Blythe, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

NISH NOROIAN FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party/ Intervenor.	Case Nos. 78-CE-10-E 78-CE-62-E 79-CE-34-EC
NISH NOROIAN FARMS, Employer, and VICTOR GARCIA, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Agent.	Case No. 78-RD-3-E 8 ALRB No. 25

DECISION AND ORDER AND
CERTIFICATION OF ELECTION RESULTS

On July 19, 1980, Administrative Law Officer (ALO) James Wolpman issued the attached Decision in which he concluded that Respondent had committed a number of unfair labor practices and had engaged in conduct which tended to affect the outcome of a decertification election. Thereafter, each of the parties except Victor Garcia filed exceptions to portions of his Decision

and a brief in support thereof.

The Board has considered the record and the attached Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent consistent herewith, and to certify the results of the election.

The ALO found that Respondent refused to bargain with the United Farm Workers of America, AFL-CIO (UFW) over changing its practice of using California workers to irrigate its fields in Arizona. Respondent excepts to this, contending that it had no duty to bargain over work performed in Arizona but that, even if it did, the question of its change in policy was the subject of a May 8, 1978, agreement between the parties which provided, inter alia, "The parties mutually waive any and all unfair labor practice charges alleging bad faith bargaining for conduct as of the date of the signing of this contract." (Emphasis added.)
The same agreement, however, specifically reserved from settlement the. charge filed by the UFW alleging that Respondent had discriminatorily laid off and refused to rehire dual-state irrigator Emiliano Becerril because of his union activities. On July 12, 1978, the Regional Director dismissed that charge on the grounds that Respondent's refusal to rehire Becerril was not discriminatory, but resulted from Respondent's changing its practice of using California employees to irrigate its fields in Arizona. The UFW requested review of the Regional Director's action, and on August 10, 1978, the Deputy General Counsel remanded the matter to the Regional Director to investigate whether Respondent

violated Labor Code section 1153(e)[1/] by unilaterally changing its practice.[2/]

The national Board has a general policy of refusing "to consider as evidence of unfair labor practices conduct of a Respondent antedating a settlement agreement, unless the Respondent has failed to comply with the settlement agreement or has engaged in independent unfair labor practices since the settlement." Larrance Tank Corporation (1951) 94 NLRB 352, 353 [28 LRRM 1045]. The Board, however, has recognized a number of exceptions to the general practice:

> [T]he Board decisions establish the principle that a settlement, if complied with, will be held to bar subsequent litigation of all prior violations [citation] except to the extent that they were not known to the General Counsel or readily discoverable by investigation [citation] or were specifically reserved from the settlement by mutual understanding of the parties [citations]. (Emphasis added.) Steves Sash and Door Company (1967) 164 NLRB 4S8, 473 [65 LRRM 1185].

There can be no doubt that insofar as the charge concerning Becerril's layoff alleged a section 1153(c) violation, it fell within the last stated exception, as it was specifically excluded from settlement. The only question, therefore, is whether, as Respondent would have it, the exclusion was so specific as to permit subsequent litigation of the Becerril

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[1/] All statutory references unless otherwise specified shall be to the Labor Code.

[2/] 8 California Administrative Code section 20219 provides that, upon review of a dismissal of a charge, the General Counsel may "affirm the decision of the Regional Director, remand for further consideration of evidence, or issue a complaint."

matter only to the extent that it alleged an act of discrimination as opposed to a refusal to bargain. We have found no case directly on point, Respondent cites none which requires this result, and we do not believe that the policy which the national Board's practice is designed to promote requires it. Although settlement agreements are accorded considerable respect by the national Board as "amicable and judicious means to expeditious disposal of disputes arising under the terms of the Act," Poole Foundry and Machine Company v. NLRB (4th Cir. 1951) 192 F.2d 740, 743 cert. den. 342 U.S. 954, they are not given such effect as will frustrate the purposes of the Act. Wallace Corporation v. NLRB (1944) 323 U.S. 248:

> [T]he Board has from the beginning encouraged compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them .... [The Board] has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose .... [Fn. omitted.] 323 U.S. at 254.

In this case, there is no denying that Becerril lost his job and that the only issue raised by the original charges was whether Respondent refused to rehire him because of his union activities. Even with the question of the motive for Respondent's conduct rendered largely irrelevant by the General Counsel's decision to consider the matter as a refusal to bargain, the ultimate issue of whether Becerril has any recourse under the Act for his loss of employment remains the same. With the same ultimate issue thus at stake, we cannot see how it would serve the purposes of the Act

to permit litigation of the question whether Respondent's motive was unlawful, but not whether its conduct was. Accordingly, we affirm the ALO's denial of Respondent's motion to dismiss.

Whether the Becerril matter was a proper subject for hearing does not end our inquiry, for Respondent also contends that it had no duty to bargain at all over work performed in Arizona. We do not need to reach this question, however, since Respondent did not eliminate only Arizona work when it changed its dual-state irrigator policy, it eliminated the California component of Becerril's work as well. Thus, it unilaterally eliminated California unit work. Accordingly, we affirm the conclusions of the ALO that Respondent thereby violated section 1153(e) and (a) of the Act.[3/]

The ALO concluded that one incident of surveillance and one of interrogation were violations of Labor Code section 1153(a). General Counsel excepts to his failure to find two other surveillance violations;[4/] Respondent excepts to the two violations he found. We find no merit in General Counsel's exceptions and no merit in Respondent's exception regarding the

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[3/] Arturo Baca was also adversely affected by Respondent's change in the hiring policy.

[4/] Although we find no merit in General Counsel's exception to the ALO's failure to find surveillance at the meeting, we reject any implication in the ALO's decision that intent is a necessary element of surveillance. See Kawano, Inc. (July 9, 1981} 7 ALRB No. 16. Our conclusion is based upon the General Counsel's failure to demonstrate that/Respondent's supervisors were engaging in surveillance. According to General Counsel's witnesses the site for the meeting was purposely chosen because that was where the water truck driven by Respondent's foremen went at the end of the day. Respondent's witnesses testified they stopped at the meeting because they couldn't pass the other cars stopped there.

interrogation violation and affirm those conclusions of the ALO. However, we do find merit in Respondent's exception regarding the surveillance violation.

Gerardo Puente, a UFW representative, testified that before he took access he told supervisor Jack Edmiaston that he and a companion were going into the field to talk to the workers and had no intention of interrupting their work. The crews were working in the field at the time and Puente noticed that Edmiaston appeared to be following him as he was talking to the workers. Puente's testimony does not state how close Edmiaston was to him but only that he (Edmiaston) could hear them talking. Puente noted that the workers were reluctant to talk to him when Edmiaston was nearby but Puente said nothing to Edmiaston about it.

Employee Jose Torres testified that Respondent's supervisors Logan and Edmiaston were in the fields when the UFW representatives were present. Torres stated that the supervisors customarily watched the employees work to see how the work was being done. In Tomooka Bros. (Oct. 29, 1976) 2 ALRB No. 52, we held that a supervisor's presence in the fields during worktime was not sufficient to establish the unlawful surveillance. In this record we find that General Counsel has not met his burden of proving unlawful surveillance occurred. Accordingly, that allegation of the complaint is hereby dismissed.

The remaining issues in this case involve the conduct of Respondent during and after the decertification campaign. The ALO found that Respondent provided support for the decertification campaign in a number of ways: (1) by using an employee, Adolfo

Beltran, as a "conduit" through which to conduct a decertification campaign; (2) by supervisor Gilbert Logan's failure to correct an employee's impression that he was required to sign the decertification petition as a condition of employment; and (3) by failing to rehire two laid-off pro-union employees until after the end of the eligibility period, thereby depriving them of an opportunity to vote in the election. In view of these findings and those discussed earlier, the ALO concluded that Respondent's conduct tended to affect the outcome of the election and recommended that the election be set aside. Respondent excepts to all these findings, conclusions, and recommendations of the ALO.

Following National Labor Relations Act (NLRA) precedent, we have held that it is an unfair labor practice[5/] for an employer to assist or support employees in a decertification campaign. Abatti Farms (Oct. 28, 1931) 1 ALRB No. 36 and cases cited therein. In the Abatti case, however, there was extensive evidence that the employer assisted the employee-organizers of the decertification campaign in obtaining signatures on the decertification petition. Although there is no similar evidence in the instant case, there is credited evidence that employee Beltran promised benefits on behalf of Respondent to employee Santos Gonzales. That promise was made to Gonzales at his home[6/] and only Gonzales heard it.

[5/] The Union did not file section 1153(a) charges alleging that Respondent either instigated or supported the decertification effort.

[6/] At one point the ALO, 'apparently referring to the Gonzales incident, identifies it as having taken place at Carmen Sanchez' home.

Therefore, although we find that Beltran's statement was not by itself sufficient to have tended to affect the outcome of the election, it does suggest that he may have been acting as Respondent's agent in the decertification campaign. The ALO found that Respondent's permitting Beltran to campaign while he worked as a raitero also evidences improper employer support of the decertification campaign.

The question of Beltran's agency, however, is not free from doubt. The standard for determining agency under the ALRA is:

> ... whether the employees "would have just cause to believe that [the actor was] acting for and on behalf of management' (Citation) or whether the employer has gained an improper benefit from the misconduct and, as a realistic matter, has the ability 'to prevent any repetition of such activities' or 'to remove the consequences of [such activities] upon the employees' rights of self-organization ....' (Citations.) Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.3d 307, 320.

In Vista Verde, supra, 29 Cal.3d 307, the question was whether employees, residing at a labor camp of labor contractor Bobby DeDios, would have just cause to believe that DeDios was acting as Respondent's agent in causing union organizers to be arrested for trespass. Our finding of agency in that case was upheld by the Supreme Court which noted the following facts: that Respondent itself had engaged in a series of hostile acts against the union, including- ejecting organizers from its property; that Respondent's agents had assisted Bobby DeDios in destroying UFW leaflets in front of workers,- that Respondent knew of Bobby DeDios' animus toward the union; and, finally, that Respondent's general manager

permitted DeDios to assemble the workers so that he could talk to them immediately after DeDios caused the UFW organizers to be arrested for trying to talk to the workers. As the court noted,

> ..... the record explicitly reveals that DiDios' (sic) ejection of the labor organizers was in no way inconsistent with Vista Verde's established policy, but rather paralleled similar conduct engaged in on several occasions by [Respondent itself]. Moreover, the record also demonstrates that although [Respondent's general manager] was present when DiDios barred the organizers from visiting Vista Verde employees in their homes, he took no action to repudiate the action but instead enlisted DiDios' aid to meet with the workers for his own purposes. Ibid, at 329. (Emphasis added.)

In the instant record, we have no evidence of any activity of Respondent similar to that of Vista Verde's. We do have credited testimony that Beltran held himself out to Santos Gonzales as acting on behalf of Respondent. There is also the incident in which supervisor Gilbert Logan stood by while employee Victor Garcia solicited employee Jesus Rubalcava's signature on the decertification petition; on that incident the ALO based his finding that Logan, by his silence, imparted the false impression that signing a decertification petition was a condition of employment.[7/] Although it is certainly possible that an employee might have concluded that the decertification petition was work-related and signed it for that reason, Rubalcava when asked what he thought he was signing, testified

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[7/] Shortly before Garcia solicited Rubalcava's signature, Logan had him sign what Rubalcava clearly understood, and refers to in his testimony, as his employment papers.

that he didn't know what the papers were for.[8/] Thus, the evidence is not sufficient for us to find that Rubalcava could have reasonably believed that Garcia was an agent of Respondent, or that, under the circumstances, Logan had any obligation to correct or disavow an "impression" which has no foundation. As to Beltran's "campaigning while employed as a raitero, there is no testimony as to what he said.[9/] Absent such evidence, we cannot conclude that there was anything in his merely being anti-union which would lead the employees to deduce he was acting on behalf of the employer in circulating the decertification petition.

The only other incident relied on by the ALO to establish Respondent's support of the decertification campaign was the failure to rehire Olivia Ruiz and her husband Jose Gutierrez until they were ineligible to vote in the election.

[8/] There was some additional testimony regarding statements Beltran made in soliciting signatures. Thus, Jose Torres testified that he was asked to sign "as a rule." However, when he was questioned he indicated that he had to sign "as a ruling for election," and on cross-examination he revealed that he still had no idea what it was he signed. Although Torres further testified that he felt he had to sign or lose his job, the question before us is whether Beltran said anything which could reasonably be taken to indicate that Torres would lose his job. The evidence is simply insufficient to support such a finding.

[9/] Employee Jesus Rubalcava testified that Beltran said that there would be a better medical plan if the union were decertified, but, unlike Gonzales, he did not testify that Beltran said the boss had told him this. It is undisputed that Respondent had medical coverage for its employees prior to the advent of the union. Thus, Beltran's statement may have been nothing more than a comparison. The only other witness who testified about the content of Beltran's "campaign" statement was not credited by the ALO on the grounds that she was "very pro-UFW and appears to have allowed her feelings to color her recollection." ALOD, p. 9.

The ALO finds this example of Respondent's misconduct to be of significance only in light of his finding of an overall pattern of misconduct designed to decertify the union. Since we reject many of those other findings, we find that the failure to rehire Ruiz and Gutierrez is not by itself grounds for setting aside the election. On the basis of this record, we find insufficient evidence of objectionable employer conduct to warrant our setting aside the election.

We shall now consider the effect of Respondent's changing its medical plan after the tally of ballots, but prior to our certification of the results of the decertification election. The NLRB considers unilateral changes in these circumstances to be unfair labor practices. See, e.g., Presbyterian Hospital in the City of New York (1979) 241 NLRB 996 [101 LRRM 1001], which holds that an employer must maintain the status quo with respect to working conditions until the results of the election are certified. This rule was recently strongly rejected by the Fifth Circuit in Dow Chemical Co., Texas Division v. NLRB (5th Cir. 1981) 660 F.2d 637 [108 LRRM 2924], which allows an employer to make changes "at its peril," with the determination of whether there is a violation dependent upon the ultimate resolution of the election.

The National Labor Relations Act (NLRA) provides for union recognition upon proof of majority support either through an election or presentation of authorization cards. Once a union is recognized, an employer may withdraw recognition and refuse to bargain if a union in fact loses majority support or if the

employer has a good-faith and reasonably grounded belief that the incumbent union no longer enjoys the support of a majority of the employees in the bargaining unit. Dayton Motels (1974) 212 NLRB 553 [87 LRRM 1341]; Orion Corp. v. NLRB (7th Cir. 1975) 515 F.2d 81 [39 LRRM 2135]. Whether the filing of a decertification or rival-union petition raise's a good faith doubt of majority support is the subject of much dispute within the NLRB and among the Circuit Courts. In 1972 the Board held that the filing of a decertification petition raised a question concerning representation (QCR), and that although an employer was not obligated to continue bargaining with the incumbent until the QCR was resolved, it was obligated to maintain the status quo with respect to the working conditions of the unit employees. Telautograph Corp. (1972) 199 NLRB 892 [81 LRRM 1337].

While the 8th Circuit concurs with the NLRB, National Cash Register Co. v. NLRB (8th Cir. 1974) 494 F.2d 189, other circuits have disagreed and found that "the naked filing of a decertification petition does not justify a refusal to bargain." NLRB v. Maywood Plant of Grede Plastics (D.C. Cir. 1980) 628 F.2d 1; Allied Industrial Workers v. NLRB (D.C. Cir. 1973) 476 F.2d 868; Rogers Mfg. Co. v. NLRB (6th Cir. 1973) 486 F.2d 644 [84 LRRM 2577].

Under federal law, once it appears that an incumbent union has lost an election, there is a reasonable basis for the employer's good-faith doubt of continued majority support. Accordingly, the employer's duty to bargain is suspended and it need only maintain the status quo as to employees' working

conditions until any election objections are resolved and the Board certifies the results of the election. Presbyterian Hospital (1979) 241 NLRB 996; Dow Chemical, supra, S60 F.2d 637; Trico (1978) 238 NLRB 1306; Turbodyne Corp. (1970) 226 NLRB 522.

The Agricultural Labor Relations Act (ALRA) differs from the NLRA in its requirements and procedures for recognition. The essential requirement for initial recognition is certification, It is an unfair labor practice for an employer to recognize or bargain with an uncertified union. Section 1153(f). Even if there were proof of 100 percent support in the appropriate unit, it is unlawful, under our Act, for an employer to recognize the bargaining representative, or for the union to attempt to force recognition through any means other than the election process. Section 1154(h). Majority support and/or a good-faith belief of majority support do not control. Under our Act, the only means by which a union can be recognized is through winning a secret-ballot election and being certified by the Board.

An employer under the ALRA does not have the same statutory rights regarding employee representation and election as employers have under the NLRA. Under the ALRA, employers cannot petition for an election, nor can they decide to or voluntarily recognize or bargain with an uncertified union. By these important differences the California legislature has indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union; that is left exclusively to the election procedures of this Board. Likewise, whether or not recognition should be withdrawn or terminated must

be left to the election process.

In summary, under the NLRA a union may be recognized once it has proven majority support, whether by an election or otherwise. Under the ALRA a union may be recognized by an employer only after it has been certified pursuant to a Board-conducted election. Once a union has been certified it remains the exclusive collective-bargaining representative of the employees in the unit until it is decertified or a rival union is certified.

Under the ALRA, the rule is as follows: After a union is certified, an employer has a duty to bargain upon request with that union. A filed petition, direction of election, or tally of ballots does not affect that duty. If a "no union" vote prevails in a decertification election or in a rival-union election, the certification of results dates back to the day 'of the election so that no violation can be found, and no remedial order imposed, based on an employer's refusal to bargain from that point forward. This is an application of the "at the employer's peril" doctrine. If a rival union is certified, the employer's duty to bargain switches from the incumbent to the rival on the date of certification. In all other ^cases, the 'employer's duty to bargain with the incumbent union continues uninterrupted. Whether or not a make-whole remedy is warranted for a refusal to bargain will be determined on a case-by-case basis. Our determination will be based on such factors as whether the employer withdrew recognition and refused to bargain because of an honestly-held and reasonable good-faith belief that the Board would ultimately certify that the

incumbent lost the election.

Policy considerations support this interpretation of the statute. An important goal is to encourage stability in bargaining relationships. Once a union is certified, it and the employer should be able to bargain unhindered by real or imagined fluctuations in the percentage of support among employees in the bargaining unit. Since, as we find today, in Cattle Valley Farms and Nick J. Canata (March 25,1982) 8 ALRB No. 24, there are sufficient avenues for rival-union and decertification elections under section 1156.3 and 1156.7, employees are free to either oust or replace the incumbent union if a majority make such a choice in an election. A suspension of the bargaining obligation unfairly prejudices the incumbent union and the majority of employees who voted to have that union represent them. Dissatisfaction among employees is likely to grow if a union is precluded from bargaining once a decertification or rival-union petition is filed. Renewal of the bargaining obligation after resolution of a decertification or rival-union election is likely to find the incumbent in a much weakened bargaining position because of the delay. In addition, a "certified until decertified" rule is easier to administer. The duty to bargain to contract or a bona fide impasse will not hinge on the percentage of support among the employees in the work force, which could fluctuate widely in a short time period, or on whether someone's belief in a loss of majority support is held in good faith or bad faith. The duty to bargain, which springs-from certification, will be terminated only with the certification of the results of a decertification

or rival-union election where the incumbent has lost.[10/]

Applying the "at the employer's peril" doctrine to the instant case, we find that Respondent had no duty to bargain with the UFW after the tally of ballots because we are now certifying the "no union" result of the Election. Accordingly, we conclude that Respondent's unilateral change in its medical plan without prior notice to, or bargaining with, the UFW did not violate section 1153(e) or (a) of the Act, and the allegations in the complaint to that effect are hereby dismissed.

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to bargain with the United Farm Workers of America, AFL-CIO (UFW) or any other labor organization certified to represent its agricultural employees concerning any proposed changes in their working conditions, and the layoff of employees or other effects which may result from such changes.

(b) Interrogating employees concerning how they

[10/] Bee and Bee Produce, Inc. (Aug. 25, 1980) 6 ALRB No. 48 we had not yet considered the effect of decertification or rival elections on the bargaining relationship between an incumbent union and the employer. In Montebello Rose Co. (Jan. 22, 1982) 8 ALRB No. 3 we stated that an employer may not assume a certified union has lost its majority support when no new election has been held. Today we find that the presumption of continuing majority support for a certified union can only be rebutted through its decertification or the certification of a rival union.

intend to vote in a Board-conducted representation election.

(c) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of their rights guaranteed by Labor Code section 1152.

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

(a) Offer employees Emiliano Becerril and Arturo Baca immediate and- full reinstatement to their former or substantially equivalent jobs as irrigators without prejudice to their seniority or other employment rights and privileges.

(b) Make Emiliano Becerril and Arturo Baca whole for any loss of pay and other economic losses they have suffered as a result of their layoff, reimbursement to be made according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at the rate of seven percent per annum.

(c) Preserve and, upon request, make available to the Board or 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 backpay period and the amount of the backpay due under the terms of this Order.

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

(e) Mail copies of the attached Notice, in all

appropriata languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from September 24, 1980, until the date on which the said Notice is mailed.

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

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

(h) 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

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to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 25, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by unilaterally changing our policy of using dual-state irrigators, which resulted in our refusal to rehire Emiliano Becerril and Arturo Baca. 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 farm workers 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 to obtain a contract covering 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 or 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 reinstate Emiliano Becerril and Arturo Baca to their former or substantially equivalent jobs, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their layoff on or about February 1, 1978.

WE WILL NOT ask our agricultural employees how they intend to vote in any election to be conducted by the Agricultural Labor Relations Board.

Dated: NISH NOROIAN FARMS

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 319 Waterman Avenue, El Centro, California 92243; the telephone number is 714/353-2130.

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

Nish Noroian Farms

8 ALRB No. 25
Case Nos. 78-CE-10-E
78-CE-62-E
79-CE-34-EC

ALO DECISION

The ALO concluded that the charge filed on behalf of Emiliano Becerril regarding Respondent's change in its hiring practice, whereby California irrigators would no longer be utilized in Arizona, was not barred by the 1978 settlement agreement between Respondent and the' UFW because it had been specifically excluded. The ALO found that the change in the hiring practice was a unilateral change and as Respondent failed to notify and bargain with the UFW prior to instituting the change it therefore violated section 1153(e) and (a) of the Act.

A decertification election, held on December 27, 1978, resulted in a vote of 21 to 8 for "no union." The ALO recommended that the election be set aside, finding that Respondent's pre-election conduct tended to affect the results of the election. He found that Respondent violated section 1153(a) when its supervisor asked two women workers who they were going to vote for, and when its supervisor watched and followed a union business agent who was talking to the workers in the fields. The ALO recommended that the election be set aside. He concluded that Respondent's unilateral change in the medical plan shortly after the election violated section 1153(e) and (a) of the Act.

BOARD DECISION

The Board found that Respondent's change in its hiring practice violated section 1153(e) and (a) because it resulted in eliminating work in California as well as the Arizona work for dual-state irrigators. The Board found no violation of the Act based on the supervisor's watching and following a union agent who was talking to workers in the field. Respondent violated section 1153(a) when it asked the women workers who they were going to vote for in the election. The Board held that Respondents conduct did not tend to affect the outcome of the election. Accordingly, the Board certified the results of the election. In view of those results, Respondent did not violate section 1153(e) and (a) of the Act when it unilaterally changed its employees' medical plan. An employer acts at its peril once a "no union" decertification result is announced but not yet certified by the Board. When the- "no union" result is certified, as the certification dates back 'to the day of the election, no violation can be found based on unilateral changes effected after the election.

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: NISH NOROIAN FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party/Intervenor.	Case Nos. 78-CE-10-E 78-CE-52-E 79-CE-34-EC
NISH NOROIAN FARMS, Employer, and VICTOR GARCIA, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Recognized Bargaining Agent.	Case No. 73-RD-3-E DECISION

Marion I. Quesenbery, Dressier, Stoll, Quesenbery, Laws & Barsaminan, of Newport Beach, California for the Respondent and Employer _

Chris A. Schneider, of Salinia, California, for the Charging Party and Recognized Bargaining Agent

William B. Eley, of Sacramento, California, for the General Counsel

STATEMENT OF THE CASE

JAMES WOLPMAN, Administrative Law Officer: This case was heard before me on June 26, 1979, March 11, 12, 13, 14 and April 24, 1980, in Blythe, California. The Complaint alleged that the Respondent, Nish Noroian Farms violated sections 1153(a) and (e) of the Agricultural Labor Relations -'Act (hereafter called the Act). The complaint was based on charges filed by the United Farm Workers (UFW), copies of which were served on Respondent. It was agreed that the hearing would be bifurcated and that the initial phase would be devoted to a determination of Respondent's Motion to Dismiss. The factual portion of the hearing was held June 26, 1979. All parties filed briefs in support of their positions and a Ruling issued, denying the Motion to Dismiss and providing that it be incorporated into the record and be subject to review upon issuance of this decision in the same manner as any other ruling made during the course of hearing. It is attached as Appendix I to this Decision.

Thereafter the Complaint was amended to include additional allegations of violations of Section 1153 (a) and (e) of the Act, based on charges filed by the UFW and served on the Respondent. In addition, the Executive Secretary ordered that hearing on certain of the objections to the election held December 27, 1978, be consolidated with the unfair labor practice hearing. The hearing on the charges, as amended, and the objections was held, and all parties appeared and filed briefs in support of their positions.

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

FINDINGS OF FACT

I. Jurisdiction.

Respondent, Nish Noroian Farms, is by its own admission, a sole proprietorship engaged in agriculture and operating in California as Nish Noroian Farms and in Arizona as Nish Noroian Farms of Arizona. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

Further, I find that the UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4 (c) of the Act.

II. The Alleged Unfair Labor Practices.

The complaint, as amended, alleges that Respondent violated Sections 1153(a) and (e) of the Act by unilaterally changing its policy with respect to the use of California employees to irrigate in Arizona and by changing the medical plan covering employees.

The amended complaint also alleges that Respondent violated Section 1153(a) of the Act by interrogating employees through its Supervisor Gilbert Logan.

Respondent denies that it committed the alleged unfair labor practice and alleges certain procedural and substantive affirmative defenses.

III. The Objections to Election.,

The objections to the decertification election held December 27, 1978, deal with certain employer conduct prior to the election which, it is alleged, affected the outcome of that election.

IV. The Facts.

A. The Change in the Use of California Irrigators in Arizona.

The UFW was certified as the bargaining representative of employees at Nish Noroian Farms on November 30, 1976, but it was not until May 8, 1978, that agreement was reached on the terms and conditions of employment.

Emiliano Becerril was a California resident who had. worked for Nish Noroian Farms as an Irrigator both in California and in Arizona. On December 17, 1977 -- while the UFW and the employer were still engaged in bargaining — he and Arturo Baca (also referred to as Bravo), a fellow California resident who also worked in Arizona as an Irrigator, were laid off for lack of work.[1/] I At the time, they were told that they would be rehired when operations resumed. Later on, however, the employer determined that it would change its hiring practice and no longer utilize California Irrigators in Arizona. The change was made without first advising the UFW. Consequently, neither Becerril nor Baca was rehired; nor were they told of the change in practice. Eventually, the UFW filed a charge of discrimination. Collective bargaining continued until May, 1978, when agreement was reached on contract terms and on the disposition of various existing and potential charges. The Becerril charge, however, was exempted from the overall settlement and was eventually dismissed by the Regional Director. Subsequently, the Deputy General Counsel sustained its dismissal as a discrimination charge but remanded it for investigation of whether the change in hiring practice had been unilateral, without required notification and bargaining. Upon investigation, a complaint issued alleging- a refusal to bargain.

Consideration of the charge involves two interrelated questions: one substantive -- was there in fact a unilateral change without notice and opportunity to negotiate; the other procedural -- did the earlier settlement of the other charges and possible charges lay to rest the refusal to bargain aspects of this charge.

[1/] At the hearing the complaint was amended to include Baca as an additional employee affected by the unilateral change in the use of Califonria Irrigators.

The procedural question was the subject of my earlier ruling on the Motion to Dismiss. I there concluded that the Becerril charge -- even in its current reformulation as a refusal to bargain rather than a discriminatory refusal to rehire -- survived the settlement agreement and required adjudication on its substantive merits. One basis for my ruling was that the UFW and the General Counsel were, according to the weight of the evidence, not made aware of the change in policy until after they had arrived at a settlement. .Another basis was my interpretation of the settlement language in the light of ALRB practice and policy.

When the hearing resumed after my ruling, the Respondent introduced additional-- evidence to establish that both the Board and the UFW had been made aware of the change prior to settlement. Such evidence, if accepted, would serve to undercut one of the bases for my earlier procedural ruling and would also establish, on the substantive merits, that notice had been given.

While there is some question as to the right of the Respondent to relitigate the procedural issue which was the subject of the initial phase of the bifurcated hearing, I shall treat the new evidence as though reconsideration had been requested and granted.

The new evidence which was introduced came primarily from David Agnew, an attorney who represented Nish Noroian Farms during negotiations. He indicated that as early as mid-March, 1973, the termination of an Irrigator (presumably Bercerril) had been discussed in negotiations in the context of the UFW's fear that, unless certain contractual protections were obtained, Nish Noroian Farms would cease using California residents to work in Arizona. Agnew's testimony, up to that point, is identical to what he had said in the earlier hearing — testimony which I there found in-• sufficient to put the union on notice that a change had occurred * two months earlier. In the reconvened hearing, however, Agnew was immediately asked:

> "Q. Well, in that meeting was the union made aware that the company was no longer hiring California irrigators for Arizona irrigation work?''
>
> "A. Yes. And there were reasons — they had reasons why they were doing that. "[IV, 7 (.8-13)].

With, all due respect, I simply cannot accept that leading question and his response as an accurate portrayal of the March meeting. Not only does it run counter to the testimony of Ann Smith and Tom Dalzell of the UFW, who, unlike Agriew, are experienced labor negotiators, but it does not fit with his previous difficulty in pinning down with any precision what was said about the issue. Even more significantly, it flies in the face of the two letters he wrote to Dalzell in April (GC Exs.3 & 4), especially that of April 23, 1978, which explains Becerril's layoff as simply due to lack of work.. I would suggest that the source of Agnew's confusion is his error in ascribing to his undated page of notes (Ess. Ex.2)

a much earlier origin than is justified. Three of the items covered on those notes tie directly into page 2 of Respondent's Exhibit B, a document which was generated in response to Respondent's Exhibit A, dated May 5, 1978. Exhibit E, rather than negotiation notes, appears to be the information Agnew jotted down in talking to management so as to prepare Respondent's Exhibit 3.

That being so, no credible evidence suggests communication of the change in policy prior to the telephone conversation in May when the items on Exhibit B were discussed. 2/

Turning to that conversation, there is, on the one hand, Agnew's testimony that he read everything on Respondent's Exhibit B verbatim to Dalzell either on Saturday, May 6, or on Sunday, May 7, including:

> "4. NNF intends to follow its past practice of using its California employees to farm its Arizona land EXCEPT as to irrigators. NNF now requires its Arizona irrigators to live in Arizona close to the land they are irrigating."

On the other hand, there is Dalzell's very definite testimony that before May 8, 1978, ". . .the change in policy for irrigators, which would have triggered in my mind a possible E violation. . .had never been raised." [I, 40 (26)-41 (2J].

In seeking to resolve this obvious conflict, it is helpful to examine with some care Respondent's Exhibit B and then to compare it with the recognition clause which was actually signed. Exhibit B reads: "NNF intends to follow its past practice of using its California employees to farm Arizona land EXCEPT as to irrigators. . . .", thus acknowledgeing that the policy on irrigators should not be considered a "past practice", but a new "EXCEPTION" The Recognition clause signed, at most, two days later, says that Nish Noroian Farms will continue its "past practice" of using California workers in Arizona [Ex. B to GC Ex. IF], no "EXCEPTION" for irrigators is spelled out.

One of two conclusions must follow: Either the new "EXCEPTION" was not communicated to Dalzell, or it was communicated and the parties agreed to eliminate it from the Recognition clause which they accepted almost immediately thereafter. 3/ Either way Nish Noroian Farms would have some sort of obligation to Becerril -- either under its labor agreement or else under the Act.

2/ I do not accept Respondent's interpretation of Ann Smith's testimony as indicating earlier knowledge. She appears merely to have assured herself that no additional Arizona irrigators would be hired, and that California irrigators would, "Do work over there I in Arizona] as they had done in the past." -- just the opposite of what Respondent claims for the statement.

3/ The possibility that the parties meant one thing by "past practice" on May 7 and another on May 8, makes no sense at all.

I cannot conclude that the issue was resolved in the contract. There is just too much evidence negating any meeting of the minds. That leaves only the first alternative: The change was not communicated to Dalzell. I therefore conclude that, under the circumstances described above and upon a careful consideration of the entire testimonial demeanor of Dalzell, Smith and Agnew, the change was not communicated prior to the signing of the agreement and settlement on May 8, 1978. Furthermore, Agnew never suggests that the Board was made privy to the information he claims to have imparted to the UFW; and its knowlege would be crucial to a finding favorable to the Respondent on the procedural issue raised by the Motion to Dismiss.4/

B. The objections and Unfair Labor Practice Allegations Involving the Decertification Election and its Aftermath.

The remaining unfair labor practice allegations and the objections all concern the decertification campaign and its aftermath. Because both objections and charges arise out of the same course of events, they are here considered together.

1. Background. On December 27, 197S, an election was held to determine whether the UFW would remain the collective bargaining representative for employees. The vote was 21 to 9 (with 2 challenged votes) in favor of decertifying the UFW. Accounts of many of the crucial events of the campaign vary widely. In order to determine what did happen, it has been necessary to rely heavily on determinations of credibility, on the consistency of testimony among witnesses, and on reading certain ambiguous testimony so as to make it reasonable and consistent.

2. Victor Garcia. The idea for the Petition for Decertification appears to have originated with employee Victor Garcia. Garcia did not testify and there is nothing in the record to indicate that in resorting to the mechanism of decertification he was anything other than a unit employee, acting on his own, who had become disenchanted with his bargaining agent. There is, therefore, no reason to believe that Mish Noroian Farms instigated the petition.

Garcia was, however, involved in an incident which is uncont-roverted and which does indicate improper employer conduct. Jesus kubalacava was hired just prior to the election. Immediately after supervisor Gilbert Logan had completed the normal hiring sign up, Garcia approached him and told him that he "needed to sign another paper"--the decertification petition. This was done while Logan was within earshot, looking on. Logan could and should have taken

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4/ I do not accent Respondent's argument that, by signing the subsequent formal settlement in August, after he knew that there had been a change in policy, Dalzell abandoned the unfair practice charge. The later agreement was, by its author's (Byron Georgioun) own testimony, merely meant; to incorporate the understanding-achieved on May 8, 1979.

action to prevent Rubalcava from gaining the false impression that his signature was required as part of the hiring process; yet he stood by and did nothing.

3. Ado If o Beltran. The worker whose activities figured much more prominently in the hearing than Garcia was Adolfo Beltran. Beltran was a long time employee of Nish Noroian Farms who worked primarily as an Irrigator. There is -- no question that the employer iravored Beltran by giving him assignments, such as yard work at the owner's home, to reward his long service, and I find nothing wrong with that. It is also clear from Beltran's own testimony that he was vehemently anti-UFW. In a. speech shortly before the election he described the UFW representatives as treating workers, “as if we were dirty animals." Those are strong words. They and his demeanor in testifying indicate his anti-unionism was uniquely his own, not something engendered or especially nurtured by management. It is equally clear that management must have been aware or his feelings; he spoke out freely and made no attempt to hide his convictions.

I do find, however, that those convictions were on a number of occasions used and exploited by management in an improper fashion. This was done in two ways: First of all, by deliberately using him as a conduit to let employees know what the employer would be willing to do for them if they would repudiate the UFW; and secondly, by assigning him to work along with the thinning and weeding crew as a gadfly whose job was not so much to get the work done as to insure that his fellow workers received maximum exposure to his anti-union message.

a. The assignment to "the thinning and weeding crew. There was considerable -- and conflicting -- testimony with respect to Beltran' s activities while assigned to the crew. The timing of the assignment -- shortly before the election — is noteworthy, but it cannot, in view of the employer's testimony that at the time he was not needed to irrigate, be accorded conclusive or controlling significance. The witnesses offered by the UFW all agreed that Beltran' s assignment was that of a raitero -- a worker who moves from row to row helping the slower members of the crew so that work progresses evenly through the field. A raitero has the opportunity, available to few others, to spend time with all of the different members of the crew — a definite advantage in electioneering. Three of the UFW witnesses also agreed that he spent a significant amount of work time moving from row to row, urging his anti-UFW views; the fourth witness recalls seeing him speaking to other workers but did not hear what was said. All four- agree that he did little actual work and was allowed to keep very loose hours, coming late and leaving early, all without objection from supervision. The witnesses presented by Respondent all testified that they had not seen Beltran "goofing off", jumping from row to row, or talking against the union during work time. They did concede, however, that his hours were not usual. On balance, their testimony is not as credible as

that of the UFW witnesses. Their demeanor tended to be more guarded, and their answers were given without explanation and without the variation in language and detail which enhances credibility. I conclude that, for whatever reason, they chose to blind themselves to Beltran's activities or, having witnessed them, to forget what they had seen and heard.

This conclusion is born out by Beltran's own testimony. He simply denied everything, even things which other employer witnesses had readily admitted. Even more important is the inherent improbability that anyone who was so vehemently anti-UFW would have been so little involved in the decertification effort. He claims never to have discussed his feelings with employer representatives, to be almost the last to have signed the petition, never to have helped collect signatures, never to have discussed the petition with other workers in the field, never to have visited employees at home (though he subsequently reversed himself on this), and even, for a while, not to have been the company observer at the election. His testimony is simply not credible.

I therefore find that the evidence is sufficient to warrant the inference that his assignment as raitero was for the purpose of seeing' to it that workers would be urged to vote against the UFW and that, in doing so, the employer was at least in part paying Beltran to engage in anti-union campaigning.

b. The visit to Santos Gonzales' home. After first denying that he had visited any employees at home to solicit their signatures on the decertification petition, Beltran later admitted to having visited Santos Gonzales' home in the company of Victor Garcia, but only as a passive spectator. He claimed that Garcia merely asked Gonzales to sign the petition and that little or nothing else was said.

For the reasons already mentioned, I do not find Beltran's testimony credible. More was discussed and Beltran was not a silent onlooker. I do credit Gonzales; he was direct and very careful to express himself accurately. According to him, Beltran said that he had spoken with the boss and been told that, if the UFW were decertified, workers would be guaranteed all present benefits, plus the money which was now going into union dues, as well as a better medical plan.

Nor do I have any reason to doubt that, in relaying the guarantee of benefits, Beltran was acting as a conduit for management. Using Beltran in that fashion was fully consistent with management's goal in assigning him to the thinning and weeding crew and is corroborated by the eventual change which was made in medical, coverage.

c. Other conduct of Beltran. I do, however, reject the claim that, by selecting Beltran as its election observer, the employer somehow increased or enhanced its previous misconduct. It remained free to designate any worker it desired. So long as that person did not engage in further objectional behavior while functioning in the role of observer the choice is protected. Seldom are observers neutral. Neutrality is only required in carrying out their

their tasks as observers. To rule otherwise would place all parties in the difficult situation of having the seemingly ministerial act of picking an observer become a possible source of jeopardy.

Nor do I find anything objectionable in the remarks which Beltran made during the meeting which preceded the election. He spoke out of his own strong anti-UFW convictions, not because he was put up to it or coached by the employer. Nor did he relay promises from management as he had done in the Gonzales home. The testimony of the one witness who said he did Olivia Ruiz--does not comport with the other UFW witnesses, including experienced organizers whose ears would be attuned to such objectionable statements. Ruiz was very pro-UFW and appears to have allowed her feelings to color her recollection.

4. The Meeting. Even if nothing objectionable was said at the meeting, there still remains the question of whether the presence of supervisory employees created an atmosphere of surviellance and intimidation.

The most coherent account of the meeting was given by Alfredo Figueroa, the UFW volunteer who spoke to the assembled workers that day. He indicated that when he arrived at least one supervisor (Rafael Alcantar) 5/ and one worker closely identified with management (Serafin Vasquez) were already there with their company pickups, and that before his speech began another supervisor (Gilbert Logan) arrived. Somewhat later, probably during the UFW presentation, Jack Edmiaston, Nish Noroian's superindentent arrived in his pickup.

There is little to suggest that the presence of Alcantar, Vasquez and Logan was unusal. Regardless of whether the meeting occurred at lunch as some witnesses believed or after work as others testified, I find that their initial presence was a normal incident of their work duties. Edmiaston's arrival might be seen as a little more out of the ordinary, but his presence left so weak an impression on the witnesses who testified that it cannot furnish a basis for a finding of intimidation or surviellance.

Before the meeting began Figeroa went over and had a friendly conversation with Alcantar and Vasquez; they even spoke about the coming election. Figeroa did not ask them to leave and said nothing to indicate that he considered their presence intimidating.

That leaves only Logan. Gerardo Puente, the UFW organizer who accompanied Figueroa, testified that he did ask Logan to leave but that Logan removed himself a short distance and remained. His continued presence and the lack of participation by the workers does suggest the possibility of intimidation.

5/ There was some question as to Alcantar's supervisory status. While little evidence was offered on the issue, it is uncontroverted that he went to the home of Maria and Jose Torres and offered them work. This, together with the way he identified himself with supervision at the meeting, is sufficient for our purposes here.

On the other hand, Figeroa actively sought to involve the management representatives in his presentation by alluding to his friendly relationships with them. His cordial acceptance and utilization of their presence, together with their initial justification for being there, the conflict in the evidence over the amount of attention they directed to workers, and finally the testimony concerning the difficulty attendant to getting the company pickups out of the confined area at the edge of the field, all serve to neutralize the inference of employer misconduct; I therefore find the evidence insufficent to sustain a finding that supervisors were present at the meeting for the purpose of surviellance and/or intimidation. Dan Tudor & Sons (1977) 3 ALRB No. 69; Tomooka Brothers (1976) 2 ALRB No. 52. Indeed, to borrow a phrase from Dan Tudor, Figeroa was the person who "intentionally interjected [their]presence."

5. Gilbert Logan. Aside from the incident already described when supervisor Logan stood silently by while Victor Garcia gave a newly hired employee (Rubalcava) the false impression that signing the decertification petition was a necessary part of the hiring process, there are two other incidents in which misconduct on Logan's part is alleged.

One occurred when employees Carmen Sanchez and Elvira Nunez Fierro were working in the fields shortly before the election. Both testified that he approached them and asked for whom they intended to vote. They replied that they did not know.

Logan died on November 3, 1979, and so his version or the incident will never be known; however, not only did both' women corroborate each other but they both impressed me as fair minded, direct and careful to express themselves accurately. I therefore credit their testimony and find that Logan was guilty of wrongful ; interrogation. The fact that neither testified to subjective feelings of fear or intimidation does not mean that they did not experience such feelings. The standard is an objective one requiring only that the questioning be such as may reasonably be said to constitute intimidation. Given the question and its context, I find that it had such a consequence.

The other incident involving Logan was described by UFW organizer Gerardo Puente. He was talking with workers in the field before the election when he noticed Logan standing by his company pickup, 250 to 350 yards away, looking toward the crew with binoculars .

In view of the fact that Logan regularly used binoculars in observing work and the lack of testimony to indicate that the employees with whom Puente was speaking were aware of being watched, there is insufficient evidence upon which to premise a finding of surviellance.

6. Jack Edmiaston. Puente also testified that while he was in the fields during working hours talking about the election, super-

indentent Edmiaston would move along with him as he went from worker to worker, always staying close enough to hear what was being said. During this time, he noted a reluctance on the part of workers to converse.

Although Edmiaston was entitled to be present at the work site, he was not justified in, following Puente as he moved from worker to worker. To do so has the objective effect of inhibiting worker participation and creating the impression of surviellance. Edmiaston denies having done any such thing, but I find Puente's description of the event more presuasive than Edmiaston's terse denial.

7. The Failure to Rehire Union Supporters until the Eligibility Date Had Passed. Olivia Ruiz and her husband Jose Guiterrez were hired in November, 1978. She had previously worked for Nish .Noroian Farms in 1976. After working a few weeks, both were laid off and not rehired until just after the eligibility cut-off date. Prior to the date, no attempt had been made to contact them about returning to work. Just before its expiration Maria and Jose Torres, neither of whom had ever worked for Nish Noroian Farms before, were hired in. Maria Torres is an elderly woman and had told the management representative (Rafael Alcantar) that she had never done thinning and weeding work before.

I have already commented on Ruiz's strong UFW bias (supra, page 9). It is likely that management too was aware of her feelings. She had been involved in a demand for time and a half for Sunday work back in 1976, a year following the original union election and the year that the certification finally issued.

I do find it unusual that two persons who had never worked for Nish Noroian Farms before, one of whom had no experience, were hired in, while two recent layoffs, husband and wife, one -- obviously sympathetic to the aims of the UFW, were kept on layoff status until the eligibility period had passed. Standing alone, that would probably not be enough to conclude that there was a wrongful refusal to rehire, but when it is seen-against the background of the employer misconduct already described, it takes on a different aspect, and the inference that the timing was deliberate becomes compelling. I therefore conclude that Nish Noroian Farms acted intentionally to defer the rehiring of Ruiz and Guiterrez until the eligibility period had passed.

8. The Change of Medical Insurance Coverage. There is no disagreement as to the change in medical coverage. On January 27, 1979, the employer, without notice or bargaining with the UFW changed its medical insurance program. This occurred subsequent to the election and tally of ballots, but in the absence of a certification of the results, something which is to abide ruling on the within objections.

CONCLUSIONS OF LAW AND RULINGS ON OBJECTIONS

I. The Change in the Use of California Irrigators in Arizona.

Turning first to the additional evidence which Respondent introduced in urging reconsideration, of the denial of its earlier Motion to Dismiss, I conclude that—based on the additional findings of fact made in this decision—there is no reason to reverse my earlier Ruling. The evidence suggesting that the unilateral change was communicated to the UFW before the settlement is unconvincing, and there is no evidence indicating communication of the change to the ALRB.

That leaves the closely related substantive issue of whether there was a refusal to bargain. Having found as a factual matter that Nish Noroian Farms changed its established hiring and work assignment practice in late January, 1978, by eliminating the use of employees who resided in California as Irrigators at its Arizona operations, and having also found that the change was made without informing the UFW, who was at the time the certified bargaining agent for the affected workers and, as such, entitled to notice and the opportunity to bargain about the impact of the change on their wages, hours and working conditions, the conclusion is inescapable that the unilateral change constituted a violation of Section 1153(e) of the act, and derivatively of Section 1153(a). There can be no question that the change directly curtailed the hours and earnings of certain unit members much in the manner subcontracting affects employees, and therefore was a mandatory subject of bargaining under Section 1155.2(a) of the Act. Fibreboard Paper Products Corp. v NLRB (1964) 379 U.S. 203. Moreover, it has long been recognized under the National Labor Relations Act that a unilateral change involving a mandatory subject of bargaining is, absent special circumstances not relevant here, a per se violation. NLRB v. Katz (1962) 369 U.S. 736. The ALRB has adopted the same position; the violation is established by proof of the unilateral change itself, subjective bad faith need not be shown. Kaplan's Fruit and Produce Co., Inc. (July 1, 1980} 6 ALRB No. 36; P.P. Murphy produce Co., Inc. (1979) 5 ALRB No. 63; Adam Dairy (1978) 4 ALRB No. 24. In Murphy the Board went on to say that a unilateral change, "in addition to constituting an independent violation, acts to support an inference of bad faith." (Decision, p. 12).

While resort to per se rules in establishing violations should —given the myriad circumstances which come into ?lay in agricultural and industrial life—be undertaken with care, the necessity that a bargaining agent be kept apprised of issues which directly affect employees is so essential to carrying out its statutory obligation to represent employees, that employer conduct which— intentionally or unintentionally—ignores or circumvents the agent's role simply cannot be countenanced.

II. The Unfair Labor Practices Involving the Decertification Election and its Aftermath.

A. The Meeting.

The evidence is insufficient to conclude that the supervisors in the vicinity of the meeting held- shortly before the decertification election were engaged in surviellance or in creating the impression of surviellance so as to intimidate workers in the exercise of their rights under Section 1152. The proof presented simply does not meet the standard enunciated in Tcmooka Brothers, supra, and Dan Tudor & Sons, supra, requiring that the supervisory presence be for the purpose of surviellance and/or intimidation. The UFW representative accepted and utilized the management presence as a part of his presentation; the supervisors were initially justified in being in the area in connection with their work duties; there is credible evidence that they did little or nothing to interject their presence during the meeting; and it would have been diffucult for them to leave the congested area where employees were assembled. I therefore conclude that there was no violation of Section 1153(a) in connection with the meeting.

B. Gilbert Logan's Interrogation of Carmen Sanchez and Elvira Nunez Fierro.

Having found that supervisor Logan did question Sanchez and Fierro as to how they intended to vote, it remains only to determine whether this misconduct was, as the Respondent maintains, de minimus. The fact that neither woman testified to her subjective feeling of fear or intimidation is not enough since the test is an objective one. Abatti Farms, Inc. (1979) 5 ALRB No. 34, aff'd__C.A.3d __ (June 24, 1980, 4 Cir. No. 18961). Perhaps, had the interrogation occurred in a vacuum without the backdrop of mis-conduct and anti-union animus described herein, the de minimus argument would be more convincing. But the interrogation was not isolated; it was part of an overall course of conduct. I therefore conclude that it violated Section 1153 la) as tending to restrain and interfere with the rights protected by Section 1152. Dave Walsh Company (1978) 4 ALRB No. 84; Tom Benqard Ranch, Inc. (1978) 4 ALRB No. 33; Akitomo Nursery (1977) 3 ALRB No.73.

C. The Unilateral Change in Medical Insurance Coverage.

After the election, but without certification of the results, the employer unilaterally changed the medical coverage without consulting with the UFW and allowing it an opportunity to bargain. While questions of de minimus or the retroactivity of decertification might warrant consideration if the election objections were overruled, they need not—in view of the ruling sustaining the objections (infra, Section III)--be considered here. The unilateral change is, under the authorities cited in the Conclusions

dealing with the change in the use of Irrigators (supra, Section I) , a per se violation of the Act, without the necessity of establishing subjective bad faith. 6Y Kaplan's Fruit and Produce Company, Inc., supra; O.P. Murphy Produce Co., Inc., supra; Adam Dairy, supra. 7/

III. The Objactions to the Election.

A. Issues to be Determined.

Three issues were presented in the Executive Secretary's determination of objections:

> "1. Whether the employer initiated, financed, encouraged, aided or abetted the decertification campaign.
>
> "2. Whether the employer refused to rehire certain employees, active Union supporters, making them ineligible to vote, and whether such conduct had an effect upon the election.
>
> "3. Whether the employer through its supervisors created an atmosphere of surviellance and intimidation and whether this conduct had an effect upon the election." [UFW Ex.F].

B. The Specific Incidents.

Taking each of the incidents upon which findings of fact were made, I conclude:

1. The decertification petition was initiated by employee Victor Garcia without the instigation of management. The objection relating to employer instigation is therefore denied.

2. Supervisor Logan should not have stood idly by and allowed employee Rubalcava to gain the false impression that his signature on Garcia's petition was a required incident of the hiring process. Doing so encouraged, aided and abetted the decertification campaign in an improper fashion and served to interfere with Rubalcava's right to freely chose his bargaining agent.

6/ The suggestion in. Nish Noroian's testimony that—based on the ambiguous statement of a UFW representative named "Chino" after the election that, "It's the last time you'll see us and I won't bother your people anymore"--the UFW had abandoned its bargaining status, was not sufficient to overcome the clear insistence on perserving those rights as evidenced by the filing of objections

7/ See considerations and conclusions regarding the bargaining status of the UFW after the filing of a decertification petition as set forth infra at page 17.

3. By assigning Adolfo Beltran to work as a raitero on the thinning and weeding crew shortly before the election and by sanctioning his casual work habits, knowing full well that he would spend significant amounts of time disseminating his anti-UFW views, the employer intentionally exploited Beltran for its own ends in a manner which interfered with the "realistic laboratory standards" required of ALRB elections. D'Arrig'o Bros, of California 11977) 3 ALRB No. 37; and see General Knit of California (1978) 239 NLRB No. 101, 99 LRRM 1687. By so doing the employer improperly encouraged, aided and abetted the decertification campaign. Furthermore, to the extent Beltran was paid for spending his time campaigning, the employer may legitimately be said to have helped finance the campaign, thereby interfering with the right of free choice of a number of members of the thinning and weeding crew.

4. With respect to the visit which Beltran and Garcia paid on Carmen Sanchez at home, L find that the employer intentionally utilized Beltran as a conduit to inform Sanchez of what benefits it would extend to him and other employees if they repudiated the UFW. By so doing the employer again interfered with realistic laboratory conditions for an election and improperly aided and abetted the decertification campaign, thus interfering with Sanchez free choice.

5. Beltran's comments at the meeting and his selection as Respondent's election observer do not, for the reasons set forth in the findings of fact, constitute objectional conduct.

6. Likewise, the presence of supervisors at the meeting does not, based on my findings and conclusions dealing with the unfair labor practice charge (supra, pp. 9-10, 13), constitute objectionable conduct.

7. On the other hand, the findings and conclusions with respect to the interrogation by supervisor Logan of employees Carmen Sanchez and Elvira Nunez Fierro (supra, pp. 10, 13) mandate a determination that such interrogation created an atmosphere of surviellance and intimidation which affected the free choice of the two women.

8. There is insufficent evidence to establish Logan's alleged use of binoculars to engage in surviellance of employees talking with UFW organizers, and so the objection relating to that incident is denied.

9. The behavior of superintendent Edmiaston in following UFW representative Puente as he went from worker to worker was, in the circumstances here found to exist, sufficient to meet the standards for surviellance and intimidation set forth in Tomooka Brothers, supra, and Dan Tudor & Sons, supra. Edmiaston interjected his presence so as to create the impression of surviellance, thus establishing—regardless of his initial justification for being in the vicinity—that his eventual purpose was intimidation and surviellance. His conduct had the effect of interfering with employee free choice.

10. Finally, in the factual circumstances here found, including management's overall course of anti-union conduct, I conclude that the failure to rehire Olivia Ruiz and Jose Guiterrez was a deliberate act aimed at making them ineligible to vote in the decertification election, thus interfering with their right of choice.

C. The Overall Effect of the, Conduct Objected To.

The crucial inquiry in cases involving election objections is whether the cumulative impact of the misconduct found is serious enough to undermine the integrity of the election. Harden Farms of California, Inc. (1976) 2 ALRB No. 30. This occurs when there is a reasonable basis for believing that the conduct had an effect upon its outcome. D'Arrigo Bros, of California, supra, Sam Andrews & Sons (.1977) 3 ALRB No. 45.

In making such an assessment, the number of eligible voters (or voters who should have been eligible), the number participating in the election, the margin of balloting, the number of persons directly or indirectly affected by the objectionable conduct, and the seriousness of the conduct must all be taken into account.

Here upwards of 32 persons were eligible. 8/ The vote was 21 to 8 for decertification, with two challenges and one void ballot. This means that had 7 to 9 votes been cast differently the outcome would have been affected. The individual incidents numbered 1, 4, 7 & 10, above, directly involved 6 named workers, 9/ and the incidents involving Beltran's assignment as a raitero and Edmiaston's surviellance involved an additional unspecified number. It, of course, cannot be known how many of these voters, despite, employer misconduct, nevertheless cast their ballots for the UFW. The incidents themselves were enough, in each case, reasonably to have affected the employee (s) concerned,' although none rise to the level of seriousness of, say, group dischages or physical intimidation which would have had a ripple effect throughout the voting unit.

Taking all these factors into account, I conclude that the impact was widespread enough such that there is a reasonable basis for believing that the conduct could have had an effect on the outcome. I therefore recommend that the election be set aside.

8/ 34 of Ruiz and Guiterrez did not vote subject to challenge.

9/ Rubalcava, Gonzales, Sanchez, Fierro, Ruiz, and Guiterrez.

REMEDY

I. The Objections to the Election.

Having found the overall impact of the employer misconduct: sufficient to have affected the outcome of the election, I recommend that the previous election be set aside and a new one held at such time and circumstances as the Board nay determine appropriate.

In order to eliminate any question as to the status of the UFW during the extended interregnum since the filing of the decertification petition, I conclude that the petition itself was not so tainted by employer action as to be itself invalid. The factual basis for this conclusion is my finding of lack of proof of management's instigation of the petition and the fact that Beltran's anti-unionism was neither engendered or nurtured by management. That being so, the employer has been under no obligation to engage in affirmative bargaining with the UFW since the petition was filed. Telautograph Corp . (1972) 199 NLRB 892, 31 LRRM 1337; see Glass Container Corp. (1979) 243 NLRB No. 108 (ALJ Dec., p. 14), 102 LRRM 1015 . "This dispensation from affirmative bargaining obligations does not, however, extend to the unilateral change in terms existing at the time of the filing of the petition. The reason being that the purpose of the Telautograph rule is to preserve the status quo pending resolution of the question concerning representation. The substitution of another medical plan altered the status quo.

II. The Refusals to Bargain.

The ALRA, unlike the NLRA, specifically provides for a make whole remedy in cases involving refusals to bargain. Section 1160.3. That provision has been the subject of extensive litigation, including decisions, appeals , remands and decisions on remand. See J.R. Norton v. ALRB' (1979) 25 Cal.3d 1, 150 Cal.Rptr. 710 on remand, 6 ALRB No. 25, and companion cases: 5 ALRB Nos. 27, 28, 29, 30, 31 & 32. The Norton line of cases all concern the invocation of the make whole remedy in situations where the employer has sought to test the validity of representation proceedings by refusing to bargain. That is not the situation here. Both of the refusals to bargain arise out of unilateral changes in working conditions in the face of an acknowledged and established bargaining relationship. The unilateral changes are serious enough to amount to per se violations, not simply a good faith effort to carry the representation issue to the courts. Measurement of the injury does not involve the nebulous question of what would the onion have obtained. for its workers if there had been bargaining, but rather how much was lost by the employer's refusal to honor the bargain which had already been struck- or the practice already in existence. Moreover, in Fibrefaoard Paper Products Corp. v. NLRB, supra at 215-215, the U. S Supreme Court found no difficulty in allowing

make whole relief for a unilateral change without the specific language of Section 1160.3. Make whole relief is therefore appropriate here. Kaplan's Fruit and Produce Co., Inc., supra; O.P. Murphy Produce Company, Inc., supra; Adam Dairy, supra.

With respect to the change in the use of California irrigators to work in Arizona, such relief should entail rescission of the unilateral change, an offer of unconditional reinstatement, and a determination of the loss of wages and benefits to Becerril and Baca proximately caused by the change. Such relief should begin with the change on February 1, 1978," and will necessarily extend to the point where it can be established the Becerril and Baca, living in California, cannot or could not perform the Arizona work because of changes in irrigation procedures, or to the point where they are unconditionally offered reinstatement 10/, or to the point where the company has complied with its obligation to bargain, either by reaching agreement with the UFW or by negotiating to an impasse, whichever of the above alternatives occurs first. The calculation of injury should be supervised by the Regional Director in the same manner as in back pay proceedings. 11/

As for the change in medical coverage, should the UFW so demand, I recommend that it be rescinded. In addition, it will be necessary, in the course of compliance proceedings, to determine what, if any, actual losses employees have suffered (as distinguished from premium losses suffered by the UFW plan) because of the difference in coverage of the two plans. It may be that there was no loss of coverage and therefore no necessity for make whole relief. Kaplan's Fruit 'and Produce Co., Inc., supra.

III. Interrogation of Employees.

With respect to the interrogation of employees in violation of Section 1153 (a), I recommend that the Board require management to cease and desist from such conduct and take the affirmative action specified in the proposed order.

10/ I find that the reinstatement offer made to Becarril in September, 1979, is not an offer which served to cut-off the employer's liability. The condition that he be available in Arizona on 30 minutes notice was not justified by the demands existing at the time. It may, however, be that some such condition would now be justified. That will have to be left for determination in the course of compliance proceedings.

11/ General Counsel argues that, the 7% interest on back pay is no longer reasonable and should be increased. That rate has been utilized by the Board since its outset and is still being used. Sunnyside Nurseries, Inc. (1977) 3 ALRB No. 42; High &_ Mighty Farms (June 19, 1980) 6 ALRB No.34. I am constrained to follow that precedent. Argument to increase the rate of interest is something which will have to be addressed to the Board itself.

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

ORDER

By authority of Labor Code section 1160.3, the Argricultural Labor Relations Board hereby orders Respondent Nish Noroian Farms, its owner, agents, successors, and assigns to:

1. Cease and desist from:

(a) Instituting unilateral changes in the use of California Irrigators to work in Arizona or in the medical plan available to employees or in any other term or condition of their employment without first notifying and affording the UFW a reasonable opportunity to bargain with respect thereto.

(b) Interrogating employees concerning whom they intend to vote for in the decertification election or concerning any other of their union activities or concerted activities for the purpose of mutual aid or protection.

(c) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code section 1152.

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

(a) Revoke the unilateral change in the use of California Irrigators to work in Arizona and in the medical plan made available and restore the practice and plan in effect prior to these changes, if the UFW as the exclusive representative of Respondent's employees, so requests, in accordance with Adam Dairy (1978) 4 ALRB No. 24.

(b) Make employees whole for any losses they may have suffered by reason fo the unilateral changes. In so far as such make whole remedy involves back pay, it is to be computed pursuant to the formula used in Sunny side Nurseries, Inc. (.1977) 3 ALRB No. 42, such make whole period to begin at the time of the change: February 1, 1978 for the Irrigators and January 27, 1979 for the medical plan, and to continue until agreement or a bona fide impasse is reached in accordance with O.P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63. Or, in the case of the Irrigators, earlier if changed procedures have made it impossible to live in California and irrigate in Arizona.

(c) Offer to Emiliano Becerril and Arturo Baca immediate and full reinstatement to their former or substantially equivalent jobs as Irrigators unless the requirements for the performance of those jobs have changed such that Becerril and/or Baca can no

longer carry them out, such issue to be determined by the Regional Director as a part of the complaince proceeding.

(d) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reinstatement under the terms of this order.

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

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

(g) Mail copies of the attached Notice in all appropriate languages, within 20 days from receipt of this Order to all employees employed during such payroll periods as the Regional Director may determine appropriate.

(h) Arrange for a representative of the Respondent or a Board agent to distrubute copies of, and read, the attached Notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall be at such time(s) and place (s) as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The workers are to be compensated at their hourly-rate for time lost at this reading and the question-and-answer period. The Regional Director is also to determine any additional amounts due workers under Respondent's incentive system as well as rate of compensation for any nonhourly employees.

(i) Hand a copy of the attached Notice to each employee hired during the next 12 months.

(j) Notify the Regional Director in writing within 20 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

(k) It is further ORDERED that all allegations contained in the complaint and not found herein to be in violation of the Act are hereby dismissed.

NOTICE TO EMPLOYEES

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

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

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

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

Because this is true we promise that:

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

Especially:

WE WILL NOT change your working conditions without first meeting and bargaining with the UFW about such matters because it is still the representative chosen by our employees.

WE WILL revoke our changes in the use of California Irrigators to work in Arozona and in the Medical. Plan applicable to you, if the UFW as your bagaining representative, requests us, to do so.

WE WILL make those of you who were affected by such changes whole for any losses of pay or coverage which resulted from the change in the medical plan and the change in the use of California Irrigators in Arizona.

WE WILL offer Emiliano Becerril and Arturo Baca full re-instatment to their former jobs or equivalent jobs so long as they can meet the current requirement for the job.

WE WILL NOT question or interrogate you about how you intend to vote in the decertification election or about your union activities or other concerted activities for the purpose of mutual aid or protection.

DATED: NISH NOROIAN FARMS

By: _____

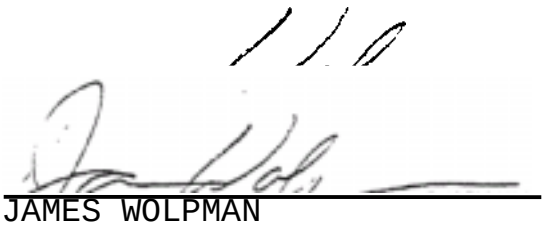
Title: _____

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

DO NOT REMOVE OR MUTILATE.

3. It is finally ORDERED that the election held in Case Number 78-RD-3-E on December 27, 1978, be and hereby is, set aside. A new election is to be held at such time and in such place as the Regional Director shall determine appropriate.

DATED: July 19, 1980.



JAMES WOLPMAN
Administrative Law Officer