino Olivas, attended the hearing under subpoena for three days? he was issued three disciplinary notices and then fired because he missed work three days in a row. In March, 1980 the General Counsel applied in Superior Court of San Diego County for a temporary restraining order and preliminary injunction, under §1160.4 of the Act, to prevent Respondent from giving effect to the disciplinary notices. The court granted the TRO and preliminary injunction. Superior Court of San Diego County, No. N-14587, Gilbert Nares, Judge. Respondent appealed, and on February 18, 1981 the Court of Appeal upheld the preliminary injunction, ALRB v. Ruline Nursery Company, 115 Cal. App. 3d 1005. The Court of Appeal stated:

> "Board orders will approach empty formality if, when finally issued, an employer's coercive conduct has already succeeded in destroying its remaining employees' interest in union activity, their will to assert their rights under the Act, or to testify at ALRB hearings against their employer. If employees who have suffered unfair labor practices must wait, in some instances, years before a final disposition by the Board is rendered, the clear message to remaining employees and agricultural workers at large is that the ALRB is not able to meaningfully aid those who are unlawfully discharged or penalized for participating in collective bargaining."

115 Cal. App.3d,p. 1017(footnotes omitted).

At the hearing on this issue, as part of his Decision in Case No. 79-CE-20-SD et al., ALO Schoorl concluded that Respondent unlawfully and discriminatorly issued warning notices and discharged the employees because they testified at the hearing (RX:2,pp.47,56).

A brief overall chronology of the above ALRB litigation involving Respondent is:

January 3, 1979: Union filed certification petition, NO.79-RC-1-SD.

January 10, 1979: Union wins election.

January 15, 1979: Respondent files exceptions to election, Case No. 79-RC-l-SD.

Beginning May 4, 1979: Election hearing before ALO Goldberg in Case No. 79-RC-l-SD.

Beginning May 21 , 1979: Hearing before ALO Cloke in Case No. 79-CE-8-SD (Discharge of Supervisor Vega. Twenty-three days of hearing).

Beginning October 11, 1979: Hearing before ALO Schoorl in Case No. 79-CE-20-SD, et.al.(Lay-off of pro-union employees. Twenty-six days of hearing).

November 26, 1979: Decision of ALO Goldberg in Case No. 79-RC-l-SD, dismissing Respondent's exceptions to election.

March, 1980: General Counsel applies for TRO and preliminary injunction during hearing in case No. 79-CE-20-SD, et. al. TRO and preliminary injunction granted, Superior Court of San Diego County, No. N-14587, Gilbert Nares, Judge.

April 14, 1980: Decision of ALO Cloke in Case No. 79-CE-8-SD, holding discharge of Supervisor Vega to be a violation of the Act. Exceptions filed and case now pending decision by Bord.

June 11, 1980: Board affirms ALO Goldberg's decision in case No. 79-RC-l-SD; certifies Union.

September 19, 1980: Decision of ALO Schoorl in Case No. 79-CE-20-SD et. al., holding that lay-offs were in violation of the Act. Exceptions filed and case now pending decision by the Board.

December 22, 1980: Complaint filed in instant case.

Beginning March 24, 1981: Hearing in instant case (Eight days of hearings).

E. The alleged Discriminatees.

I find that the following nine individuals, named as the alleged discriminatees in this case, were at all material times agricultural employees within the meaning of §1140.4(b) of the Act: Elias Gonzalez, Maria Gonzalez, Agustin Madrid, Victorino Rivas, Miguel Pereda, Pedro Rivas, Guadalupe Ruiz, Juana De Varela, and Justina Wichware.

Mr. Elias Gonzalez began working for Respondent on February 9, 1973. He is listed as number two (2) on Respondent's overall 1980 seniority listing (RX:5). He worked at Respondent's until approximately June, 1979 (Tr.IV;13), when he was laid-off. He was rehired in October, 1980, and laid-off again that same month(RX:5). Mr. Gonzalez was a charging party in previous Charges 79-CE-9-SD, 79-CE-20-SD, and 79-CE-22-SD. He was a beneficiary of ALO Schoorl's decision in Case No. 79-CE-20-SD et. al. Mr. Gonzalez is married to alleged discriminatee , Maria Gonzalez.

Ms. Maria Gonzalez began working for Respondent on January 29, 1973. She is listed as number one (1) on Respondent's overall 1980 seniority listing (RX:5). She worked at Respondent's business during the 1979 Union election (TR. I:134). During that time she wore Union buttons to work (Tr.I:135). Ms. Gonzalez was a charging party in previous Charges 79-CE-3-SD and 79-CE-22-SD. She testified in a previous ALRB hearing involving Respondent (TR. I-135-136). Ms. Gonzalez is married to alleged discriminatee Elias Gonzalez; her daughter is alleged discriminatee Guadalupe Ruiz. She generally rode to work every day with alleged discriminatees Juana De Varela, Justina Wichware and Victorino Olivas (Tr. I 136-137). Ms. Gonzalez was laid-off in 1979 (Tr.1:155), and again in June, 1980 (Tr.1:142-144). She was recalled in July, 1980 and worked through the rest of 1980(RX:5).

Mr. Agustin Madrid began working for Respondent on

February 2, 1976. He is listed as number twelve(12) on Respondent's overall 1980 seniority listing(RX:5). Mr. Madrid participated in the Union election in 1979 (Tr.11:71). He attended Union meetings and wore Union buttons to work both before and after the election (Tr.II:71-73). Mr. Madrid testified in a previous ALRB hearing against Respondent, (Tr.ii:74). Mr. Madrid was laid off and recalled on several occasions, including times when he was arrested by the Immigration Service for border violations (Tr.1:77-84). The most recent arrest occurred in December, 1980 (Tr.1:83-84). He was fired and refused rehire by Respondent on December 12, 1980 (RX:5). Mr. Madrid sometimes drove to work with alleged discriminatee Victorino Olivas (Tr.I:79). Mr. Madrid was a beneficiary of ALO Schoorl's decision in Case No. 79-CE-20-SD et. a1. Mr. Madrid was charging party in Charge No. 81-CE-2-SD in the instant case.

Mr. Victorino Olivas began working for Respondent on December 4, 1975. He was listed as number ten (10) on Respondent's overall 1980 seniority listing (RX:5). Mr. Olivas participated in the Union election in 1979 (Tr.II:91-92). he wore a Union button to work, attended meetings and spoke to other workers in favor of the Union (Tr.II:92). He testified at a previous ALRB hearing against Respondent (Tr. II:95-96). Mr.Olivas has been laid-off and recalled several times, including times when he was arrested by the Immigration Service (Tr. II: 108-110)Mr. Olivas was a charging party in previous Charges 79-CE-6-SD and 79-CE-22-SD. Mr. Olivas was a beneficiary of ALO Schoorl's decision in Case No. 79-CE-20-SD et. al. Mr. Olivas was recalled to work in October 1980, and laid-off a few days later; he was subsequently recalled in late November, 1980 and worked through the rest of 1980 (RX:5).

Mr. Miguel Pereda began working at Respondent's business on January 12, 1976. He is listed as number eleven(11) on Respondent's overall 1980 seniority listing(RX:5). Mr. Pereda was a charging party in previous Charges 79-CE-6-SD and 79-CE-22-SD. Mr. Pereda was a beneficiary of ALO Schoorl's decision on Case No. 79-CE-20-SD et. al. Mr. Pereda was recalled to work in October, 1980 after a lay-off; he worked for five days and was laid-off again(Tr.IV:17-19).

Mr. Pedro Rivas began working for Respondent on September 22, 1975. He was listed as number five (5) on Respondent's overall 1980 seniority listing (RX:5). Mr. Rivas participated in the Union election in 1979; he spoke to other workers in favor of the Union and was the Union observer at the election (Tr.II:19-21). He wore Union buttons to work after the election (Tr.II:21-23). Mr. Rivas testified in two previous ALRB hearings against Respondent (Tr JI-23). Mr. Rivas was a charging party in previous Charges 79-CE-21-SD,79-CE-22-SD and 79-CE-23-SD. Mr. Rivas is the charging party in Charges

80-CE-65-SD and 80-CE-87-SD in the instant case. Mr. Rivas was a beneficiary of ALo Schoorl's decision in Case NO-79-CE-20-SD et. al. Mr. Rivas applied for work at Respondent's business in the summer of 1980 but was not hired(Tr.II:25-32). Mr. Rivas was recalled to work in October, 1980 and laid-off again that same month (RX:5). Mr. Rivas, along with Mr. Gonzalez, Mr. Madrid, Mr. Olivas and Mr. Pereda, sent a letter (GCX:6), on October 21, 1980 to Mr. Rufus Orson:

> "Mr. Rufus Orson: We are writing you in order to ask you some questions that we would like you to answer for us. We want you to tell us the motive or the reason for the last layoff. And to tell us when you will have work and for how long you will give us work and we would also like to sit down at a table and negotiate. We beg of you to answer us please. Without anything else to add, the undersigned. (Followed by the five names)." [12/]

Mrs. Guadalupe Ruiz began working for Respondent on March 3, 1976. She was listed as number thirteen (13) on Respondent's overall 1980 seniority listing(RX:5). Ms. Ruiz participated in the Union election in 1979 (Tr. III :51) . She wore a Union button (Tr.III :51). Ms. Ruiz was a charging party in previous Charges 79-CE-6-SD and 79-CE-22-SD. She was a beneficiary of ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. Ms. Ruiz was a charging party in Charge 80-CE-88-SD In" the instant case. Ms. Ruiz requested work at Respondent's business in the summer of 1980 but was not hired (Tr.III :52-54) . She was recalled to work in October, 1980 and worked through the remainder of 1980 (RX:5).

Ms. Juana De Varela began working for Respondent on March 25, 1975. She was listed as number four (4) on Respondent's overall 1980 seniority listing (RX:5). Ms. De Varela was a charging party in previous Charges 79-CE-3-SD and 79-CE-22-SD. She was a beneficary of ALO Schoorl's decision in Case No. 79-CE-2Q-SD et. al. Ms. De Varela was recalled to work in October, 1980 and worked through the rest of 1980 (RX:5).

Ms. Justina Wichware began working at Respondent's business by at least July 30, 1979.[13/] She was listed as number nineteen (19) on Respondent's overall 1980 seniority listing (RX:5). Ms. Wichware was a charging party in previous

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[12/] GCX:6, the original letter, is in Spanish. The above translation was read into the record by the interpreter, Tr.II :35.

[13/] Respondent's Exhibit No. 5 shows a starting date of July 20, 1979. Ms. Wichware testified that she began working in 1966 (Tr. IV:60)

Charge 79-CE-3-SD. She was a beneficiary of ALO Schoorl's decision in Case No. 79-CE-20-SD et. al. She was recalled to work in September, 1980 and worked through the remainder of 1980 (RX:5).

There was no evidence indicating that prior to the allegations in this case any of the named alleged discriminatees had ever been disciplined for incompetence or inability to correctly perform the work to which they had been assigend.

VI. THE ALLEGED VIOLATIONS OF §1153(e)

There is no material dispute as to the facts concerning the refusal-to-bargain allegations of the complaint The General Counsel alleges two types of violation of §1153(e): (1) an outright refusal to meet and bargain with the Union; and (2) several unilateral changes in working conditions without notice to or bargaining with the Union.

As already stated above, the Union won an election at Respondent's premises on January 10, 1979. Respondent filed objections to the election; after a hearing, these objections were rejected by a hearing officer and the hearing officer's decision was affirmed by the Board on June 11, 1980. The Board certified the Union on June 11, 1980. In July, 1980 the Union sent a written request to Respondent to commence negotiations. On August 7, 1980 Respondent sent a letter in reply stating that it would refuse to bargain in order to test the Union's certification. Mr. Orson admitted receiving the Union's request to bargain, and admitted that Respondent had not bargained with the Union in any way since receiving that request (Tr.I:91).

Concerning the unilateral changes, the General Counsel alleges that Respondent made three unilateral changes in working conditions:(1) reduction in the length of the workday from nine hours per day to eight hours;(2) raise in wages; and (3) elimination of vacation pay and holiday pay.

Concerning the reduction in the workday, it was stipulated:

> "On or about January 1, 1980, the length of the normal workday for hourly paid employees was reduced from nine hours per day to eight hours per day. Ruline Nursery did not notify the UFW about this change or discuss it with the UFW prior to its implementation." (TR:i:3).

Concerning the raise in wages, it was stipulated:

> "Beginning January 1, 1980, Ruline Nursery raised the wages of its hourly paid employees in

the following ways: (a) employees who had been paid $2.90 per hour before January 1 were thereafter paid $3.10 per hour; (b) employees who had been paid $3.70 per hour before January 1 were thereafter paid $4.00 per hour; (c) the hourly wage of Rebecca Ponce was raised from $3. 60 per hour to $3. 8.9 per hour; the hourly wage of Elvira Martinez was increased from $3 . 50 per hour to $3.78 per hour; the hourly wage of Victorino Olivas was raised from $3.35 per hour to $3.62 per hour Ruline Nursery did. not notify the UFS about these changes or discuss them with the UFW prior to their implementation." (Tr.f:2-3).

Concerning vacation and holiday pay, it was stipulated:

(I) "During calendar year 1979 and calendar year 1980, Ruline Nursery provided holiday pay(without requiring employees to work) to its hourly-paid employees on each of the following holidays: New Year's Day, Memorial Day, July 4, Labor Day, Thanksgiving and Christmas.

The amount of pay provided in each instance was either eight hours' pay or nine hours' pay, the amount depending on whether the regular work day during the week including the holiday was 8 hours or 9 hours.

During the payroll week ending January 6, 1980, Ruline Nursery paid eight hours holiday pay, for January 1, 1980 (a Tuesday), to each of the following hourly-paid employees: Teresa Corona; Maria Gonzalez; Elvira Martinez, Victorino Olivas, and Justina Wichware.

No hourly paid employee has been provided holiday pay at any time since then." (Tr.VI:6;GCX:9).

(2)"In the last three months of 1978, Ruline Nursery paid vacation pay to each of the following hourly paid employees: Elvira Martinez, Yolanda Navarro, Manuel Miramontes, Rebecca Ponce, Teresa Corona, Baudelio Catsaneda (sic), Francisco Serrato, Pedro Rivas. The amounts paid by Ruline Nursery were equivalent to one week's pay for Martinez Serrato, and Rivas; and two weeks' pay for Ponce, Corona, Castenada, Navarro, and Miramontes.

During the calendar year 1979, Ruline Nursery paid vacation pay to each of the following hourly-paid employees; Fortunate Guadarama, Martha Aros, Reynalda Garcia, Mario Duran, Maria Gonzalez, Elias Gonzalez, Carmen Ramirez, Juana De Varela, and Justina Wichware. The amounts paid by Ruline Nursery were equivalent to one week's pay

for Duran (received 1/25/79); two weeks' pay each for Aros (1/28/79), Garcia (1/28/79), Maria Gonzalez (6/5/79), Elias Gonzalez (6/5/79), Carmen Ramirez (1/17/79 and 5/10/79), and three weeks' pay for Juana De Varela (6/24/79 and 6/30/79—two weeks) and Justina Wichware (6/30/79) .

During the payroll week ending January 6, 1980, Ruline Nursery paid vacation pay of $155.60 to Rebecca Ponce, and $199.80 to Baudelio Castaneda.

During the payroll week ending January 13, 1980, Ruline Nursery paid vacation pay of $155.60 to Rebecca Ponce and $199.80 to Baudelio Castaneda.

After the week ending January 13, 1980, and continuing through the remainder of calendar year 1980, the only Ruline Nursery employees who received vacation pay were:

a. Dana Martin, who received an equivalent of two weeks' vacation pay over a three-week period in August, 1980.

b. Socorro Sandoval, Baudelio Castaneda, Lucio Corona, and Luz Escobeda. All of this vacation pay was paid during the payroll weeks ending May 4, 1980, through June 22, 1980. Corona received a total of $1,567.80. Sandoval received a total of $1,730.60. Castaneda received a total of $199.80. Escobedo received one day's vacation pay, included within a weekly salary of $224.73." (Tr.VI:1-6;GCX:9).

It is undisputed that Respondent did not notify the Union or bargain with the Union about the decision to end vacation and holiday pay(Tr.VIII:157-159, testimony of Rufus Orson).

The requirement under the Act that the employer meet with and bargain with a certified union is clear and well-settled; indeed, the requirement of collective bargaining is the central goal of the Act in its entirety. Thus, a refusal to meet and bargain with the Union is a violation of §1153 (e). J.R. Norton, 4 ALRB No. 39 (modified as to remedy, 26 Cal.Sd 1); Superior Farming Co., 4 ALRB No. 44; Sunnyside Nurseries, Inc., 5 ALRB No. 23; Romar Carrot Co.. 4 ALRB 56; Montebello Rose/Mount Arbor Nurseries, 5 ALRB No. 64.

Similarly, it is well-settled that an employer must notify and bargain with the union over changes in wages and working conditions. Adam Dairy, 4 ALRB No. 24; Hemet

Wholesale Company, 4 ALRB No. 75: Highland Ranch and San Clements Ranch, 5 ALRB No. 54; Montebello Rose/Mount Arbor Nurseries, 5 ALRB No. 64; AS-H-NE Farms, ALRB No. 9; Kaplan's Fruit and Produce Col,6 ALRB No. 36; Signal Produce Company, 6 ALRB No. 47. These cases hold that such unilateral changes are per se violations of §1153 (e) of the Act. This applies to changes in wages and hours, see, e.g. Montebello Rose/Mount Arbor Nurseries, supra; it is also settled, under the analagous provision of the National Labor Relations Act, that holiday and vacation pay are subjects which must be bargained about, see, e.g., Singer Manufacturing Co., 24 NLRB 444, 6 LRRM 405,enf'd Singer Manufacturing Co. v. NLRB, 119 F.2d 131 (7th Cir.1941).

In the instant case it is undisputed that Respondent has refused to meet and bargain with the Union. It is also undisputed that Respondent made unilateral changes in wages, hours, vacations and holidays, without bargaining with the Union. Thus, Respondent has violated §1153 (e) of the Act, unless it has valid defenses to such violations. Respondent asserts three such defenses.

First, Respondent has asserted that the allegations concerning the unilateral changes are time-barred by §1160.2 of the Act. I have already considered and rejected this assertion in Section IV(C)(3) of this Decision, supra.

Second, Respondent has asserted that it had no obligation to bargain with the Union concerning the unilateral changes because the changes took place after the Union won the election but before the Union was certified by the Board. I have already considered and rejected this assertion in Section IV(C)(4) of this Decision, supra.

Finally Respondent asserts that its refusal to meet and bargain with the Union is a good-faith attempt on its part to challenge the Union's certification based on the objections and exceptions to the election Respondent filed with the Board. However, this is not a defense to a violation of §1153 (e) of the Act; rather, it just concerns the appropriateness of any make-whole remedy for such violation. Accordingly, I treat this issue in the discussion of the Remedy in this case, Section IX(E) of this Decision, infra.

Therefore, applying the above legal standards, and in view of the undisputed facts and stipulations, I find and conclude that Respondent refused to meet and bargain with the Union, and made unilateral changes in wages, hours, vacations and holidays without bargaining with the Union, all in violation of §1153(e) and (a) of the Act.

VII. THE ALLEGED VIOLATIONS OF §1153(a)

A. The Spillway.

Paragraph 20 of the Complaint alleges that in October, 1980 Respondent interfered with three pro-Union employees, Juana De Varela, Justina Wichware, and Maria Gonzalez, when Respondent's supervisors drove a car next to the employees in such a manner that water was splashed over the employees.

Maria Gonzalez testified that the three employees were eating lunch alongside a spillway or a lagoon on Respondent's property. They were sitting near a stream. Respondent's supervisors Luz Escobedo and Jack Jester drove up in Ms. Escobedo's car, with Ms. Escobedo driving. They stopped next to the employees and spoke to another worker, Ms. Josefina Lomeli. They informed Ms. Lomeli that the State of California had ordered Respondent to take back Ms. De Varela, and that therefore Ms. Lomeli would have to be laid off. Ms. Lomeli got in the car. They then drove up the hill, turned the car around and drove back. "They went by real fast and they [the car] threw water on our face, our food and our clothing. And after they went by the little river, they went slowly and we heard the laughter. They were laughing."(Tr.I:140).

Justina Wichware testified that the three employees were having lunch when Ms. Escobedo and Ms. Jester drove up. After the conversation with Ms. Lomeli, the supervisors took Ms. Lomeli into the car. They turned the car around at the top of the little hill beyond them and drove back. "The car was coming back real fast... and we all got a bath, our food included and everything." (Tr. IV:65). Then "they[Jester and Escobedo inside the car] turned around and they were laughing." (Tr.IV:65). Neither Mr. Jester nor Ms. Escobedo ever apologized for the incident (Tr.IV:66).

Supervisor Escobedo testified and admitted all aspects of the incident except that she was driving the car fast. She testified that she had driven through the spillway area before, and that to her knowledge she had never gotten anybody wet before (Tr.VIHI:51) . She testified that she and Mr. Jester drove up and talked with Ms. Lomeli; Ms. Lomeli got in the car, and then Ms. Escobedo turned the car around and drove back. She drove at the same speed she normally does in that area. The three employees were sitting by the spillway. She drove past them, and did not notice anything. She testified further:

> " I was driving and Jack[Jester] started laughing. And, I said 'What's the matter? Why are you laughing. He goes, 'You just got them wet.'

> And I said, 'Who did I get wet?' He said, The ladies'—or the women, that's what he said, "The women'. And, I started laughing because Josefina [Lomeli] and him were laughing really hard and then I saw that he was really laughing hard and I said, 'Oh, shut up. You know, just—you know, it happened like that..."

(Tr.VIII:45).

Jack Jester testified:

> "And, so Lucy [Escobedo]--you know, we all got in the car and Josefina[Lomeli] in the back seat and I was in the front, Lucy driving. Went up the hill, turned around by house 28 and then, you know, came back down across the lagoon, the spillway, and Lucy had, as she was going through there, splashed a lot of water up and it—not a lot of water, a little water up, and sprayed the girls a little bit and I kind of laughed about it,..."

(Tr. VIII:14-15).

Section 1153 (a) of the Act prohibits interference with employees in the exercise of their rights under the Act. The cases are clear that this section of the Act prohibits threats, Maggio Tostado, Inc., 3 ALRB No. 33, Butte View Farms, 3 ALRB No. 50, Prohoroff Poultry Farms, 3 ALRB No. 87, and physical assaults, Vista Verde Farms, 3 ALRB No.91,,Harry Carlan Sales, 6 ALRV No. 55. Section 1153(a) also prohibits physical actions which have an intimidating effect on employees, see,e.g., Anderson Farms Co., 3 ALRB No. 67, Mario Saikhon, Inc. 5 ALRB No. 44, Giannini & Del Chiaro Co., 6 ALRB No.38, Perry Farms, Inc. 4 ALRB No. 25.

As discussed elsewhere throughout this Decision,(see particularly Sections V(C)-(E), supra),Ms. De Varela, Ms. Gonzalez, and Ms. Wichware were three of the core Union supporters at Respondent's premises. They were past alleged discriminatees in unfair labor practices by Respondent. Ms. Wichware and Ms. De Varela had been laid off by Respondent and ordered back by ALO Schoorl 14/. They had just returned to work in fall, 1980(RX:5) shortly before this incident by the spillway occurred.

14/ Ms. Wichware had been ordered back to work earlier by the preliminary injunction issued by Superior Court. See Section V(D) supra.

In light of these facts, and the virtually undisputed testimony of all witnesses (including Supervisors Escobedo and Jester), I have no trouble concluding that Respondent's actions here were a clear violation of §1153 (a) of the Act. Two of these pro-Union workers had just been returned to work by order of the hearing officer. Supervisor Escobedo testified that she had driven through the spillway area before without getting anyone wet. Simple human courtesy would usually indicate that the driver of a car will drive as slowly as is necessary in order not to splash water on people who are peacefully sitting by the road eating their lunch. Yet the three workers were splashed with water over themselves and their food. The response of Respondent's two supervisors was not an apology, but rather laughter at the victims of their actions. The clear message to the employees by this crude, disrespectful, and grossly discourteous action was, in essence: Welcome back, Union supporters, we still don't like you." Without question, a physical assault of this nature has an intimidating and threatening effect on the workers. Accordingly, I find and conclude that in October, 1980 Respondent, through its supervisors Lucy Escobedo and Jack Jester, interfered with, threatened, and intimidated Juana De Varela, Maria Gonzalez , and Justina Wichware in violation of §1153(a) of the Act.

B. The Cooler.

Paragraph 21 of the Complaint alleges that in November 1980 Respondent, through Supervisor Jack Jester, violated §1153(a) of the Act by threatening Justina Wichware and Guadalupe Ruiz.

Guadalupe Ruiz testified that on the day in question she was assigned by Supervisors Jack Jester and Lucy Escobedo to work in the cooler to stack azaleas. Justina Wichware was assigned to work with her. Ms. Ruiz had done this work on previous occasions. The cooler is a shed where plants are stored. Ms. Ruiz worked on a ladder, storing the plants that were handed up to her by Ms. Wichware. They worked that day and returned to continue the job the next day. Ms. Ruiz testified that Mr. Jester came by on this day and asked why they weren't putting plants on the top shelves. Ms. Ruiz answered that it was too high, and that Mr. Jester had not brought a ladder for them to use; the short ladder they had used the day before did not reach that high. Another supervisor had brought a longer ladder but Ms. Ruiz testified that the braces which prevent the ladder from falling were broken on that ladder. Ms. Ruiz told this to Mr. Jester. Ms. Ruis testified:

"Q: You told Jack[Jester] that nobody had brought you the ladder, is that correct?

A: Yes, I told him the one that had been brought over was broken down.

Q: What did Jack say?

A: He got mad and started screaming and insulting us. He started tell us, bastards, fatsos, do it.

Q: How long did he do that?

A: For about 10 minutes.

Q: What were you doing when he was saying that?

A: We were crying.

Q: Were you saying anything to him?

A: No.

Q: How did that end?

A: When we went back he spat on the floor.(Witness crying)

Q: While—were you moving—do you want to take a break? Do you want to take a break?

A: It's okay.

Q: Okay. Why were you moving back?

A: Because he was spitting on the floor.

Q: Were you saying anything to him while he was doing it?

A: No."

(Tr:IV:61-62).

Justina Wichware testified that she and Ms. Ruiz had been assigned to stack plants in the cooler, and that they did this the first day. The next day they returned to the cooler and Mr. Jester asked why they weren't storing plants on the top shelves. Ms. Ruiz told him the ladder was broken. Ms. Wichware testified that Mr. Jester then called them "fatsos", "damn bastards: and "son-of-a-bitches",(Tr.IV:69-70), and that Mr. Jester followed them around in the shed making gestures with his fists and yelling at them. Ms. Wichware testified that later in the day she informed Mr. Orson of these actions of Mr. Jester, and that Mr. Orson said he would look into it but he never said anything more about it to either of the women (Tr. IV:71-73).

Mr. Jester testified that he had assigned the two workers to the cooler. He admitted that when he went in the next day and saw that they hadn't stacked the plants on the top shelves, "I got extremely upset." (Tr.VIII:27). He testified that he was yelling at them(Tr.VIII:27). He denied shaking his fists at the women or making threatening gestures, (Tr.VIII:29). He admitted spitting on the floor (Tr.VIII:29). He also testified that other employees do not use a ladder to reach the top shelves, but rather climb up the shelves themselves (Tr. VIII:31). Mr. Jester further testified that on previous occasions he has gotten mad at employees and cursed them, including employees who were not Union sympathizers(Tr.VIII:34).

Supervisor Lucy Escobedo testified that she saw the two employees using a ladder on the first day. She also testified:

> "Q: ...How often do you use ladders as compared to [climbing] the shelves...?
>
> A: Depends on how you like to do it. Some girls don't like to use the ladders and other like to do it..."

(Tr.VIII:64).

The legal standards concerning threats, intimidation and interference with employees under §1153 (a) of the Act have been discussed in the immediate preceeding section of this Decision. I find and conclude that this incident constituted unlawful interference under §1153 (a) of the Act. As discussed elsewhere in this Decision, Justina Wichware and Guadalupe Ruiz were core pro-Union supporters at Respondent's premises, and were alleged discriminatees in previous unfair labor practices. (See Sections V (C)-(E) of this decision, supra). As described in the immediate preceeding section, Ms. Wichware had been ordered returned to work after an unlawful lay-off; she had returned to work in September, 1980 (RX:5). In October, 1980 she, along with two other pro-Union employees, was subject to the car splashing incident described in the preceding section. A month later, she and Ms. Ruiz were called "fatso", "bastard", and "son-of-a-bitch" by Respondent's overall supervisor, Mr. Jester, who also spat on the floor while shouting at them. This was his response to their delay in stacking plants while waiting for a ladder. Supervisor Escobedo testified that using a ladder-was an available option which some of the employees chose when being assigned this particular type of work. I find that the actions of Mr. Jester were uncalled-for in the circumstances, and that they had an intimidating effect on these pro-Union workers. Coming as they did shortly after ALO Schoorl's Decision ordering that certain pro-Union employees be reinstated, and following an abusive incident a month before, I find and conclude that' the yelling, cursing and spitting of Mr. Jester constituted unlawful interference with and intimidation of these two pro-Union employees, in violation of §1153 (a) of the Act.

VIII. THE ALLEGED VIOLATIONS OF §1153(c)AND (d)

There are six allegations concerning §§1153 (c) and (d) of the Act:

1. In July and August, 1980, Respondent discriminatorily refused to rehire Pedro Rivas and Guadalupe Ruiz;

2. In October, 1980 Respondent discriminatorily laid off Pedro Rivas, Elias Gonzalez Miguel Pereda, Victorino Olivas, and Agustin Madrid.

3. In November, 1980 Respondent discriminatorily delayed recalling Pedro Rivas, Elias Gonzalez, Miguel Pereda, Victorino Olivas, and Agustin Madrid, and discriminatorily attached different terms of employment in recalling them;

4. In November, 1980 Respondent discriminatorily withheld wage increases from Guadalupe Ruiz, Pedro Rivas, Elias Gonzalez, Miguel Pereda, Juana De Varela, and Agustin Madrid;

5. In December, 1980 Respondent discriminatorily refused to rehire Agustin Madrid;

6. In 1980 Respondent discriminatorily made unilateral changes in wages, hours, holidays and vacations.

In each of these allegations, General Counsel asserts that the actions taken by Respondent against the discriminatees were because of their pro-Union activities and sympathies, and their having filed charges and/or testified in prior ALRB proceedings. The actions are thus said to violate §§1153(c) (union discrimination) and (d) (ALRB discrimination) of the Act.

I will deal with each of these allegations in turn, discussing my findings of fact and conclusions of law as to each. First, I will discuss my finding and conclusions concerning the pro-Union and ALRB activities of the alleged discriminatees, and the anti-union animus of Respondent.

A. Union and ALRB Activites of the Alleged Discriminatees.

Based on the testimony and evidence discussed above, see Section V of this Decision, supra, I make the following findings concerning the alleged discriminatees:

Pedro Rivas. Mr. Rivas was a pro-Union supporter at the time of the Union election in January, 1979. He participated in the election, spoke to other workers, wore Union buttons at that time and since, and was the Union observer at the election. His ALRB activities include: testimony in two previous ALRB

hearings involving Respondent; charging party in three charges previous to this case; beneficiary of ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. I find Respondent's knowledge of Mr. Rivas' pro-Union activities from his wearing Union buttons, being Union observer at the election, and signing the letter (October, 1980; GCX:6); complaining of the October lay-off and requesting Respondent to" sit down at the table and negotiate." I find Respondent's knowledge of Mr. Rivas'ALRB activities from his being the charging party on previous charges, from his having testified at ALRB hearings and from his having been named a beneficiary in ALO Schoorl's written Decision.

Guadalupe Ruiz. Ms.Ruizwas a pro-Union supporter at the time of the Union election in January,1979. She participated in the election, and wore a union button. Her ALRB activity includes: being a charging party in two previous charges and being a beneficiary of ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. I find Respondent's knowledge of her Union and ALRB activities from her wearing Union buttons, being a charging party on previous charges, and being named a beneficiary in ALO Schoorl’s written Decision.

Agustin Madrid. Mr. Madrid was a Union supporter at the time of the Union election in 1979. He participated in the election, and wore Union buttons before and since then. His ALRB activities include: testifying in a previous ALRB hearing and being a beneficary of ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. I find Respondent's knowledge of his Union and ALRB activities from his wearing Union buttons, testifying in a previous proceeding, and being named a beneficiary in ALO Schoorl's written decision.

Victprino Olivas. Mr. Olivas was a Union supporter at the time of the Union election in 1979. He participated in the election, spoke to other workers, attended meetings, and wore Union buttons before and since then. His ALRB activities include: being a charging party in two previous charges, testifying in a previous hearing, and being a beneficiary in ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. I find Respondent's knowledge of his Union and ALRB activities from his wearing Union buttons, being a charging party in previous charges testifying in a previous hearing, and being named a beneficiary in ALO Schoorl's written Decision.

Elias Gonzalez. Mr. Gonzalez was working at Respondent's business at the time of the Union election in January, 1979. He was a charging party in three previous charges, and was a beneficiary of ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. I find Respondent's knowledge of his ALRB activities from his being a charging party in previous charges and being named a

beneficiary in ALO Schoorl's written Decision. Regarding his union activities, I find Respondent's knowledge of Mr. Gonzales' Union support from the above-mentioned ALRB activities, in which Mr. Gonzales was identified as a Union supporter and was associated with the others of the group of Union supporters at the time of the election and since. I also find Respondent's knowledge from Mr. Gonzalez being a signatory to the letter in October, 1980 complaining of the October layoff and requesting Respondent to negotiate.

Miguel Pereda. Mr. Pereda was a charging party in two previous charges, and was a beneficiary of ALO Schoorl's Decision in Case No. 79-CE-20-SD et.al_. I find Respondent's knowledge of his ALRB activities from being a charging party in previous charges and from being named a beneficiary in ALO Schoorl's written Decision. I find Respondent's knowledge of his union activities from the above-mentioned ALRB activities, in which Mr. Pereda was identifed as a Union supporter and was associated with the others of the group of Union supporters. He also was a signatory to the October, 1980 letter requesting Respondent to negotiate.

Juana De Varela. Ms. De Varela was a charging party in two previous charges. She was a beneficiary of ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. I find Respondent's knowledge of Ms. De Varela's union support from these ALRB activities, in which she was identified as a Union supporter and associated with the core group of Union supporters at Respondent's business.

B. Anti-Union Animus

I find anti-union animus on the part of Respondent from two sources: (1) the testimony in this case of Raul Vega, former supervisor for Respondent, concerning anti-union actions an attitudes on the part of Respondent during the years 1975-1978; and (2) the two incidents discussed in Section VII of this Decision, supra, involving supervisors splashing water on pro-Union employees and yelling, cursing and spitting on the floor near them.

Respondent argues that I should not consider the testimony of Mr. Vega because it concerns events more than six months prior to the Complaint in this case. However, "earlier events may be utilized to shed light on the character of [current] events," including use of a "history of anti-union animus...to impute an improper motive for [an employer's actions]." ALRB v. Ruline Nursery Company, 115 Cal.App.3d 1005, 1013. Thus, earlier events may be used to shed light on the actions being litigated in the current hearing. See, e.g., O.P. Murphy Produce Co., Inc., 4 ALRB No. 62; Jack R. Baillie Co., Inc., 3 ALRB No. 85.

I consider Mr. Vaga's testimony relevant because it indicates a set of attitudes of the part of Respondent over a three year period which appears to have continued through to the incidents of the present case. I find nothing in the record of this case to show that Respondent has in any significant manner changed its attitudes towards unionization of its work force, or towards the named discriminatees in this case who constituted part of the core of Union supporters during the Union election in 1979.

Mr. Vega testified that in 1975, as the Agricultural Labor Relations Act was about to take effect, Mr. Orson had a conversation in which he, Mr. Orson, told Mr. Vega to "get rid of" employees who were likely to press for unionization at the nursery. (Tr. III:15). Mr. Vega testified that Mr. Orson indicated that the Union would push for exhorbitant salaries, and that Mr. Orson would not be able to control the workers if a union came in (Tr. III:17). Mr. Vega further testified that Mr. Orson was worried about groups of workers who were seen with "Chavistas," (Tr. III:22-24) and Mr. Orson stated to Mr. Vega that he would use various pretexts to fire pro-Union employees (Tr. III:17-25). Mr. Vega testified that in November, 1978 he had a conversation with Mr. Orson in which Mr. Vega informed Mr. Orson that the workers were unhappy with management policies toward them and were actively trying to organize themselves; when Mr. Vega stated that he wanted to remain neutral if the workers did organize, Mr. Orson told him that was not possible and that Mr. Orson would not "take [the workers] actions] lying down." (Tr. III:29). Mr. Vega further testified that in a conversation with Mr. Orson in December, 1978, after an election petition had been filed, Mr. Orson instructed Mr. Vega not to commit unfair labor practices, but Mr. Orson also stated that he preferred unfair labor practices to having the union. (Tr. 111:32). During the times of these various conversations with Mr. Orson, Mr. Vega was the head supervisor at Respondent's business, with responsibility for assigning employees, directing work, and hiring and firing. (Tr. III: 32, 7,18). Much of Mr. Vega's testimony was uncontradicted. Some of it was contradicted by Mr. Orson, but I credit Mr. Vega's testimony on these points. I was impressed by Mr. Vega's demeanor, and I found his account more consistent with the later evidence regarding anti-union attitudes of Respondent's other superviors.

The two incidents in 1980 involving Respondent's supervisors, have been discussed at length in Section VII of this Decision, supra. I find that the water-splashing and cursing incidents are evidence of anti-union animus on the part of Respondent, for the reason stated in Section VII of this Decision, supra.

C. Refusal to Rehire Pedro Rivas and Guadalupe Ruiz in July/August 1980.

Paragraph 16 of the complaint alleges that on July 22, 1980 and August 13, 1980 Pedro Rivas and Guadalupe Ruiz applied for rehire at Respondent's business and were discriminator!ly refused rehire. The essential facts concerning this allegation are not in dispute.

Mr. Rivas and Ms. Ruiz testified that on July 22, 1980 they went to Respondent's premises and asked Mr. Orson for work; he told them that there was no work available. They then asked for a written application for work, but were told that, as in the past, Respondent did not use written applications. On August 13, 1980 they went back to Respondent's premises and spoke with Mr. Orson's secretary, Dana Martin. They gave her a letter with their addresses and phone numbers and asked to be called if work was available. Ms. Martin took the letter and said she would give it to Mr. Orson. (Tr.II:26-32, 41-42; 111:52-54). Mr. Rivas and Ms. Ruiz did not hear anything from Respondent until they were sent recall letters on September 29, 1980 (GCX:3 E,3P). Ms. Martin was not called as a witness, and Mr. Orson did not disagree in> material respects with Mr. Rivas' and Ms. Ruiz' testimony.

Respondent's payroll records (RX:5) show that Mr. Rivas was listed as number five (5) on Respondent's overall seniority listing (with a starting date of employment at Respondent's of 9/22/75), and Ms. Ruiz was listed number 13(starting date 3/3/76). The same payroll records reveal the following concerning employment at Respondent's nursery from the period July 22, 1980 through the end of August, 1980:

--On July 28, recall notices were sent to Josefina Lomili(listed as number 93 on the seniority listing, starting date 5/20/80), Enedina Mendez(#86,5/21/80), and Ofelia Calderon (#97,5/22/80).

--On July 29, Lomeli, Mendez and Calderon began working. On the same date a recall notice was sent to Teresa Diaz (#95, 5/21/80).

--On July 30 ,Diaz began working.

--On July 31,recall letters were sent to Maria Barcia (#42,3/17/80) and Graciella Sevilla (#94,5/20/80).

--On August 1, Garcia and Sevilla began working. On

the same date recall notice was sent to Esperonza Garibai (#92,5/20/80).

--On August 2, Garibai began working.

--On August 4, two new employees were hired and began working; Rocio Lozano(#103) and Maria Sisneros(#104).

--On August 5, three new workers were hired and began working Barial Delgado (#105), Leticia Lozano(#io6) and Laura Navarro (#107) .On the same date a recall notice was sent to Victoria Ayala(#101,6/12/80).

--On August 6, Ayala began working.

--On August 11, three new workers were hired and began working:Angel Castellon (#108), Javier Machedo (#109) and Uriel Mendoza(#110). On the same date recall notices were sent to Epifanio Mendoza (#28,11/19/79) and Regelio Mendoza(#33, 12/3/79).

--On August 12, Epifanio Mendoza and Regelio Mendoza began working.

--August 19, two new employees were hired and began working: Elisero Robles(#lll) and Juan Romero(#112). The same date a recall notice was sent to Teresa Diaz (#95)..15/

---On August 2Q, a new employee was hired and began working: Antonio Mendoza(#113). On the same date recall notices were sent to Esperanza Garibai (#92), Ofelia Calderon(#97) and Victoria Ayala(#101).

---On August 21, Rafael Martinez began working (#27, 11/19/79), as did Calderon, Ayala, and Mendoza. On the same date recall notices were sent to Maria Garcia (#42), Jaime Garcia (#46, 3/24/80), Garciella Sevilla (#94) and Maria Sisneros (#104).

---On August 22, Maria Garcia and Jaime Garcia, Sevilla and Sisneros began working.

---On August 25, a recall notice was sent to Rocio Lozano(#103).

---On August 26, Lozano began working. On the same date a recall notice was sent to Laura Navarro (#107).

15/ Ms. Diaz, as was the case for several of the other employees, had worked for a number of days after her recall earlier (July 30), then had been laid off and was now recalled again.

--On August 27, Navarro began working.

--On August 29, two new employees were hired and began working: Rodolfo Cortex(#114) and Carlos Martinez (#115). [16/]

Supervisor Lucy Escobedo testified that when people came by for work on a day when there was no work available, Respondent's policy was to contact them by phone or by sending word with someone who knew them, when work was available. (Tr.IV:147-157) . She stated that such a procedure was used for Esperanza Garibai(Tr.IV:149) , Javier Macedo (Machedo) (Tr.IV:153), Angel Castellon (Tr.IV:154), Eliseo Robles (Tr.IV:155-156), Juan Romero(Tr.IV:157-158), and Rodolfo Cortez (Tr.IV:162). Her testimony concerning Mr. Robles and Mr. Romero was typical:

"Q: And how did [Mr. Robles] get hired? How did it happen?

A: He came over and asked for a job.

Q: And you put him on?

A: No.

Q: Oh.

A: He--I didn't have work for him when he came in and asked for a job. Not until later, I don't remember how late, after he came, but I called him.

Q: Oh, he gave—

A: Sent word with somebody else to get him.

Q: Was he related to somebody or a friend of somebody?

A: No; he wasn't related; just somebody knew him.

Q: Okay. You didn't have his phone number?

A: No; I didn't.

16/ In the above chronology of employment, RX:5 lists recall letters as having been sent on the dates mentioned. However, as Ms. Escobedo's testimony (infra in text) shows, the recalls were often done by phone or by sending word with someone who knew the person.

Q: And what did you tell him. Did you tell the both of them [Mr. Robles and Mr.Romero] the same thing?

A: No; I just told them that I don't have work and yes, what I told you, that I didn't know when.

Q: Okay.

A: But if I did, I would let them know.

Q: You sent word to both Mr. Robles and Mr. Romero?

A: I sent word to both, yes; for both, yes.

Q. And then they both showed up the day after you sent word or something like that?

A: Yeah, that the—some work.

Q: Okay, and then you put them to work?

A: Right."

(Tr.IV:156-158).

Mr. Orson testified and he stated three reasons why he did not hire Mr. Rivas and Ms. Ruiz in July/August 1980. First, he stated that he was not hiring anyone because there was no need for additional workers. (Tr.1:115; Tr.VII:95). Second, he stated that Dana Martin was an "office girl" with no authority to hire employees. (Tr. VII -25-26,93) . Third, he stated that Respondent's policy was that workers who had previously been sent recall notices and did not respond to them would lose their seniority; Mr. Rivas had been sent a notice,(RX:10), on October 22, 1979 and did not report to work, and Ms. Ruiz had been sent a notice on July 23, 1979, (RX:II), and did not report to work then (Tr. VII:88-92). Thus, "I was under no obligation to hire these people for any reason as they had refused work in the past. " (Tr. VII:95). In explaining this policy, Mr. Orson stated: "[If employees] had been asked to come back prior and they had refused work then I would assume that they no longer cared to work for Ruline. That's an assumption I would make...I would assume they are no longer available." (Tr. I:128-129).

The law regarding discriminatory refusal to rehire in violation of §1153(c) of the Act is clear. A long line of cases has held that a refusal to rehire is a violation of §1153 (c) of the Act where it is shown that a proper application for work was made, the employee was qualified for work, work was available, and the employer's motivation for refusing

rehire is because of the employee's union activities, known to the employer. Pleasant Valley Vegetable Co-Op., 4 ALRB No. 11; Sahara Packing Co., 4 ALRB No.40 ; Kitayama Bros. Nursery, 4 ALRB No. 85; Kawano, Inc., 4 ALRB No. 104; Abbati Farms, Inc., 5 ALRB No. 34; Jesus Martinez, 5 ALRB No. 51; Sam Andres' Sons, 6 ALRB No. 44. Under the language of §1153(d) of the Act, the same requirements for discriminatory refusal to rehire would apply, except that the employer's motivation would be based on the employee's ALRB activities, known to the employer.

Applying these standards to the instant case, I make the following findings and conclusions:

1. Proper application for work. Respondent in its brief contends that, because Dana Martin had no authority to hire, Mr. Rivas and Ms. Ruiz did not make proper application for work. However, this is clearly not the case. First, the testimony of Supervisor Escobedo makes clear that Respondent had no formal applicaton procedure. She testified that workers came around and asked for work; if work was available they were hired, if not they were contacted later. Thus, Mr. Rivas and Ms. Ruiz made a proper application for work on July 22, 1980, when they spoke directly to Mr. Orson and asked for work. Second, I find that giving a letter to Mr. Orson's secretary, with her agreement to give it to him, was also more than sufficient application for work. Mr. Orson did not testify whether Ms. Martin actually gave him the letter, but given the small workforce and relatively informal nature of Respondent's hiring practices, I find that Mr. Rivas and Ms. Ruiz made their desire to work amply known to Respondent by leaving a written letter with their addresses and phone numbers with the secretary of the owner/operator of the business.

2. The applicant was qualified. Both Mr. Rivas and Ms. Ruiz had worked for Respondent for a considerable time in the past. Former Supervisor Raul Vega testified that Pedro Rivas' work was satisfactory in all the jobs he had done for Respondent. (Tr.Ill:43-44). There was no evidence that Mr. Rivas or Ms. Ruiz had been unable to perform the work at Respondent's business prior to July, 1980. I find that they both were qualified to perform the work at Respondent's nursery.

3. Work was available. Respondent's position is that since no employees were hired on the specific day that Mr. Rivas and Ms. Ruiz applied, no work was available. However, this argument is invalid because Respondent's own supervisor (Ms. Escobedo) testified that Respondent's practice was to contact workers later who had applied on days when work was

not available; indeed, this is precisely what Mr. Rivas and Ms Ruiz requested when they spoke to Mr. Orson's secretary. The payroll records clearly show that numerous jobs were available during the time period when the two employees applied for work. In the last week of July, four employees were recalled. In August more than twenty workers were recalled or hired. Mr. Rivas and Ms. Ruiz applied for work twice within that period; they were not sent recall notices until September 29, 1980, while approximately twenty people began work in the end of July and in August. At least eight of these/according to the testimony of Supervisor Escobedo),were people who had applied for work during this period on days when there was no work available, and then had been contacted by Respondent as work opened up. I find, therefore, that work was available during the time period when Mr. Rivas and Ms. Ruiz applied for work; specifically, that at least from July 29, 1980 (the first date after July 22, 1980 on which people were recalled) work was available at Respondent's business.

4. Discriminatory motivation. Respondent asserts a justification for refusing to hire Mr. Rivas and Mr. Ruiz, in that both had previously been sent recall notices in 1979 and had not reported for work at that time. However, under Mr. Orson's own testimony, plus the undisputed payroll evidence, this justification must fail as being pretextual. Mr. Orson testified that failure to respond to a recall notice meant that a person lost his or her seniority ranking. Mr. Orson further explained that the loss of seniority was because "I would assume that they no longer cared to work for [Respondent]. ... I would assume they were no longer available." (Tr.I:128-129). Therefore the previous failure of Mr. Rivas and Ms Ruiz to respond to a recall notice could provide a reason for Respondent recalling other workers, even though they had lower seniority ratings than Mr. Rivas and Mr. Ruiz. However, the facts are undisputed that between August 4th and August 29th, Respondent hired no fewer than eleven new employees, people who had never worked for Respondent before. Further, Ms. Escobedo testified that several of these had come to Respondent's business on days when there was no work available, and Respondent had contacted them later to come to work.

Thus, Respondent hired eleven new workers at a time when two long-standing employees had twice come to the premises and requested work. Mr. Rivas' and Ms. Ruiz' conversation with Mr. Orson on July 22nd requesting work clearly eliminated an "assumption" Mr. Orson might have had that "they were no longer available" or that "they no longer cared to work for" Respondent. Yet Respondent passed over these proven employees for untried newcomers. On the record in this case, the only plausible explanation is that Respondent did not hire the two employees because of their

extensive union and ALRB activities. In Section VIII(A) supra, I have detailed these activities of Mr. Rivas and Ms. Ruiz, two of the Union supporters during the time of the election in 1979 and since. Both had been charging parties in previous ALRB charges, Mr. Rivas has testified twice in ALRB hearings, and both were beneficiaries of ALO Schoorl's Decision in Case No. 79-CE-20-SD et. al. Mr. Rufas and Ms. Ruiz wore Union buttons and actively supported the Union at Respondent's premises.

Accordingly, for all the reasons stated above, I find and conclude that in July and August, 1980, Respondent refused to rehire Pedro Rivas and Guadalupe Ruiz after they had applied for work for which they were qualified, at a time when work was available, and that Respondent's refusal to rehire them was discriminator!ly motivated by their extensive Union and ALRB activities of which Respondent was aware. Therefore, I find and conlude that by refusing to rehire Mr. Rivas and Mr. Ruiz in July and August, 1980, Respondent violated §§1153 (c) (d) , and (a) of the Act.

D. Layoff and Recall of Pedro Rivas, Elias Gonzalez Miguel Pereda, Victorino Olivas and Agustin Madrid in October/November 1980.

Paragraph 17(a) and (b) of the complaint alleges that on October 10,1980 Respondent discriminatorily laid off Pedro Rivas, Elias Gonzalez Miguel Pereda, Victorino Olivas and Agustin Madrid, and that Respondent discriminatorily delayed recalling them until November 20-25, 1980, in violation of §§1153 (c) and (d) of the Act.

Most of the facts concerning this issue are undisputed. Mr. Orson testified that since July, 1979, as a result of a settlement in ALO Cloke's case, Respondent has used a seniority system for laying off and recalling employees. (Tr. 1:126-130); Tr. VII:51, 223-224). Respondent's Exhibit No. 5 contains Respondent's overall seniority listing for the period July-December, 1980. In September, 1980 ALO Schoorl issued his Decision in Case No. 70-CE-20-SD et al., (RX:2). In that Decision ALO Schoorl ordered a number of employees reinstated due to discriminatory layoffs. Mr. Orson testified that after ALO Schoorl' s Decision, Mr. Or son's attorney advised him to send recall letters to the people listed in the Decision, including the five alleged discriminatees here. (Tr.VIII:155). Accordingly, in late September Respondent sent recall letters to the twelve employees listed in ALO Schoorl's Decision. (GCX:3A,B,C,E,G,I,J,K,L,N,P,R). Seven of these employees responded to the letters and returned to work: Juana De Varela, Elias Gonzalez, Pedro Rivas, Agustin Madrid, Victorino Olivas,

Miguel Pereda, and Guadalupe Ruiz.[17/] Respondent's Exhibit No. 5 shows that Elias Gonzales, returned to work on October 2, 1980; Pedro Rivas returned to work on October 7, 1980; Miguel Pereda returned to work on October 6,1980; Victorino Oliveras returned to work on October 6, 1980; and Agustin Madrid returned to work on October 6, 1980. Respondent's Exhibit No. 5 also shows the following seniority rankings and starting dates for these five alleged discriminatees: Pedro Rivas (#5, 9/22/75); Elias Gonzales(#2, 2/9/73); Miguel Pereda (#11,1/12/76); Victorino Olivas(#10, 12/4/75); and Agustin Madrid (#12, 2/26/76).

It is undisputed that on October 10, 1980 the five alleged discriminatees were laid off(RX:5). Respondent's Exhibit No. 5 also shows that on the same date nine other employees were also laid off: Rebecca Ponce(#6,10/1/75); Epifanio Mendoza (#28, 11/19/79); Regilio Mendoza(#33, 12/3/79); Alfonso Barajas (#45, 3/24/80); Elias Barajas(#46, 3/24/80) Jaime Garcia (#47,2/24/80) ; Jose Rubalcaba (#51,3/24/80) ; Gabriel Delgado (#106,8/5/80);and'Uriel Mendoza(#111,8/11/80).

It is further undisputed, (RX:5), that on and after October 10, 1980, when the five alleged discriminatees were laid off, six hourly-paid employees remained working: Maria Gonzalez, (#1, 1/29/73); Teresa Corona(#3, 1/24/74); Juana De Varela (#4, 3/25/75); Guadalupe Ruiz (#13, 3/3/76); Justina Wichware (#19, 7/30/79); and Teresa Correa(Cortez) (#21, 8/27/79).

Three of the alleged discriminatees were recalled for work on November 20, 1980: Elias Gonzalez (GCX:3D), Pedro Rivas(GCX:3F), and Victorino Olivas (GCX:3M). It is undisputed (RX:5) that between October 10, 1980, when these discriminatees were laid off, and November 20, 1980, then they were recalled, Respondent hired or recalled five employees: Enedina Mendez (#97,5/21/80; recalled October 27, 1980);Teresa Diaz (#96, 5/21/80; recalled October 27, 1980); Esperanza Garibai (#93, 5/20/80; recalled November 13, 1980) ;Laura Navarro (#108 , 8/8/80 ;recalled November 13 1980); and Berta Jaime(#118,new hire on November 13, 1980).

Respondent sent recall notices to the other two alleged discriminatees, Agustin Madrid (GCX:3H) and Miguel Pereda (GCX:3(O)), to begin work on November 25, 1980. It is undisputed, (RX:5), that in addition to the five employees listed in the preceeding paragraph, Respondent hired or recalled four additional employees prior to November 25, 1980: Javier Machedo (#110, 8/11/80; recalled November 21,

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17/ An eighth employee, Justina Wichware, had already returned to work under an injunction issued by Superior Court, see Section V(D) of this Decision, supra.

1980); Uriel Mendoza (#111,8/11/80; recalled November 22, 1980); Rodolfo Cortez (116, 8/29/80; recalled November 23, 1980); and Epifanio Mendoza (#28,11/19/79; recalled November 22, 1980).

From these undisputed facts, it is apparent that for each of the five alleged discriminatees, between eight and thirteen employees with lower seniority were retained or recalled while the discriminatees were laid off, (the number depending on the seniority ranking of the discriminatee and the date of which he was rehired).

Where an employee's union activities or ALRB activities are the motivation for layoff or delayed recall, the employer violates §§1153(c) and/or (d) of the Act. See Hemet Wholesale, 3 ALRB No. 47; S. Kuramura, Inc. 3 ALRB No. 49; Akitomo Nursery, 3 ALRB No. 73; J&L Farms, 6 ALRB No. 43; Pleasant Valley Vegetable Co-Op., 4 ALRB No. 11. Even where some layoffs are necessitated by economic conditions, a violation of the Act is found where the employees selected for layoff are so selected because of union activities. Akitomo Nursery,3 ALRB No. 73; J&L Farms, 6 ALRB No. 43. Where a prima facie case of discriminatory layoff is proved, a violation of the Act if found unless a proper business justification for the layoff is shown. Dutch Brothers ,3ALRB No. 80 ;Sacramento Nursery Growers, Inc., 3 ALRB No. 94; Martori Brothers Distributors, 4 ALRB No. 80; Kitayama Bros .Nursery /4 ALRB No. 85;Foster Poultry Farms £ AlRB No. 15.

In the instant case a prima facie case of discriminatory layoff/recall has been proven. The five alleged discriminatees were active Union supporters and had participated in previous ALRB activities, known to Respondent, (See Section VIII(A) of this Decision, supra); there is evidence of anti-union animus on the part of Respondent, (See Section VIII(B) of this Decision supra) ; and the undisputed facts -show that a number of lower-seniority employees were retained or rehired while the alleged discriminatees were on layoff. Thus, -a violation of §§1153(c) and (d) of the Act will be found, unless there was a valid business justification for the layoffs and delayed recall.

The key point to this issue, then, is the justification put forth in Mr. Orson's testimony for the retention and recall of lower-seniority employees while the five alleged discriminatees were on lay-off; that Respondent laid off the five discriminatees as part of the layoff of all of Respondent’s male hourly workers , because the work during this time was work which was only done by women due to their superiority for such work. As described in detail below, Mr. Orson testified that only women were retained or recalled ahead of these five alleged discriminatees, all men, for the legitimate reason that women were more capable of doing this work and had traditionally done this work at Respondent's business. Before considering

this justification!, however, it is undisputed that four men(Rodolfo Cortez, Javier Machedo, Epifanio Mendoza, and Uriel Mendoza) were recalled ahead of two of the discriminatees, Miguel Pereda and Agustin Madrid, Respondent has offered no justification for the recall of these lower seniority male employees ahead of Mr. Pereda and Mr. Madrid. Therefore, I find that as of November 21, 1980 {the date Mr. Machedo was recalled), Respondent discriminatorily delayed recalling Mr. Pereda and Mr. Madrid; in view of the union and ALRB activities of these two, known to Respondent, Respondent's anti-union animus, and the lack of any business justification, I conclude that as of November 21, 1980, Respondent violated §§1153(c)(d) and (a) of the Act as to Mr. Pereda and Mr. Madrid. This finding and conclusion becomes subsumed under my overall finding on this issue below, but should that overall finding be found incorrect for any reason, this finding regarding Mr. Madrid and Mr. Pereda would stand as a separate finding and conclusion.

Respondent's position is that the work being done during the period October 10-November 20, was the type of work done only by women, and that Respondent therefore was justified in laying off all the men, including the five alleged discriminatees, during this time. However, the testimony from Mr. Orson reveals that this type of work was not in fact done exclusively by women. Specifically, Mr. Orson testified tha the following types of work were being done during this period:

Planting poinsettias. Mr. Orson testified that planting poinsettias involves placing the small plants in the pots: "There is soil in the pot and we are placing the plant in the pot."(Re.VII:121). He was aked "Have men ever done that kind of work?", to which he answered, "I used to do it , myself, when I was by myself." (Tr.VII:122).

Pinching Poinsettias. Mr. Orson testified that "soft" pinching involves removing the growing tip of the plant by fingernail; "hard" pinching involves cutting off the tip with a knife or shears. (Tr. VII:122-123). He testified that women always do this work because "Men are basically, overall, too rough." (Tr.VII:123). He also testified, however, that the analogous hard pinching of azaleas has occasionally been done by men. (Tr. VII:124), and that women "usually" do the soft pinching of azaleas. (Tr.VII:125) He testified that women "have a better eye" for soft and hard pinching of the plants. (Tr. VII:125).

Spreading Poinsettias. Mr. Orson testifed that women do the

spreading of poinsettias. (Tr. VII:126). He also was asked:

"Q: Have men ever done that kind of work?

A: They can, under—if there's no one else available.

Q: All right. And I take it that men have done that sometime between 1973 and the present day?

A: Occasionally."

(Tr. VII:126).

Placing irrigation spitters. Mr. Orson testified that this task involves "a piece of plastic, approximately three inches long that has an orifice in it that is plugged into a piece of plastic tubing, and as you turn the pressure on in the main, the water will spit out of this orifice and go across the top of the soil, thereby watering the plant." (Tr.VII:127). He testified that women do this work. (Tr. VII:127). He was asked "Have men ever done this kind of work?", to which he answered: "Occasionally; only if we get too far behind."(Tr.VII:127).

Cleaning and sleeving cyclamen. Mr. Orson testified that women do this work. (Tr. VII:128). Sleeving involves putting a prepared paper sleeve over the plant to keep it from being bruised during shipping. (Tr. 1:122-123).

Irrigation. Mr. Orson testified that this work was done by a woman employee, Teresa Corona. (Tr.VII:128). He said that other people have been asked to do it when the work is behind schedule. (Tr. VII-.128). He did not give any reason why women are better suited for this work other than to say that Ms. Corona and another woman "have the knowledae to do so." (Tr.VII:128).

P1antjng Cyc1amen; Mr. Orson testified that this work involves transferring small plants out of a flat into an individual pot. He stated that this was "delicate" work and therefore women have done this work. (Tr. VII:130).

Later in his testimony, Mr. Orson testified that some of these jobs are done by men "when we are very short or behind." (Tr .VII :140) . He also stated that sleeving plants is "usually always" done by women,(Tr.VII:140), and that cleaning plants is "usually" done by women.(Tr. VII: 140). He stated that separating plants is usually done by women because "it's a judgment thing and a delicate thing." (Tr. VII:142). This work requires being able to tell a good plant from a bad one, and women" are just more adept at it. They have an eye." (Tr. VII:142). He stated that separating plants

involves separating short plants from tall one, and plants with a lot of flowers from ones that have few flowers. (Tr. VII:144). He testified that women generally do this work, although men "very occasionally" do it. (Tr. VII:145). He also testified that during this time-period there was some work being done that was of the type traditionally done be men (such as driving forklifts and loading plants on the trucks), but that there was not much of this work to be done so the women did it along with the fulltime salaried employees and the supervisors. (Tr. VII:140-150).

Mr. Orson was asked by General Counsel what he meant by "delicate"work, and he stated that such work was work which had to be "very carefully done."(Tr. VIII:127). He also stated that this work required sound judgment and the ability to discern good plants from bad. To do this work well "you have to have an eye for it." (Tr, VIII: 127). He was asked about the training required for the work:

"Q: I take it you wouldn't take somebody off the street to do this kind of work:

A: No.

Q: Okay.

A: I could if they were trainable and we would find that out within a few days.

Q: Okay. That's the next question I was going to ask you. You don't have a formal training program for new workers, do you?

A. No. We put them with somebody that has experience and see how they do.

Q: Okay.

A: Some people can do it and some can't.

Q: Okay; now, if a new worker— a worker that hasn't worked with Ruline before, comes in and is assigned to one of these tasks that require very delicate work, is that person assigned to a supervisor in particular, or how does the on-the-job training go?

A: The supervisor or one of the other employees who is experienced at it, can show them the first time, and then keep checking back, making any corrections and if they make mistakes that's fine for a day or two, but after that they are taken off or fired or whatever. If they are not adaptable to it.

Q: Has it been your observation that different people learn these skills, some people learn these skills more quickly than others?

A; Oh, yes.

Q: Has it been your observation that some people are actually able to learn one skill faster than that person's able to learn a difference skill?

A: Yes. Some people have good dexterity; some do not."

(Tr:VII:128-129).

Mr. Orson testified, as the crux of his decision not to recall the five alleged discriminatees, that he would make exceptions to his seniority system in that "if we need women-, I'm certainly not going to recall men with higher seniority who can't do the job." (Tr. VII:136).

Based on the above testimony from Mr. Orson, I find that Respondent has not offered any serious business justification for retaining and recalling lower-seniority employees while the five alleged discriminatees were on layoff. Whether Respondent generally chooses to use women for some tasks and men for others is not an issue that is per se before me. Rather, the question is whether the alleged superiority of women for these tasks is a justification for not recalling these five men, I find that under Mr. Orson's own testimony it is not. The key is Mr. Orson's statement that he would not recall "men with higher seniority who can't do the job." However, Mr. Orson himself admitted that everyone needs to be trained for this work, that some people are more dextrous than others, and that a person is given a few days to try the work to see if that person can perform it correctly. Yet none of these men was given that chance. There is thus no evidence that those five men could not do this work. Therefore, to find Respondent's justification valid I would have to find that women are inherently better at judging good plants from bad, at watering plants, at placing tubes into plastic pipes, at wrapping paper sleeves around plants, at putting plants into pots of soil, and at pinching or cutting off with a knife the tips of plants. I find that no such generalization could possibly be justified. Stereotypes about women being dainty, and men being strong and clumsy are just that— stereotypes. It is well-known that men as well as women have adequately performed the jobs of surgeon and concert violinist, tasks which undoubtedly require as high a degree of manual dexterity as putting plants into pots of soil; similarly, the ability to judge a good plant from a bad one is

certainly no more difficult or elusive than the ability to judge quality control in any of numerous professions in which men adequately make such judgments. Had Mr. Orson recalled the five alleged discriminatees and trained them at these jobs and found them wanting, that would have been an entirely different case than the one before me. However, the refusal to recall them and try them at this work based solely on the generalization that they, as men, could not perform it adequately, is not a justification which I find sufficient to avoid a violation of the Act.

Respondent also argues that it laid off all men, not just the pro-Union ones, and that it kept some pro-Union women, and that this shows that it had no anti-Union animus in the layoff and delayed recall of the five alleged discriminatees. However, an employer does not have to discriminate against all members of the pro-Union group of employees, or act against them exclusively, in order to make out a violation of the Act. Desert Automated Farming, 4 ALRB No. 99; TEX CAL Land Management, Inc., 3 ALRB No. 14.

Therefore, for the above reasons, and applying the above legal standards, and in light of the Union and ALRB activities of these employees, known to Respondent, I find and conclude that in the period October 10, 1980 through November 20 and 25, 1980, Respondent laid off and delayed recalling Pedro Rivas, Elias Gonzalez, Miguel Pereda, Victorino Olivas and Agustin Madrid, because of their Union and ALRB activities, in violation of §§1153 (c) (d) and (a) of the Act.

E. Recall Notices for Pedro Rivas, Elias Gonzalez, Miguel Pereda, Victorino Olivas, and Agustin Madrid in November, 1980.

Paragraph 17(c) of the Complaint alleges that in November, 1980 Respondent offered reinstatement to these five named employees, but attached unattractive conditions of employement to its reinstatement offers, because of the employees' Union and ALRB activities.

Section 1153(c) of the act prohibits discrimination in regard to "tenure of employment" or "any term or condition of employment"; Section 1153(d) of the Act prohibits an employer from discharging or "otherwise discriminat(ing)" against employees. Thus, if Respondent did offer less attractive terms or conditions of employment to these five employees because of their Union or ALRB activities, the Act would be violated.

On November 12, 1980, Respondent sent recall letters to Elias Gonzalez (GCX:3D), Pedro Rivas (GCX:3F), and Victorino Olivas (GCX:3M). All these letters were identical, and all contained the statement that "Work will be available

from November 20, 1980 through December 19, 1980." On November 18, 1980 Respondent sent recall letters to Agustin Madrid (GCX:3H) and Miguel Pereda (GCX:3(0)). Their letters were identical, and contained the statement that "Work will be available from November 25, 1980 through December 19, 1980."

Supervisor Luz Escobedo testified that she often was the person who contacted employees for recalls (because she spoke Spanish), and generally these recalls were handled in a variety of ways, including phone calls, sending messages' with other employees, or conversation - with applicants who came to the premises looking for work. (Tr. IV:145-159). For most of the people she contacted during November, 1980, she simply told them work was available, without indicating that there would be any time limitations to the work, (Tr. IV:151-153), although for two people she indicated that work would be for a few weeks, through the - Christmas season. (Tr.IV: 149-150).

Mr. Madrid and Mr. Olivas returned to work in compliance with the recall notices. Mr. Rivas, Mr. Pereda, and Mr. Gonzalez all testified that they did not return to work for this recall because they did not want to return to work for only the limited time specified in their notice. (Rivas: Tr.II:40; Pereda: Tr.IV:19; Gonzalez :Tr.IV.-13) .

The General Counsel takes the position that simply by the inclusion of the time-limitation notice in the recall letters to these five employees, Respondent discriminated against them and intended to discourage them from returning to work. However, I find that even though the general practice of Ms. Escobedo did not include time-limitations in recalling workers, there was no discrimination simply by the inclusion of the limitation in the letters to these five, because in fact these workers requested to be informed of the time-limitation for work when they were recalled. On October 21, 1980 Mr. Madrid,Mr. Olivas, Mr. Pereda, Mr. Gonzale.z and Mr. Rivas sent a letter to Rufus Orson, (GCX:6; translated into English, Tr.11:35), which stated:

> "We are writing you in order to ask you some questions that we would like you to answer for us. We want you to tell us the motive or the reason for the last layoff. And to tell us when you will have work and for how long you will give us work, and we would also like to set down at a table and negotiate...."(Emphasis added).

In view of this request, I find that the General Counsel has not proven discrimination against these employees simply by the fact that a time-limitation was included in their recall

notices.

However, there is a separate reason why I do find that these recall notices discriminated against the employees: the time-limitation stated in the recall notices was false. Respondent's Exhibit No. 5 indicates that no fewer than twelve employees with lower seniority than these five alleged discriminatees worked through the end of December, 1980. No records were introduced to indicate how far into 1981 these employees worked;(RX:5 covers the period through December 31, 1980). Thus the five employees would not have had their work limited to the period ending December 19, 1980, as stated in their notice. Further, there was also no indication in the notices that the limit of December 19 was flexible or approximate. Thus, I find that the limitation period had a tendency to discourage the return to work of the alleged discriminatees, and did in fact discourage three of them from returning, and that the time limitation period contained in the notices was false. In light of the Union and ALRB activities of these employees, known to Respondent, Respondent's anti-Union animus, and the discriminatory actions taken against these employees in October, 1980(layoff and delayed recall, see Section VIII(D) of this Decision, supra), I find and conclude that the November, 1980 recall notices contained a limitation in the terms and conditions of employment for Pedro Rivas, Elias Gonzalez, Miguel Pereda, Victorino Olivas and Agustin Madrid, and that this limitation was motivated by the Union and ALRB acttivities of these employees, known to Respondent, in violation of §§1153 (c) (d) and (a) of the Act.

F. Withholding Wage Increases for Guadalupe Ruiz, Pedro Rivas, Elias Gonzalez, Miguel Pereda, Juana De Varela and Agustin Madrid, in October, 1980.

Paragraph 17(d) and 19 of the Complaint allege that in November, 1980 Respondent withheld wage increases to these six named alleged discriminatees. 18/The facts concerning this issue are not in dispute, and are mostly stipulated to.

It was stipulated that on January 1, 1980 Respondent raised the wages of all its hourly employees:

"Beginning January 1, 1980, Ruline Nursery raised the wages of its hourly paid employees

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18/ Paragraph 17(d) included Victorino Olivas as one of the discriminatees on this issue and did not include Juana De Varela. However, as the stipulations show, Mr. Olivas is not an alleged discriminatee on this issue, and Ms. De Varela is, Since the issue was fully litigated I will make findings and conclusions as to Ms. De Varela. See Anderson Farms Co., 3 ALRB No. 67; Prohoroff Poultry Farms, 3 ALRB NO. 87; Highland Ranch, 5 ALRB No. 54.

in the following ways:(a) employees who had been paid $2.90 per hour before January 1 were thereafter paid $3.10 per hour; (b) employees who had been paid $3.70 per hour before January 1 were thereafter paid $4.00 per hour; (c) the hourly wage of Rebecca Ponce was raised from $3.60 per hour to $3.89 per hour; the hourly wage of Elvira Martinez was increased from $3.50 per hour to $3.78 per hour; the hourly wage of Victorino Olivas was raised from $3.35 per hour to $3,62 per hour. ..."

(Tr. I:2-3).

Mr. Orson testified that he raised wages on January 1, 1980 because he believed that those of his employees who were making the minimum wage would, have to get a raise to comply with applicable law. (Tr. VII:163). He then raised all employees' wages by approximately the same percentage:"(I)t was my intent to be fair across the board and to increase everyone's wage by the same percentage." (Tr. VII:163).

It is undisputed that the six named discriminatees in this issue were on layoff status on January 1, 1980, and it is further undisputed that they were ordered reinstated in ALO Schoorl's decision in Case No. 79-CE-20-SD et al., issued in September, 1980. As a result all six were recalled. It is stipulated (GCX:lO) that when they were recalled they were paid at the same rate they had been earning in summer, 1979 and that they did not receive the pay increase given to the other employees on January 1, 1980:

"Each of the following persons was re-employed at Ruline on the dates listed below at the same rate which he or she was earning when last employed by Rule Nursery in the summer of 1979. The hourly rate at which each such person was paid is set out next to his or her name:(followed by a list of the six individuals, their date of recall, and their salary)."

(Tr. VI:7-10; GCX:10(page 4)).

Mr. Orson's sole explanation of why the six employees did not receive the wage increase was that: "They were not employed on January 1, 1980." (Tr.VII:165). He also testified that three known Union supporters who were working on January 1, 1980 did receive wage increases (Tr.VII:166-168).

Section 1153(c) of the Act prohibiting an employer from discrimination, due to union activity, "in regard to the

hiring or tenure of employment, or any term or condition o<£ employment." Similarly, §1153 (d) prohibits an employer, due to employee's ALRB activities, from "discharg(ing) or otherwise discriminat(ing) against an agricultural employee." The wages of an employee are a basic condition or term of employment, and discrimination against employees in terms of wages, due to improper motivation, would perforce be violations of §§1153 (c) and (d) of the Act.

In the instant case, the above facts concerning wage increases clearly show a discrimination against the named employees. Mr. Orson testified that "it was ray intent to be fair across the board and to increase everyone's wage by the same percentage." (Tr. VII:163). The only ground on which he defended not increasing the wages of the six employees was that they were on layoff status on the specific date the wage increase was granted. I find this a very weak and implausible excuse. If an employer truly wants to be fair across the board, it makes no sense at all to withhold wage increases from certain employees who are recalled to work after the effective date of the wage increases. Those who got the increases continued to receive their augmented wage at the time the six employees were recalled; but the six had to work at their old rate. I do not credit Mr. Orson's brief and unexplained justifications for denying the wage increase to the six employees. Rather, on the grounds stated in Sections VIII (A) and (B) supra, I find that the motivation for denying these six employees a wage increase was because of their Union and ALRB activities, known to Respondent.

Respondent seeks to justify its actions on the ground that three other pro-Union employees did receive a wage increase. However, the cases are clear that not all Union supporters need be discriminated against in order to make a finding of discrimination against some employees. See, e.g_. , Desert Automated Farming, 4 ALRB No. 99: TEX CAL Land Management, Inc. 3 ALRB No. 14.19/

19/ Respondent in its Post-Hearing Brief (p.68) argues that one employee, Kenny Church, did not work on January 1, 1980 and also was not given a wage increase, and that Mr. Church was not a Union supporter. However, I specifically reject any comparisons between Mr. Church and other employees because it has been Respondent's position throughout this litigation, which I accept, that Mr. Church is a special status employee and is not comparable to the others. Respondent's Brief elsewhere summarizes this special status of Mr. Church:

> "Rufus Orson testified (that) Kenny Church constitutes a special status employee. Kenny Church is an hourly paid employee. However, Kenny Church is not subject to the seniority system. Kenny Church started work at Ruline in 1975 when he was a high school student and a member of Future Farmers of America. At that time

Therefore, I find and conclude that in October, 1980 Respondent discriminatorily withheld wage increases from Guadalupe Ruiz, Pedro Rivas, Elias Gonzales, Miguel Pereda, Juana De Varela and Agustin Madrid, because of their Union and ALRB activities, known to Respondent, in violation of §§1153 (c) (d) and (a) of the Act.

G. Refusal to Rehire Agustin Madrid in December, 1980.

Paragraph 18 of the Complaint alleges that on December 12, 1980 Respondent discriminatorily refused to rehire Agustin Madrid, in violation of §§1153 (c) and (d) of the Act.

Mr. Madrid had been recalled to work by Respondent on November 25, 1980. He worked through December 6, 1980 (RX:5) At-that time Mr. Madrid was arrested by the Border Patrol and deported. (Tr. 11:83-84). He was away until December 12th, at which time he came to Respondent's premises to request that he be rehired. At that time Supervisors Escobedo and Jester paid him for the work he had done and told him there was no more work for him(Tr. 11:85).

Supervisor Escobedo testified to the same events and stated that the reason Mr. Madrid was discharged, which reason she told to him on December 12th, was that he had missed five days of work without giving notice. (Tr.VIII: 52-54). She also testified that during the conversation

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19/(continued)

> Kenny was looking for summer and holiday work. A special relationship developed between him and Rufus Orson. Since Kenny was so interested in floriculture and horticulture, Rufus decided to train Kenny. Currently Kenny Church is now a student at Cal Poly with a major in floriculture and a second major in horticulture. Kenny Church continues to work during summers and holidays. He is basically a 'grower'. ALO Schoorl's decision in ALRB Case No. 79-CE-20-SD held that Kenny Church was a special status employee, and that Ruline Nursery was justified in excepting him from the layoff-recall system. No exceptions were taken to that finding and it is now final and binding in this case.

(Respondent's Post-Hearing Brief, pp.15-16).

Accordingly, I do not consider the treatment afforded to Mr. Church as being relevant to the treatment afforded the regular hourly employees, and it does not provide a justification for the discrimination against the six named employees.

Mr. Madrid did-not give any-explanation to her or to Mr. Jester as to why he did not give notice when he was away. Mr. Madrid told them he had been arrested, but offered no explanation of why he did not call and tell Respondent. (Tr. VIII:54-55). Mr. Jester testified to the conversation, and he also stated that Mr. Madrid was discharged because he missed work and because, in the conversation with Mr. Jester "he would give no reason why he didn't call or notify us." (Tr. VIII:5).

Mr. Madrid testified that during the conversation with Mr. Jester and Ms. Escobedo he told them that the reason he did not notify Respondent of this arrest was that he had been alone when he was arrested and "I only had $2.00 and I couldn't call you or anything." (Tr. II:84). He testified that Ms. Escobedo replied "that's not my problem." (Tr. II:84). Mr. Jester and Ms. Escobedo denied that Mr. Madrid told them he did not have money to call and notify Respondent when he was arrested. (Tr. VIII:5,52-55).

Mr. Madrid, Supervisor Escobedo, and Victorino Olivas, all testified that Respondent hired undocumented workers, that in the past Mr. Madrid among others had missed work due to arrest by the Immigration and Nationalization Service, and that Mr. Madrid had returned to work on those occasions and been reinstated. (Tr. II:78-84,108-110; Tr. VII:124-126). Mr. Olivas testified that on one occasion he, Mr. Olivas, was reinstated after missing fifteen days because of arrest and deportation. (Tr. II:108-110).

The core of Respondent's position regarding the discharge of Mr. Madrid is that Respondent instituted a disciplinary system in January, 1979, (RX:14), announcing that warning notices would be given to a worker who missed work without explanation, and that three such notices within a three-month period would be cause for discharge and loss of seniority. Mr. Madrid received a notice for each of the five days he missed after his arrest on December 6th, and therefore was discharged.

Supervisor Jester testified, concerning this system, that it was not really a discharge system but a loss of seniority system. In other words, if a person was terminated because of missing three or more days of work without explanation, the person could still apply for work like anyone else, only without their former seniority:

> "Q: If that person wants to work there again either upon his or her return or a week later, would you treat that person just like somebody off the street, I take it?
>
> A: Correct.
>
> Q: No better and no worse?

A; Right.

Q: That's been the rule at Ruline for a while, I take it?

A: Yes."

(Tr. V:42).

Based on the above testimony, and resolving conflicts in the testimony, I find that since January, 1979 Respondent has had a system where an employee is disciplined for missing work without giving notice. If an employee misses three days of work without notice, the employee is not terminated automatically, but is given a chance to explain why he or she could not give notice. 20/ if a person does not explain why notice was not given, the person is terminated. The termination is without prejudice to the person re-applying for work, but the person will no longer have his or her former seniority. I further find that on December 6th Agustin Madrid missed work for at least five days, until December 12, and that he did not give notice to Respondent during the time he was away from work. I credit Mr. Madrid's testimony that, on his return, he told Respondent's supervisors that he had not been able to give notice because he did not have money to call Respondent when he was arrested.

The legal standards for lay-off (discharge) and refusal to rehire an employee are given in Section VIII(C) and (D) of this Decision, supra.

In the instant case, I find that Mr. Madrid was not terminated under a neutrally applied system, for two reasons. First, I find that Mr. Madrid gave an explanation for his failure to give notice, and that giving such an explanation was, as a matter of Respondent's practice,

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20/ This understanding of the disciplinary system is also the one advanced by Respondent in its Post-Hearing Brief: "Ruline is willing to take said employees back after they have been arrested by the Border Patrol, but only if they gave notice of the reason for their absence. If an employee fails to give said notice, he must explain why he failed to give notice. Failure to give such notice (or discharge if the employee failed to show up for work three days in a row)." Brief for Respondent, pp. 46-47

sufficient to excuse the disciplinary notices. Second, I find that in any event Mr. Madrid was not treated the same as any other person "off the street" on his re-application for work on December 12. Respondent's Exhibit No. 5 shows that in the period December 12-19, the week following Mr. Madrid's application for rehire and Respondent's refusal to do so, Respondent hired two new workers, Ray Duarte and Joe King. It has already been established in Section VIII(C) of this Decision, supra, that when a person applied for work on a day when no work was available, Respondent's practice was to contact that person when work was available. Yet Respondent never contacted Mr. Madrid, a long-time experienced worker (starting date 2/26/76) who had requested work. Instead it employed two workers who had never worked for Respondent before. It is also noteworthy that Mr. Or son testified that this time of the season, pre-Christmas, was a very busy time, so busy that Mr. Orson asked a friend who was a teacher at the local high school "If he had any students that wanted to work during the December period, we needed extra help." (Tr. VIII:165).

I find that this case is similar to others in which it has been held that when a discharge is motivated by an employer's anti-union purpose, it is a violation of the Act even though other reasons for the discharge may exist. See e.b. Abbati Farms, Inc., 5 ALRB No. 34, affirmed, Abatti Farms Inc., v. ALRB, 107 Cal.App.3d 317 (1980); Bacchus Farms, 4 ALRB No. 26; S. Kuramura Inc., 3 ALRB No. 49.

In this case Respondent did not credit Mr. Madrid's explanation of why he failed to give notice. Further, even assuming Respondent was justified in terminating Mr. Madrid, there is no credible explanation why Respondent failed to rehire him when he applied and instead hired two new employees. Rather, based on the evidence in this case of Mr. Madrid's union and ALRB activities, Respondent's anti-union animus, and Respondent's discriminatory treatment of Mr. Madrid in laying-off and recalling him in October, 1980, (See Section VIII(D), supra), I conclude that on December 12,1980 Respondent refused to rehire Mr. Madrid, after Mr. Madrid applied for work for which he was qualified, and at a time when work was available, because of Mr. Madrid's union and ALRB. activities, known to Respondent, in violation of §§1153(c)(d) and (a) of the Act.

H. Elimination of Paid Holidays and Vacations.

Paragraphs 22 and 26 of the complaint allege that Respondent violated §1153 (c) of the Act by eliminating its policy of giving employees paid vacations and holidays, in, retaliation for the union activities of Respondent's employees.[21/]

21/ The elmination of paid vacations and holidays has also been alleged to be a refusal-to-bargain violation, and is discussed in that capactity in Section VI of this Decision, supra.

As already noted, there are two stipulations in this case regarding the holiday and vacation pay issues:

> (1) "During calendar year 1979 and calendar year 1978, Ruline Nursery provided holiday pay (without requiring employees to work) to its hourly-paid employees on each of the following holidays: New Year's Day, Memorial Day, July 4, Labor Day, Thanksgiving, and Christmas.
>
> The amount of pay provided in each instance was either eight hours' pay or nine hours' pay, the amount depending on whether the regular work day during the week including the holiday was 8 hours oar 9 hours.
>
> During the payroll week ending January 6, 1980, Ruline Nursery paid eight hours' holiday pay for January 1, 1980 (a Tuesday), to each of the following hourly-paid employees: Teresa Corona; Maria Gonzalez; Elvira Martinez, Victorino Olivas, and Justina Wichware.
>
> No hourly paid employee has been provided holiday pay at any time since them."(GCX:9; Tr.VI:7).
>
> (2) "In the last three months of 1978, Ruline Nursery paid vacation pay to each of the following hourly paid employeee: Elvira Martinez, Yolando Navarro, Manuel Miramontes, Rebecca Ponce, Teresa Corona, Baudelio Casteneda, Francisco Serrato, Pedro Rivas. The amounts paid by Ruline Nursery were [here the amount of pay, one or two weeks, is listed for the employees].
>
> During the calendar year 1979, Ruline Nursery paid vacation pay to each of the following hourly paid employees: Fortunate Guadarma, Martha Aroys, Reynalda Garcia, Mario Duran, Maria Gonzalez,Elias Gonzalez, Carmen Ramires, Juana De Varela, and Justina Wichware. The amounts paid by Ruline Nursery were [here the amount paid for each employee, one,two , or three weeks' pay, is listed].
>
> During the payroll week ending January 6, 1980, Ruline Nursery paid vacation pay of $155.60 to Rebecca Ponce, and $199.80 to Baudelio Castaneda.
>
> During the payroll week ending January 13, 1980, Ruline Nursery paid vacation pay of $155.60 to Rebecca Ponce and $199.80 to Baudelio Castaneda.

After the week ending January 13, 1980, and continuing through the remainder of calendar year 1980, the only Ruline Nursery employees who received vacation pay were:

(a) Dana Martin, who received an equivalent of two weeks' vacation pay over a three-week period in August, 1980.

(b) Socorro Sandoval, Baudelio Castaneda, Lucio Corona and Luz Escobedo. All of this vacation pay was paid during the payroll weeks ending May 4, 1980, through June . 22, 1980 [here follows the amount paid.]" —' (GCX:8;Tr.VI:6).

Mr. Orson testified that the elimination of paid vacations and holidays came about as a result of a change in Respondent's business. He testified that through 1978 Respondent grew both seasonal blooming foliage (azaleas and poinsettias being the main ones) and "green foliage". The green foliage involved daily propagation of plants and a continuous year-round operation. In 1977 and 1978, however, the market for green foliage declined and in late 1978 Mr. Orson decided to eliminate green foliage. (Tr. VII: 53-62). In April, 1979 the green foliage was eliminated, and in June, 1979, after the azalea season, people were laid off and a seasonal type of employment instituted. Mr. Orson testified: "Our whole operation changed. We had eliminated the green foliage which was a daily propagation, shipping, sales operation to a part-time seasonal situation of blooming plants, which included azaleas, poinsettias, et cetera." (Tr.VII: 53-54).

When asked why he elminated paid vacations Mr. Orson's entire explanaton was:

> "As of the major layoff and change of operations June 30, 1979, there were no longer permanent personnel outside of the salaried personnel. Therefore, no more paid vacations."

(Tr.VII:168).

22/ None of the employees listed in the final paragraph were regular hourly paid employees. Dana Martin was an "office girl " and secretary to Mr. Orson, see Section VIII(C) of this Decision, supra. Luz Escobedo is a supervisor, see,Section V(B) of this Decision, Lucio Corona, Baudelio Castaneda, and Socorro Sandoval were determined by ALO Schoorl in Case 79-CEO20-SD et al. , to be special status employees, a ruling which neither Respondent nor the General Counsel excepted to in that case.

Mr. Orson further testified that he made the decision to eliminate paid vacations in January, 1978, and that the decision was implementedin June, 1979 at which time accrued vacations were paid off. (Tr. VII:169). He stated that Rebecca Ponce was paid vacation pay in January, 1980 because a mistake had been made and she had not been credited with vacation time in 1978. (Tr. VII:170). He stated that the same was true for Dana Martin and the special status employees who were paid vacation pay in January, 1980.

Mr. Orson's entire explanation of why paid holidays were elminated was as follows:

> "Q: Now, did Ruline also change its holiday pay policy?
>
> A: Yes; we did.
>
> Q: All right. Why don't you explain how that change occurred?
>
> A: When we had the change as of June 30, 1979, I anticipated discontinuance of holiday pay and vacation pay; that everyone outside of the salaried personnel [i.e., the non-hourly paid personnel] would be changed to a seasonal and therefore parttime status. "

(Tr.VII:175-176).

He testified that people contined to receive holiday pay through New Year's day 1980 because Dana Martin had made a mistake and not discontinued holiday pay in June 1979 despite being told to do so. (Tr. VII:177).

Section 1153(c) of the Act prohibits discrimination in regard to "any term or condition of employment." Paid vacations and holidays are terms and conditions of employment, and discrimination in regard to them would thus be violations fo the Act. This is true under the analogous provision: of the National Labor Relations Act. Winco Petroleum, 240 NLRB No. 179, 101 LRRM 1100 (1979). See also Arbco Electronics, 165 NLRB No.94, 65 LRRM 1535 (1967); Interstate Transport Security, 240 NLRB No. 11, 100 LRRM 1273 (1979) .

In this case I find that Respondent's elimination of paid vacations and holidays was done out of discriminatory motivation, in violation of §1153 (c) of the Act. Mr. Orson's explanation of these changes is really no explanation at all. He testified that he decided in January, 1979 to eliminate paid vacations and holidays when the green foliage ended. His entire explanataion was that there would be a

shift to seasonal employment: "No permanent personnel...therefore, no more paid vacations." This is a. non-sequitor, both as a matter of logic and in terms of the reality of working conditions. There is no reason at all why seasonal employees cannot receive paid holiday and vacation time. That pay can be computed on almost any conceivable basis, including pro-rating the pay based on actual number of hours worked, the number of years employed, a minimum number of hours worked over a given time span , etc. Yet Mr. Orson apparently did not consider these, or any other, alternatives. He simply announced the unelucidated conclusion that in addition to changing the work from year-round to seasonal, he was eliminating the paid vacations and holidays.

I do not credit Mr. Orson's explanation. Rather, I find it significant that he decided on this policy in January, 1979, the time when the Union won the election. This timing, plus the evidence from Mr. Vega of Respondent's anti-union animus in late 1978, immediately before the Union election and the decision to end paid vacations and holidays, leads me to conclude that the elminiation of paid vacations was intended to be a discouragement to the workforce which had unionized. I find that Respondent's implementation of this changed policy was in retaliation for the Union activities of its employees, and I conclude, therefore, that Respondent violated §1153(c) and (a) of the Act.

IX. THE REMEDY

A. Refusal to Bargain;

Respondent argues that its admitted refusal to bargain with the Union was done reasonably and in good faith, in order to test the Respondent's objections to the Union's election victory and certification by the Board. Respondent argues that therefore a make-whole remedy should not be imposed in this case.

Under the test of J.R. Norton Co. v. Agricultural Labor Relations Board, 26 Cal. 3d. 1, the appropriateness of a make-whole remedy depends upon whether or not "the employer reasonably and in good faith believed the violation would have affected the outcome of the election." 26 Cal. 3d. at p.39. The Board has discussed the criteria to be used in determining the appropriateness of a make-whole remedy:

> "We take this language[of the Supreme Court] to mean that the employer's litigation posture must have been reasonable at the time of the refusal to bargain, and that the employer must have acted in good faith. The good-faith aspect requires consideration both of the employer's belief as to the validity of its objection, and of the employer's motive for engaging in the litigation, i.e., whether it

> 'went through the motions of contesting the elections results as an elaborate pretense to avoid bargaining.'... We recognize that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis for his position, while not acting in good faith as shown by the totality of the circumstances. We shall consider evidence relevant to those determinations which is available at the time of the litigation of the refusal-to-bargain charge. This also is in accordance with the Court's concern that the determination not turn on whether the employer was successful in its claim. Application of this standard will permit this Board to give adequate consideration on a case by case basis to the concerns raised by the Court in Norton."

J.R. Norton Company, 6 ALRB No. 26, pp.3-4 (Supplemental Decision).

Applying this twin test, I find that Respondent does not qualify on either of the two grounds which it must jointly meet in order to avoid the make-whole remedy.

First, I find that Respondent did not have a reasonable basis for believing the election would be set aside. ALO Goldberg's Decision notes that virturally all of Respondent's objections to the election were based on the sole testimony of Respondent's election observer, a witness whom ALO Goldberg found not credible (See Section V(D) of this Decision, supra). In most cases, the witness' version was contradicted by two or more witnesses, whom ALO Gold-berg found to be credible. These objections to the election, which turn so entirely on credibility resolutions, based on testimony of a witness found to be not credible and internally inconsistent in her accounts of events, do not seem to me to have given Respondent a reasonable basis for setting aside the election. I also agree with ALO Goldberg that many of these issues would not warrant setting aside the election, which the Union won by a large majority, even if they were proven. Respondent's other election argument, concerning the statutory construction of the peak season requirement of the Act, also does not seem substantial to me, and I do not think it affords a reasonable basis for setting aside the election. Given the limited nature of judicial review of factual findings and credibility resolutions by the administrative trier of facts, see, e.g., Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146 (1941); NLRB v. Comfort, Inc. 365 F. 2d 867 (8th Cir., 1966); TEX CAL Land Management, Inc. v. ALRB, 24 Cal. 3d 355, and to the supervision of elections,

see San Deigo Nursery Co. v. ALRB, 100 Cal. App.3d 128 (1979). I do not believe Respondent had a reasonable basis for setting aside the election.

Secondly, I find that Respondent was not in good faith in its challenges to the election. I have credited the testimony of Raul Vega, Respondent's former supervisor, that in the period of time before the election Respondent acted to thwart the Union drive at its premises and to frustrate the desires of its employees to have a Union. I find that Respondent's objections to the election, based on a sole witness, were not in good faith but rather were an attempt by litigation to delay Respondent's obligation to bargain with the Union.

Accordingly, find that a make-whole remedy is appropriate in this case for the refusal-to-bargain violations.

B. Recommended Order.

Having found that Respondent has engaged in certain unfair labor practices within the meaning of §§1153(a) i (c),(d), and (e) of the Act, I shall recommend that it cease and desist from such practices and take certain affirmative action designed to effectutate the policies of the Act.

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

ORDER

Respondent, its officers, agents, and representative, shall;

1. Cease and desist from:

(a) Discouraging the membership of any of its employees in the United Farm Workers of America, ALF-CIO, by laying off, delaying recalling, refusing to rehire, physically assaulting or otherwise harassing, or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any terms or conditions of employment, except as authorized by the Act.

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

and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized by the Act.

2. Respondent shall sign and post copies of the attached Notice to Employees (Appendix A) in English and Spanish in appropriate conspicuous places on its premises. Copies of this Notice shall be furnished Respondent for distribution by the San Diego Regional Office. A copy of this Notice shall be given personally to each employee currently working at Respondent's premises, and who works for the next azalea, poinsettia, and other blooming-flower seasons immediately following the issuance of this Decision. Copies of this Notice shall also be mailed to all employees employed from June 30, 1979 until the present date.

3. Regarding the violation of §1153 (e), Respondent shall:

(a) Cease and desist from refusing to bargain in good faith, as defined in the Act, with the United Farm Workers of America, AFL-CIO as the representative of its agricultural employees, including refusing to bargain upon request about vacation and holiday pay, length of the workday, and pay scale.

(b) Take the following affirmative action:

(1) Upon request, meet and bargain collectively with the United Farm Workers of America, AFL-CIO, as the certified exclusive bargaining representative of its agricultural employees, and if understanding is reached, embody such understanding in a signed agreement.

(2) Promptly furnish to the United Farm Workers of America, AFL-CIO all information it requests which is relevant to the preparation for, or conduct of, collective bargaining negotiations.

(3) Make whole its agricultural employees for all losses of pay and other economic losses sustained by them as the result of Respondent's failure and refusal to bargain in good faith, as such losses nave been defined in Adam Diary dba Rancho Do Rios, 4 ALRB No. 24 (1978), for the period from July, 1980 until such time as Respondent commences to bargain in good faith with the United Farm Workers of America, AFL-CIO, and thereafter bargains to contract or impasse.

(4) 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 its employees under the terms of this Order.

(c) It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees, be extended for a period of one year starting on the date on which Respondent commences to bargain in good faith with said union.

4. Regarding violations of §§1153 (c) and (d) of the Act, Respondent shall take the following affirmative action:

(a) Make whole to Pedro Rivas and Guadalupe Ruiz any losses they may have suffered as a result of Respondent's refusal to hire them on July 22, 1980 and August 13, 1980, in accordance with the formula used in F.W. Woolworth Company, 90 NLRB 289 and Isis Plumbing and Heating Co., 138 NLRB 716.

(b) Make whole to Pedro Rivas, Elias Gonzalez, Miguel Pereda, Victorino Olivas and Agustin Madrid any losses they may have suffered as a result of Respondent's laying them off in October, 1980 and not recalling them until November 20 and 25, 1980, in accordance with the formula specified in Section (a) above.

(c) Make whole to Pedro Rivas, Elias Gonzalez', Miguel Pereda, Agustin Madrid, Juana De Varela, and Guadalupe Ruiz any losses them may have suffered as a result of Respondent's withholding wage increases form them in October 1980 and thenceforth.

(d) Make whole to Pedro Rivas, Elias Gonzales, Agustin Madrid, Miguel Pereda, and Victorino Olivas any losses they may have suffered due to the inaccurate information in the recall notices sent to them in November, 1980.

(e) Make whole to Agustin Madrid any losses he may have suffered from Respondent's refusal to rehire him in December, 1980, in accordance with the formula specified in Section (a) above.

(f) Make whole to all hourly-paid emplovees employed from June 30, 1979 until the present any. losses-4s&ey may have suffered by Respondent's discontinuance of paid vacations and holidays, in accordance with the methods used in Leeds & Northrup Corp. v. NLRB,391 F.2d 874, 67 LRRM 2793 (3d Cir.1968), and NLRB v. Frontier Homes, 371 F.2d 974, 64 LRRM 2320 (8th Cir., 1967), and in accordance with the methods of the NLRB as shown in Amoco Chemicals Corp., 211 NLRB No. 84, 86 LRRM 1483 (1974), and Missourina Publishing

Co., 216 NLRB No. 24, 88 LRRM 1647 (1975).

(g) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security records, time cards, personnel records, reports, and other records necessary to analyze the amount due to the above employees.

5. Respondent shall notify the Regional Director in the San Diego Regional Office within twenty (20) days from receipt of a copy of this Decision of steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

Dated: July 3, 1981

AGRICULTURAL LABOR RELATIONS BOARD

BEVERLY AXELROD
Administrative Law Officer

APPENDIX A

NOTICE TO EMPLOYEES

After a hearing, an Administrative Law Officer has found that we have engaged in violations of the Agricultural Labor Realtions Act, and has ordered us to notify all employees that we will remedy those violations and will respect the rights of all of our employees in the furure. Specifically, we are now telling you:

(1) We will meet with and bargain with the United Farm Workers of America, AFL-CIO, as the certified union representing our agricultural employees.

(2) We will give back pay to cover any losses suffered by the following employees when they were laid-off, refused rehire, or had wage increases withheld in 1980: Pedro Rivas, Guadalupe Ruiz, Elias Gonzalez, Miguel Pereda, Victorino Olivas, Agustin Madrid, and Juana De Varela.

(3) We apologize to Juana De Varela, Justina Wichware, and Maria Gonzalez for any actions our supervisors might have taken which resulted in water being splashed on them, and we will make sure that in the future none of our employees will be physically interfered with in any like manner.

(4) All employees who have worked for us since June 30, 1979 are entitled to vacation and holiday pay, and all such employees should contact us and we will inform them when there will be a hearing to determine the amount of such pay which might be due to them.

(5) We will respect the rights of all of our employees to support the United Farm Workers of America, and to participate in hearings or other processes of the Agricultural Labor Relations Board, and we will not discharge, lay-off, withhold wage increases, or in any manner harrass, threaten or interfere with our employees for supporting the union or for participating in the processes of the Agrucultural Labor Relations Board.

Dated:_____ Signed:

_____
RULINE NURSERY

By:_____
(title)

APPENDIX B

INDEX OF EXHIBITS

GENERAL COUNSEL

Ehxibit Number	Admitted in Evidence	Description
1A	Tr. I:104	Charge 80-CE-61-SD (8/18/80)
IB	Tr. I:104	Charge 80-CE-65-SD (9/11/80)
1C	Tr. I:104	Charge 80-CE-70-SD (10/6/80)
ID	Tr. I:104	Charge 80-CE-87-SD (11/6/80
IE	Tr. I:104	Charge 80-CE-88-SD (11/6/80)
IF	Tr. I:104	Charge 80-CE-93-SD (11/6/80)
1G	Tr. I:104	Charge 80-CE-96-SD (12/2/80)
1H	Tr. I:104	Charge 81-CE-2-SD (1/14/81)
11	Tr. I:104	Notice of Hearing and original Complaint. (12/22/80)
1J	Tr. I:104	Order Consolidating Cases (12/22/80)
IK	Tr. I:104	Answer to Complaint (1/6/81)
1L	Tr. IV :1	Amended Complaint (3/30/81)
2	Tr. II:8	Subpoena Duces Tecum (2/27/81)
3A-R	Tr. II:2	Settlement offer letters to employees (9/29/80)
4A	Tr. II:45	Charge 78-CE-50-X (12/28/78)
4B	Tr. II:45	Charge 79-CE-3-SD (1/18/79)
4C	Tr. II:45	Charge 79-CE-6-SD (2/22/79)
4D	Tr. II:45	Charge 79-CE-9-SD (3/16/79)
4E	Tr. II:45	Charge 79-CE-20-SD (6/22/79)
4F	Tr. II:45	Charge 79-CE-21-SD (6/26/79)
4G	Tr. II:45	Charge 79-CE-22-SD (7/2/79)
4H	Tr. II:45	Charge 79-CE-23-SD (7/2/79)

INDEX OF EXHIBITS

(continued)

GENERAL COUNSEL (continued)

5	Tr. II:11	Decision of ALO Kenneth Cloke in Case No. 79-CE-8-SD (4/14/80)
6	Tr. II:38	Letter to Rufus Orson from Pedro Rivas et al. (10/21/80)
7	Tr. II:45	Photographs of Union (UFW) buttons belonging to Pedro Rivas
8	Tr. VI:6	Summary of payroll records—vacations (1978-1979)
9	Tr. VI:7	Summary of payroll records—holidays (1978-1979)
10	Tr. VI:9(page 4 only)	Summary of parvoll records—hiring (1980)
11	Withdrawn	
12	Tr. V:33	Transcript of testimony of Jack Jester during hearing in Case No. 79-CE-20-SD, et. al. (3/7/80)
13	Tr. VIII:177	General Counsel's Motion to Amend Complaint (3/24/81)

RESPONDENT

Exhibit Number	Admitted in Evidence	Description
1	Tr. I:41	Letter to ALO Beverly Axelrod from Thomas Giovacchini, Esq. (3/19/81)
2	Tr. I:41	Decision of ALO Arie Schoorl in Case No. 79-CE-20-SD, et. al., (9/19/80)
3	Tr. I:42	Fourth Amended Complaint in Case No. 79-CE-20-SD et. al. (1/80)
4	Tr. I:76	First Amended Answer (3/23/81)

RESPONDENT (continued)

Exhibit Number	Admitted in Evidence	Description
5	Tr. V:50 Tr.	Employee List, July-December, 1980
6	VII:14	General Counsel's Exceptions to Decision of ALO in Case No. 79-CE-8-SD
7	Tr: VII:46	Charging Party's Exceptions to Decision of ALO in Case No. 79-CE-20-SD et. al.
8	Tr. VII:46	General Counsel's Exceptions to Decision of ALO in Case No. 79-CE-20-SD et. al.
9	Tr. VII:180	Notice to Employees of Layoff from Rufus Orson (6/26/79)
10	Tr. VII:93	Recall letter to Pedro Rivas from Rufus Orson (10/22/79)
11	Tr. VII:93	Recall letter to Guadalupe Ruiz, with return receipt (7/23/79)
12	Tr. VII:93	Recall letter to Guadalupe Ruiz (7/23/79)
13	Tr. VII:103	Recall letter to Jose Olivieras (9/29/80)
14	Tr. VII:158	Notice to Employees concerning disciplinary procedures (1/25/79)
15	Tr. VII:158	Disciplinary Notice form.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, PEDRO RIVAS, GUADALUPE RUIZ, and AGUSTIN MADRID, Charging Parties.	Case Nos. 80-CE-61-SD 80-CE-65-SD 80-CE-70-SD 80-CE-87-SD 80-CE-88-SD 80-CE-93-SD 80-CE-96-SD 81-CE-2-SD CORRECTIONS TO ADMINISTRATIVE LAW OFFICER'S DECISION

The following corrections should be made to the Administrative Law Officer's Decission dated July 3, 1981:

1. Page 2, Paragraph 9 (referring to Paragraph 23), line 2: "wi<u>th</u>out".

2. Page 4, Paragraph 7 (top of page), line 2: "Dece<u>m</u>ber".

3. Page 4, first paragraph of C, 1 (Paragraph 17), line 9: "Complaint.<u>)</u>"

4. Page 9, first paragraph of text, line 2: "<u>of</u> proving that".

5. Page 10, line 11 from top of page: "received".

6. Page 13, first paragraph of Paragraph 4, line 2: "in Paragraphs 22, 23 and 24 o<u>n</u>".

7. Page 14, first paragraph of V, A, line 1: "Respondent Rulin<u>e</u> Nursery".

8. Page 15, last paragraph of Section B, line 3: "to Mr. Jester's approval, and <u>he</u> directs" (omit "t" in "the").

9. Page 17, first paragraph of Section D, line 14: "chronology of that litigation can be".

10. Page 19, quotation referring to Case No. 79-CE-20-SD, et al., line 3: "in a campaign".

11. Page 20, line 4 from top of page: "during the two-month period".

12. Page 20, first complete paragraph of quotation, line 5: "of any actual O£ potential"; and line 6: "spondent utilized this practice".

13. Page 26, line 10 from top of page: "Nursery did not notify the UFW".

14. Page 28, line 2 from top of page: "Montebello"; line 4 from top of page: "Produce Co.".

15. Page 30, first paragraph of text, line 6: "Harry Carian Sales".

16. Page 31, Section B, second paragraph, line 16: "Ms. Rui£ testified:".

17. Page 42, line 6 from top of page: "Sam Andrews'".

18. Page 44, line 8 from top of page: "Mr. Rivas and Ms. Ruiz".

19. Page 46, second complete paragraph, line 12: "lation of the Act is found".

20. Page 49, first line of page: "tall ones,".

21. Page 54, third paragraph (quotation), line 5: "Ruline Nursery".

22. Page 59, footnote 21, line 3: "and is discussed in that capacity".

23. Page 61, footnote 22, line 7: "Case 79-CE^20-SD".

24. Page 62, third paragraph of text, line 5: "violations of the Act"; fourth paragraph of text, line 7: "His entire explanation".

25. Appendix A, Paragraph 5, line 7: "Agricultural".

DATED: June 24, 1982.

BEVERLY AXELROD
Administrative Law Officer