San Clemente, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN CLEMENTE RANCH, LTD., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 78-CE-20-X 78-CE-22-X 78-CE-34-X 8 ALRB No. 29

DECISION AND ORDER

On January 28, 1980, Administrative Law Officer (ALO) Kenneth Cloke issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each timely filed exceptions.

Pursuant to the provisions of Labor Code section 1146, 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[1/] and the ALO's Decision in light of the exceptions and briefs and has decided to

[1/] Following issuance of the ALO's Decision, Respondent moved to reopen the record to admit evidence that the discriminatees had all returned to work for Respondent. Respondent asserts that this fact disproves the basis for the ALO's conclusions by negating any inference of anti-union animus. The offered evidence may be relevant in the matter of compliance. We deny the motion, noting that the preferred evidence would not affect the result reached by the ALO. The ALO did not, as Respondent asserts, base his conclusions upon a finding that Respondent systematically discriminated against former employees of Highland Ranch. Rather, the ALO based his conclusions upon the conduct of Isaac Rodriguez and Arturo Jimenez, individual supervisors who were not necessarily acting pursuant to a policy developed by Respondent's higher-level management personnel.

affirm the rulings, findings, and conclusions of the ALO except as modified herein.

In Highland Ranch and San Clemente Ranch, Ltd. (Aug. 16, 1979) 5 ALRB No. 54, affirmed San Clemente Ranch, Ltd. v. ALRB (1981) 29 Cal.3d 874, this Board found that Respondent, as the successor to Highland Ranch, unlawfully refused to meet and bargain with the United Farm Workers of America, AFL-CIO (UFW), the certified collective bargaining representative of its employees. As Highland's successor, Respondent had a duty to notify and bargain with the UFW prior to instituting any change in the wages, hours, or working conditions of its' agricultural employees. As Respondent admits that it did not notify or bargain with the UFW prior to instituting the unilateral changes, we conclude that it thereby violated Labor Code section 1153 (e) and (a). NLRB v. Katz (1962) 369 U.S. 747. Accordingly, we shall order Respondent to rescind the unilateral changes at the Union's request, to meet and bargain in good faith with the UFW over these changes, and to make whole all employees who have incurred economic losses as a result of any unilateral changes. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24. The make-whole period shall commence on January 3, 1978.

Respondent violated section 1153 (e) and (a) of the Act when it caused Sun West, a labor contractor, to refuse employment to four former Highland Ranch employees and to lay off eight former Highland Ranch employees. The ALO based his findings of violations of the Act on the credible testimonies of Arturo Jimenez, a bus driver/supervisor for Sun West (Respondent's agent

and labor contractor), and Isidro Gonzales, an alleged discriminatee who was laid off by Sun West at the direction of Isaac Rodriguez, a supervisor for Respondent. Respondent excepts to these credibility resolutions. To the extent that an ALO's credibility resolutions are based upon the witnesses' demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are clearly erroneous. Adam Dairy dba Rancho Dos Rios, supra, 4 ALRB No. 24; Sun Harvest (Jan. 21, 1980) 6 ALRB No. 4. We find the ALO's credibility resolutions to be supported by the record as a whole but we do not rely on his finding that Jimenez testified against his own self-interest as a supervisor and potential applicant for employment in agricultural labor. Jimenez was no longer working for Respondent at the time of the hearing.

Jimenez testified that Isaac Rodriguez told him to ask an applicant for his name and then to check with him (Rodriguez) on whether or not to hire the applicant. Gonzalo Gutierrez testified that he and Jose Gascon, Augustin Romero, and Felix De La Torre asked Jimenez for work in early April 1978 and Jimenez told them that he would have to check with the company. Jimenez testified that Rodriguez told him not to hire these four former Highland Ranch employees, because they were Chavistas. As a result, Jimenez did not hire those persons.

On or about April 17, 1978, eight former Highland employees were laid off by Jimenez. Jimenez testified that Rodriguez told him to lay off those eight workers. Jimenez asked Rodriguez to give him a list of the names. Rodriguez

gave him the list and told him to lay them off as soon as possible because they were Chavistas. The eight workers were laid off although other employees, who had worked fewer days or were hired by Sun West after the eight, continued to work. On April 18 and 19, the Sun West work force at San Clemente was larger than it had been on April 17 when the layoffs were made. On April 20, Sun West supplied only 35 workers, one half of the number it had previously supplied to Respondent. Respondent argues that the layoff of the eight former Highland employees was economically justified. Assuming the layoffs were economically justified, Respondent violated section 1153(c) and (a) by discriminatorily selecting these eight workers for layoff because of their union support. Akitomo Nursery (Sept. 1, 1977) 3 ALRB No. 73. In reaching this conclusion, we do not rely on the ALO's finding that these workers wore union buttons on the day they were laid off.

Respondent argues that it is not the employer of Sun West's agricultural employees and therefore not liable for any of Jimenez' discriminatory acts. We find no merit in this contention. Respondent is liable for the acts of its supervisor, Isaac Rodriguez, who ordered Jimenez not to hire the four former Highland employees and to lay off the eight former Highland employees. In addition, given that Sun West is a labor contractor, section 1140.4(c) precludes Sun West from being an employer under the Act and requires that the employer engaging him (Respondent) be deemed the employer for all purposes under the Act. Vista Verde Farms (Dec. 14, 1977) 3 ALRB No. 91.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent San Clemente Ranch, Ltd., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to hire or rehire any agricultural employee because of his or her union activities or sympathies.

(b) Laying off, discharging, or otherwise discriminating against any agricultural employee because of his or her union activities or sympathies.

(c) Instituting any change in any term or condition of employment of any of its agricultural employees without giving prior notice to and bargaining with the United Farm Workers of America, AFL-CIO (UFW) about any such proposed change.

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

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

(a) Immediately offer to the following-named employees full reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other employment rights and privileges:

Manuel Arrellano	Isidro Gonzalez	Manuel Ramirez
Jose Carrillo	Gregorio Lopez	Juan Rosas
Casiano Gomez	Simon Pulido	

(b) Immediately offer to the following-named employees employment at the positions for which they applied in early April 1978:

Felix De La Torre	Gonzalo Gutierrez
Jose Gascon	Augustin Tomero

(c) Make whole each of the employees named above in subparagraphs 2(a) and (b) for all losses of pay and other economic losses they have suffered as a result of Respondent's discrimination against them, together with interest thereon computed at the rate of seven percent per annum, in accordance with the formula established by the Board in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43.

(d) Rescind, upon request of the UFW, any and all unilateral changes instituted by Respondent found in this matter to constitute violations of Labor Code section 1153 (e) and (a) and make whole all agricultural employees for any and all economic losses they may have suffered as a result of the unilateral changes.

(e) Upon request, meet and bargain collectively in good faith with the UFW concerning the effects upon its agricultural employees of the unilateral changes it has instituted in the terms and conditions of their employment and, at the UFW's request, reduce to writing any agreement reached as a result of such bargaining.

(f) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll records and reports, and all other

records relevant and necessary to a determination by the Regional Director, of the backpay, make-whole awards, and other amounts due employees under the terms of this Order.

(g) 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.

(h) Post copies of the attached Notice in conspicuous locations on its premises for 60 days, the period and places 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.

(i) Mail copies of the attached Notice in appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed at any time between January 3, 1978, and the date on which said Notice is mailed.

(j) Arrange for a representative of Respondent or a Board agent to read the attached Notice in appropriate languages to the assembled employees of Respondent on company time, at such time(s) and place(s) as are specified by the Regional Director. Following the reading, the Board agent shall be given an opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them

for time lost at this reading and the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing as to what further steps it has taken in compliance with this Order. Dated: April 6, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties were given an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by failing and refusing to meet and bargain with the United Farm Workers of America, AFL-CIO (UFW) about our agricultural employees' working conditions and by laying off and refusing to hire or rehire employees because of their support for the UFW. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also 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 about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL, on request, meet and bargain in good faith with the UFW before changing our employees' working conditions because it is the certified collective bargaining representative of all of our agricultural employees.

WE WILL offer immediate employment to Felix De La Torre, Jose Gascon, Gonzalo Gutierrez, and Augustin Romero to jobs for which they applied or substantially equivalent jobs, and give them backpay plus seven percent interest, and reimburse them for all other economic losses they sustained as a result of our refusal to hire them.

WE WILL give backpay plus seven percent interest to Manuel Arrellano, Jose Carrillo, Casiano Gomez, Isidro Gonzalez, Gregorio Lopez, Simon Pulido, Manuel Ramirez, and Juan Rosas, to reimburse them for all losses of pay and other economic losses they sustained because we laid them off, and will offer them immediate full reinstatement to their former positions or substantially equivalent jobs without prejudice to their seniority or other employment rights and privileges.

WE WILL, if the UFW requests us to do so, revoke any changes we made in your working conditions, such as the new employee rulebook, the new hiring system, the utilization of a labor contractor, and

the separation between field and shed work, and will make each of you whole for any loss of pay and other economic losses you have sustained as a result of those changes, plus seven percent interest

WE WILL NOT discriminate against employees in hiring, laying off, or any other way because of their union membership or activities.

Dated: SAN CLEMENTE RANCH, LTD.

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, Room 2062, San Diego, CA 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

San Clemente Ranch, Ltd.

8 ALRB No. 29
Case Nos. 78-CE-20-X
78-CE-22-X
78-CE-34-X

ALO DECISION

Based on the Board's finding in Highland Ranch and San Clemente Ranch, Ltd. (Aug. 16, 1979) 5 ALRB No. 54, affirmed in San Clemente Ranch, Ltd. v. ALRB (1981) 29 Cal.3d 874, that Respondent is the successor to Highland Ranch, the ALO found that Respondent made unilateral changes in the wages, hours, and working conditions of its agricultural employees without notifying and bargaining with the UFW, the certified bargaining representative of its agricultural employees, and thereby violated section 1153(e) and (a) of the Act. The ALO concluded that Respondent also violated section 1153(c) and (a) by refusing to hire four former Highland Ranch employees, and by selecting eight former Highland Ranch employees for layoff because of their union activities.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions but did not rely, for proof of union activity, on the ALO's finding that the eight employees who were selected for layoff wore union buttons on the day of their layoff. The Board rejected Respondent's contention that it was not the employer responsible for the discrimination against former Highland employees.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
SAN CLEMENTE RANCH, LTD.,	)	Case Nos. 78-CE-20-X
	)	78-CE-22-X
Respondents,	)	78-CE-34-X
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

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for the Respondent

DECISION

KENNETH CLOKE, Administrative Law Officer:

Statement of the Case

This case was heard before me in San Diego, California, on February 13, 14, 15, and 16, 1979. The Notice of Hearing and Complaint were filed on January 3, 1979 and served on the same day. The Complaint alleged violations of Sections 1153 (a), (c), and (e) of the Agricultural Labor Relations Act, (herein referred

to as the "Act") by San Clemente Ranch, Ltd., (herein referred to as Respondent). The Complaint is based on several charges filed against Respondent: 78-CE-20-X, filed on February 27, 1978; 78-CE-22-X, filed on March 6, 1978; and 78-CE-34-X, filed on May 17, 1978. These cases were consolidated on January 3, 1979, pursuant to Section 20244 of Agricultural Labor Relations Board (herein referred to as ALRB) Regulations. On the same day, an Order Consolidating Cases and Notice of Hearing and Complaint were served on Respondent and the United Farm Workers of America, AFL-CIO, (herein referred to as "UFW"). General Counsel amended the Complaint on January 4, 1979 to substitute the name "Ramirez" for "Romero" in paragraph 10(d) and to add Manuel Ramirez to the list of persons in paragraph 10 (e) Respondent, through its counsel, filed and served an Answer admitting the allegations contained in paragraphs 1, 2, 3, 4, 5, and 8 of the Complaint; admitting the allegations contained in paragraph 6 only insofar as they related to Thomas Brooks, Durston Williams, Tom Tanaka, Thomas Deardorff, Issac Rodriquez, and Telesforo Hernandez; admitting the allegations contained in paragraph 7 only insofar as they related to Vincente Arroyo, Gonzolo Gutierrez, Augustin Ramirez, Juan Rosas, Gregorio Lopez, Manuel Ramirez, Manuel Arrellano, Simon Pulido, Jose Carillo, Casiano Gomez and Isidro Gonzales, and denying the rest.

In a prehearing motion Respondent amended its Answer to eliminate the name Arturo Jiminez in paragraph 3 and admit it in paragraph 2 (Reporters Transcript Volume I, pages 9-10, herein cited as R.T. I, 9-10). Respondent further admitted

that Virginia Diaz, Maria Meza Garcia, Carmen Diaz, Marciela Zamudre and Norma Castellano were agricultural employees under the Act. The names of these individuals were added to paragraph 4 of Respondent's Answer (R.T. I, 10). The parties settled the case of Virginia Diaz, set forth in paragraph 19(c) of the Complaint (R.T. II, l).

On February 14, 1979, counsel for both parties entered into a stipulation with regard to the allegations set forth in paragraphs 10(a)(1) through 10(a)(4) of the complaint, agreeing to postpone decision on these questions until after the ALRB had reached a decision on the merits in case number 77-CE-ll-C. That case raised issues as to whether Respondent was a successor in interest to the previous owner, Highland Ranch. On August 16, 1979 the Board, following a decision by Administrative Law Officer Robert LeProhn, affirmed the hearing officer's finding that San Clemente Ranch was a successor to Highland, and that it had violated its duty to bargain in good faith with the UFW by refusing to meet and supply relevant information. The Board issued its decision in October, 1979. Pursuant to the agreement of both parties herein, the Board's decision is res judicata on the merits.

All parties were given full opportunity to participate in the nearing, to call and examine witnesses, examine and present documentary evidence, and argue their positions, and following the close thereof, all parties submitted briefs in support of their relative positions. Several motions were made by Respondent, which decisions were reserved by me and incorporated

herein. Upon the entire record, including exhibits, briefs, judicial notice, testimony, and my personal observation of the demeanor of the witnesses, and after careful consideration of the briefs filed by the parties and independent research and reflection, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Jurisdiction

Respondent is a corporation engaged in agriculture in San Diego and Orange Counties and at all times material herein has been an agricultural employer within the meaning of Section 1140.4(c) of the Act. The Union, as charging party, is a labor organization within the meaning of Section 1140.4(f) of the Act. Thomas Brooks, Durston Williams, Tom Tanaka, Thomas Deardorff, Issac Rodriquez, Telesforo Hernandez, and Arturo Jimenez are admitted to be supervisors within the meaning of Section 1140.4(j) of the Act.

Sun West Labor Contractor was at all times material herein a representative of and agent for Respondent, acting directly and indirectly in its interest within the meaning of Sections 1140.4(c) and (e) of the Act. The alleged discriminatees were all agricultural employees within the meaning of Section 1140.4(b) of the Act, and at all times material herein were under the direct supervision of one or more of the aforementioned supervisors.

2. Unfair Labor Practices

A. General Findings:

Respondent is a limited partnership which conducts agricultural operations on land formerly leased by Highland Ranch. On December 1, 1977, Respondent formally took possession of the premises and commenced its operations. The parties stipulated that since it was formed, Respondent has unilaterally changed its practices as set forth in paragraph 10(a) (l)-(4) of the Amended Complaint, without bargaining or giving notice to the UFW. At the time it did so, San Clemente Ranch considered itself a new company, and not a successor to Highland Ranch.

Respondent began hiring employees in December, 1977, issued a new rule book establishing a 45 day probation period, required written applications, and set up a hiring system on a "first-come, first serve" basis. It hired employees from Sun West Labor Contractors, who acted as their agents. All labor relations matters were handled by Thomas Brooks, who had not worked at Highland Ranch and was not familiar with its employees. Other Highland Ranch supervisors, however, continued to work for Respondent.

B. Unilateral Changes in Wages, Hours, and Working Conditions

1. Unilateral Changes in Employment:

The ALRB, in case number 77-CE-ll-C, found that San Clemente Ranch was a successor to Highland Ranch and that it had violated its duty to bargain in good faith with the UFW by refusing to meet and supply relevant information. Pursuant to a stipulation entered into by counsel for both sides, that decision is res judicata as to the allegations in paragraphs 10(a) (1) through 10(a) (4) of the Amended Complaint in the

present case. I therefore find that Respondent effected unilateral changes in the wages, hours, and working conditions of its employees without bargaining with the certified representative by the following acts:

> 1. On or about January 3, 1978, and continuing to date, Respondent issued a new employee rule book establishing a 45-day probation period.
>
> 2. On or about February 1, 1978, and continuing to date, Respondent instituted a new hiring system requiring written applications to be mailed to Oxnard or presented at Respondent's office.
>
> 3. On or about February 1, 1978, and continuing to date, Respondent began hiring employees in the order their applications were submitted.
>
> 4. On or about March 9, 1978, and continuing to date, Respondent began hiring employees through Sun West Labor Contractor.

2. Curtailment of the Practice Which Provided Female Shed Workers With Supplemental Hours of Field Work

A remaining issue is whether the acts alleged in paragraph 10(a) (5) of the Complaint constitute a violation of Section 1153(e) of the Act, i.e., whether Respondent's refusal to offer field work to shed workers constituted a unilateral change in hours, wages and working conditions over which Respondent had a duty to bargain.

Carmen Diaz, a shed worker, testified that between 1972 and 1977 she worked in the fields on days when there was no work in the sheds. Shed workers had worked in the fields part-time every year over a span of five years for two to three months. Sometimes they worked two to four hours a day and sometimes a full day. (R.T. II, 100-103) While Ms. Diaz stated

she felt she had to do the work or she wouldn't have a job (R.T. II, 113) , she was speaking only for herself and not expressing the feelings of other workers who conceivably relied on field work as a supplement to their income. Her testimony in this regard does not defeat the claim that there was a long-standing practice of employing women shed workers in the fields which constituted a past-practice over which San Clemente Ranch, as successor to Highland Ranch, had a duty to bargain.

Respondent asserts Highland's "past practice" of requesting female shed workers to perform field work was merely an exercise of managerial discretion, and not a binding past practice. This assertion is based solely on a 1952 labor arbitration case, Ford Motor Company, Rouge Plant and U.A.W., Local 600 (CIO), 19 LA 238. In that case, pipefitters refused to perform work customarily assigned to riggers, and the issue was whether or not they had a right to refuse the work at the time of the request. The Arbitrator held they had no right of refusal, since under the circumstances management was merely exercising its discretion regarding the most convenient method of work. However, the Arbitrator also stated: "The law and the policy of collective bargaining may well require that the employer inform the union and that he be ready to discuss the matter with it on request." Respondent here was unwilling to discuss any changes in what appears to have been a well-established past practice. Furthermore, shed workers were not refusing to perform work, and thereby challenging the authority of management, but were objecting to a unilateral decision by management which deprived them of a source of needed income

on which they had come to rely.

In another arbitration case, Lohr Distributing Co., 62 LA 1123, an employer unilaterally discontinued employee parking in the company's truck parking facility. Even though employee parking rights were not covered by the terms of the contract, the parking lot had been available to employees for the past seven years, and the arbitrator found this constituted a "working condition" established by past practice. While the company offered an alternative provisional parking plan the arbitrator held "... the common determinant is whether the substitute regulation does or does not reasonably preserve the benefit involved ... it must be concluded that such unilateral regulation fails to preserve the benefit provided by the parking privilege." At 1124; see also, Valley Mould and Iron and Steelworkers, 65 LA 88.

Respondent argues in its Brief at page 17 that because its use of shed workers in the field was infrequent, it was not a consistent practice. Frequency, however, is only a measure of consistency, and while the nature of the work, type of crop, length of work and number of workers involved varied greatly, it was conceded by Respondent that shed workers had been consistently used for field work when they were needed, and that this practice had been changed without bargaining. This extra labor was important to the workers, however insubstantial it may have appeared in toto, and whether they were informed or not in advance of their obligation to perform it. While the company may have initiated the practice to help itself, as Respondent asserts, it thereafter became a common condition of work and a past practice over which the

company had to bargain.

I therefore find that Respondent's refusal to supplement the hours of shed workers with field work constitutes a unilateral change in working conditions by San Clemente Ranch which fails to preserve a benefit established through past practice.

C. Discriminatory Refusal to Hire Vincente Arroyo;

Mr. Arroyo is 64 years old, began working at Highland Ranch in 1964, and ceased working there on November 30, 1977. For the past five years, Mr. Arroyo had been employed as an irrigator, but when there was no irrigation work he worked in the field. On one such occasion late in 1977, Arroyo testified Respondent's general foreman, Isaac Rodriguez had stated: "Poor Chavistas, they're going to lose their jobs." (R.T. II, 48-49, 61-62, 80.)

The parties stipulated that Arroyo voluntarily quit his employment at San Clemente Ranch on October 12, 1978, due to Social Security regulations which limited his annual earnings to $3,200.00. This was the first year he qualified for Social Security benefits (R.T. II, 95), and Mr. Arroyo testified he would only work part time in order to remain eligible for social security benefits, even if the company could not reinstate him on a part-time basis.

Arroyo approached Thomas Brooks on February 28, 1978, looking for work. Brooks, however, had no applications and due to weather conditions there was no work available. Arroyo returned on March 25 and was given an application. When Brooks asked Arroyo what his specialty was, Arroyo stated he told Brooks he was an irrigator and Brooks told him to put that information

on the form. Brooks' testified Arroyo had said he was a field worker. Arroyo later stated he had told Brooks he was able to do any kind of farm work available in the field. The application (General Counsel's Exhibit Number 6, herein cited as GCX #6) was marked "field" on the upper right-hand corner by Brooks at the time of the interview. Arroyo had his son, who reads English, fill out the application, which provided no space for "specialty" or "position applied for". According to Brooks, the word "field" was written by him on the application in English when Arroyo took it home to fill it out. The application was accepted on March 28, 1978.

On either May 5 or April 17, Arroyo was offered shed work by Brooks. Arroyo stated he could not do shed work because he had never worked packing cabbage. On May 28, Arroyo received a letter from Brooks offering him a job in the field, and reported to work on June 1, 1978. During the period between February 27 and March 28 Respondent accepted several applications for work (See GCX #4 pp. 2-3). Between March 28 and June 1, only one worker was hired out of order, when a worker brought to the Ranch without Brooks' knowledge was discovered several hours after work began and given a job.

General Counsel argues in her brief that this testimony is not credible, (General Counsel's Brief, herein cited as GC Brief, p. 13) first, because it would have been more reasonable for Brooks simply to have paid the worker for one day rather than offer him a permanent job; and second, because Respondents' work sheets indicate an application for employment had been made the previous day. (GCX #4) Yet even on these facts, General Counsel has not adequately demonstrated that Respondent discrim-

inated against Arroyo by reason of his union membership. Arroyo waited for almost a month after being told there were no applications available before returning to look for work and was then offered work twice. The misunderstanding concerning Arroyo's occupational specialty is insufficient, without more, to infer discrimination. While company knowledge of Arroyo's union sentiments may be inferred from the fact that he wore a union button every day to work and attended union meetings in the company's labor camp, Respondent's offers of employment based on the application received indicate its' policy was not one of intentional discrimination against him. The statement attributed to Isaac Rodriquez indeed expresses anti-union sentiment, yet even if it were inferred that Rodriquez communicated his knowledge of Arroyo's pro-union attitudes to Brooks, General Counsel still lacks competent evidence of discrimination. Since other employees who supported the UFW were re-hired, logic fails to support either the proposition that Respondent was engaged in a systematic campaign to deny applications to all former employees, or that it had some special reason to single out Mr. Arroyo. There is no proof that had Mr. Arroyo returned on February 27 and March 23 he would have been denied an application, or that others similarly known to have worn union buttons were denied applications. Nor is there any clear link between Arroyo's former union activity and Thomas Brooks, although one might be inferred if Brooks had hired others out of turn or refused re-employment to Arroyo. While Brooks did hire one employee out of turn, it is likely that establishing an amicable relationship with those responsible was more important in causation than discrimination directed at Arroyo. Were it otherwise, Brooks

would not have offered him employment at all. An equally probable explanation for Arroyo's behavior is his reluctance to earn more than allowed by the Social Security Administration. This by no means justifies Respondents' failure to offer him a position while employing a worker with lower seniority who made a later application, yet it is not clear that the reason Mr. Arroyo was not sleeted first had its nexus in anti-union animus.

General Counsel cites Pleasant Valley Vegetable Co-op, 4 ALRB No. 11 (1978), GC's Brief p. 12, yet that case involved many employees hired out of turn, and a discriminatee who had sought work several times during the period in question. The ALRB was able to conclude that the employer's reasons for failing to recall the employee were pretextual, concluding that "the true reason may be inferred from its conduct toward him." Id., at p. 4. None of these facts exist here. I therefore find that Vicente Arroyo was not discriminated against in his application for employment, either on February 27 or at any time thereafter, and the Charge filed on his behalf is hereby dismissed.

General Counsel also argues in her Brief at p. 13, that but for the unilateral changes in working conditions occasioned by Respondent's refusal to bargain, written applications and central hiring would not have been instituted, and Arroyo would have returned to his job in 1978. This argument is unopposed by Respondent, and there is certainly no reason to exclude Arroyo from a make-whole order. Yet no special facts were adduced at hearing which would require a specific finding of entitlement under the make whole order.

D. Discriminatory Refusal to Hire Gonzalo Gutierrez, et al.

In April, 1978, four former Highland Ranch employees, Felix de la Torre, Gonzalo Gutierrez, Jose Gascon and Augustin Ramirez, sought work at Respondent's ranch. They spoke with Arturo Jiminez, a supervisor/bus driver for Respondent's agent and labor contractor, Sun-West. Jiminez asked if they had worked for Highland before, and on learning they had, Jiminez checked with Issac Rodriquez, Respondent's General Foreman, who told him not to hire them because they were Chavistas. (R.T. Ill, 2-3, 70-73, 77-78). Rodriquez testified he had no authority to hire or fire, that foremen were told not to discriminate, and that there was no company policy against hiring former Highland employees. Respondent proved it hired many former Highland employees, but did not show it hired any who had consistently worn union buttons to work in 1978.

Fausto Machado Ojeda testified he heard Telesforo Hernandez, a foreman, make the statement: "All those who voted in "77, they were not going to get work because they had voted for Chavez' union." (R.T. II, 123, 11, 12-14) Hernandez denied ever making this statement, and Eliodoro Lupercio, an employee in Telesforo's crew also denied the statement had been made. I find the conversation involving Jiminez and Rodriquez took place, first because Jiminez testified against his own self-interest as a supervisor and a potential applicant for future employment in agricultural labor; second, based on observation of the demeanor of the witnesses; and third, because Jiminez had no other valid reason for denying them work, yet they were not employed after timely application.

Mr. Ojeda, however, had a personal reason for retaliating against the company. Hernandez was corroborated in his denial while Ojeda was not, and there were major discrepancies in his testimony, pointed out by Respondent in its Brief, at pp. 38-40. General Counsel called no corroborative witnesses, although such witnesses should have been available, and Mr. Ojeda's remarks are not relied on in reaching a result herein.

Respondent argues in its Brief at p. 34, that the alleged discriminatees never made formal application for work, or "followed up" on their initial application. While Respondent is certainly correct in this assertion, application for employment had been informal prior to the unilateral changes which had been instituted in company hiring practices. No other evidence was produced regarding customary methods of application for work at Highland Ranch or San Clemente, and it must be assumed, from Jiminez's testimony, that he believed a proper application had been made. The applicants could not be expected to do more than what was customary and reasonable under the circumstances.

Respondent also argues in its Brief at p. 34 ff, that Sun West had exclusive control over hiring. While this comports with the express language of its agreement with Sun West, Jiminez testified that on at least two occasions Respondent's foreman Isaac Rodriquez interfered with Sun West's hiring or retention of employees, when those employees were believed to have been "Chavistas". While the exception may prove the rule, it also proves the exception, and the language of a legal agreement is not conclusive evidence of its

implementation, and find Respondent's refusal to rehire discriminatory.

E. Discriminatory Lay-off of Isidro Gonzalez

Isidro Gonzalez testified he asked Arturo Jiminez, a driver for Sun West, about work, and Jiminez responded that he had work if Gonzalez would work the whole season. Gonzalez agreed and worked for Respondent through Sun West for over three weeks, riding to work in a bus driven by Jiminez. On or about April 14, Gonzalez testified Jiminez read a list of names of employees who were no longer going to have work: These included Juan Rosas, Simon Pulido, Manuel Arrellano, Manuel Ramirez, Casiano Gomez, Jose Carrillo, Isidro Gonzalez and Gregorio Lopez. Gonzalez and three other laid-off employees went to Respondent's ranch and spoke with Thomas Brooks, who stated he did not know anything about the lay-off and could not provide them with lay-off slips, because they were Sun West employees. Brooks then had Jiminez sign the lay-off slips. According to Gonzalez, he and three other co-workers were the only ones who wore union buttons to work on April 14. All eight of the alleged discriminatees had voted in the ALRB election at Highland Ranch in 1972, and wore union buttons to work.

At least three former Highland Ranch employees were on the same bus on April 14, and were not laid-off. Gonzalez testified that on the morning of the 14th there were 19 to 22 new workers on a bus of from 30 to 35 people, none of whom wore union buttons and only one of whom had worked for Highland Ranch in 1977, yet GCX #9 for April 13 and April 14 reveal no new employees.

Gonzalez testified he overheard three conversations in which Arturo Jiminez indicated that Issac Rodriquez had informed

him that he, Rodriquez, did not want any union people working at the camp, that he had been told to ask those applying for work if they had worked at the ranch in 1977, and that there would be "new faces" on the bus. On April 17, Jiminez reportedly told Gonzales "this thing is not from me - I have orders from the office." (R.T. Ill, 18-19, 31-34, 20-22). Jiminez testified in substantial agreement, stating Rodriquez had told him a few days before the lay-off to get rid of eight workers from the bus crew because they had been Chavistas at Highland Ranch. Jiminez had not been able to remember all the names and had asked for a list which Rodriquez gave him. (R.T. III, 73-74, 78, 86-87).

The testimony of Mr. Tom Tanaka, Respondents' general manager, established that there was a general decline in the number of workers during April due to a late rainy season. Tanaka's testimony that Sun West crews were used to supplement Respondent's Ranch crews, so that any changes in the labor force were reflected primarily in the Sun West crews, is substantiated by GCX #7, which demonstrates that the number of Sun 'West workers went from a high of about 80 in early April to a low of 21 at the end of April. Out of 24 potential work days in April there were five days of "no work".

While Respondent has proven its layoffs were economically necessary, it has not countered General Counsel's showing that the individuals laid-off were discriminatorily selected. Again, Jiminez's testimony is the more credible version, not only because he was the principle actor, but because his version closely matches that of Mr. Gonzalez, although some minor discrepancies exist in their respective

accounts. Jiminez testified against his self-interest as a supervisor, and Respondent provided no credible explanation for why he would deliberately lie in admitting an unfair labor practice committed by himself.

While Respondent has pointed out minor discrepancies in the testimony of Isidro Gonzalez, Brief at pp. 47-48, these were primarily perceptual, and are not relied on in reaching a result here. While Isidro Gonzalez was later hired by Respondent, no evidence of animus was ever adduced regarding Tom Brooks, but centered rather on the actions and statements of Mr. Rodriquez, who testified he knew all the discriminatees except for one, and according to Jiminez, knew of their union affiliation and directed their lay-off for reasons of anti-union animus.

The demeanor of the witnesses was also a factor here, as was the failure of Respondent to provide any adequate reason why former Highland employees who wore union buttons and had the highest seniority and experience should be laid-off while less experienced workers who had not worn union buttons remained.

These were senior employees, and Respondent cannot justify the hiring of less able employees who snuck on board a bus, came from far away, or were not notified due to a lack of diligence by its labor contractor, in circumstances indicating the existence of anti-union animus among its foremen. While Respondent had a valid reason for laying off members of its crew, it had no valid reason for selecting these employees.

None of the cases cited by Respondent in its Brief,

at pp. 56-57 are applicable here, since they rely either on a lack of knowledge, inadequate evidence of animus, or non-discriminatory selection. I therefore find Respondent discriminatorily laid-off eight employees on April 17, 1978.

CONCLUSIONS OF LAW

Section 1152 of the ALRA states:

> Employees shall have the 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 bargaining or other mutual aid or protection.

Section 1153 of the ALRA states:

> It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (a) To interfere with, restrain or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152...
>
> (c) 3y discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

These sections make unlawful all forms of discrimination, whether affecting hire, rehire, layoff, transfer, fire or any term or condition of employment, and the prohibition against employer discrimination extends to applicants for re-employment, as well as those already employed. Pate Mfg. Co., 197 NLRB 793, 802, 80 LRRM 1846 (1972).

In discriminatory lay-off cases, it is generally necessary for the General Counsel to prove: (1) that the

employee had engaged in "concerted" or union membership activities, (2) that the company knew of the employee's union membership or activities, and (3) that (a) the lay-off was "inherently destructive" of important employee rights, or (b) while the adverse effect of the lay-off was comparatively slight, the employer failed to come forward with adequate economic justification, or (c) the employer's motive was to discriminate against the union and thereby affect union membership. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

The ALRB has held that Great Dane Trailers in effect transfers the burden of proof on a showing of discriminatory effect: "The employer has the burden of proving that it was motivated by legitimate objectives once the General Counsel has shown that the employer engaged in discriminatory conduct which would have adversely affected employee rights." Maggio Tostado, Inc., 3 ALRB No. 33 (1977), at 4. Respondent argues in its Brief (at p. 8) that:

> "Once the discriminatory conduct has been established, the burden shifts to the employer to explain this action. (Arnaudo Bros., Inc. , supra at p. 22) If the employer comes forward with evidence of legitimate and substantial business justifications, the General Counsel must prove anti-union motivation on the part of the employer." Citing Lu-Ette Farms, Inc., 3 ALRB No. 38 (1977), pp. 8-9.

This statement is somewhat misleading, as it fails to account for situations in which the General Counsel has shown the acts or statements have to been "inherently destructive" of important employee rights. The NLRB has held an employer's failure to recall any of its former union-

represented employees at the time it resumed operations after an economic layoff "inherently destructive" of important employee rights under Great Dane Trailer. Rushton & Mercier Woodworking Co., 203 NLRB 123, 83 LRRM 1070 (1973), enforced, 86 LRRM 2151 (CA 1, 1974). This result is clearer where a successor employer has unilaterally instituted new work rules, and where employees of the previous employer must reapply to a labor contractor for employment. An employer may not avoid liability under the ALRA by delegating responsibility for carrying out its discriminatory intent to an agent or labor contractor.

While the ALRB has held discriminatory lay-offs of leading union adherents are not, without more, "inherently destructive" of important employee rights, so that anti-union motivation by Respondent must be proven, Mario Saikhon, Inc., 4 ALRB No. 72 (1978) , General Counsel has met this burden of proof, and Respondent has countered, arguing the existence of an economic justification for the lay-off. It is not necessary, here, therefore, to decide whether the lay-offs were "inherently destructive", since General Counsel has proven the existence of discriminatory animus in statements attributed to Isaac Rodriquez, and in the actions of Respondent's agent Sun West through its employee Arturo Jiminez, in discriminatorily selecting those who were to be laid off.

REMEDY

Respondent has been found to have unilaterally altered past practices without bargaining with the designated representative of its employees. It must therefore be directed to engage in

good faith efforts to reach an agreement or impasse over these subjects, and workers who have been injured as a result of its unilateral action must be made whole for the injuries they have suffered. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978).

With respect to the refusal to re-hire and lay-off, the remedy is less clear. Respondent argues in its Brief, at p. 59, that an employer is not normally changeable with responsibility for isolated or sporadic incidents of anti-union conduct engaged in by its supervisors, in the absence of evidence of approval by the employer. This is generally correct, as the cases cited by Respondent bear out. Where a supervisor has individually violated a company policy against the commission of unfair labor practices, as appears to have been the case here, and where that violation results in a refusal to re-hire or a lay-off of company employees, the problem becomes one of remedy,-as opposed to violation. Refusal to rehire or lay-off, when accomplished in a discriminatory fashion, is a violation of the Act, even where a supervisor has expressly disobeyed orders, and reinstatement and back-pay are required to redress the injury incurred. Some modification can be made, however, in the notice requirement, so that workers are made aware that the practice was one which was disapproved or disfavored by the company. The Notice and Order which follow are therefore

directed at the problem of supervisional violation, rather than company policy. Some notice is required, however, so that workers will not be intimidated, restrained or coerced in the exercise of rights guaranteed them under Section 1152 of the Act.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that:

1. Respondent San Clemente Ranch, Ltd., its officers, agents, successors and assigns, shall direct that its supervisorial personnel cease and desist from:

(a) Discouraging employees' membership in, or activities on behalf of the UFW, or any other labor organization, by discharging, laying off or by otherwise discriminating against employees in regard to their tenure of employment or any term or condition of employment, except as authorized by Section 1153(c) of the Act.

(b) In any other manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

2. Respondent San Clemente Ranch, Ltd., its officers, agents, successors and assigns, shall cease and desist from:

(a) Refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees in violation of Labor Code Section 1153(e) and (a), and in particular: (1) refusing to meet at reasonable times and confer in good faith and submit meaningful bargaining

proposals with respect to wages, hours and other terms and conditions of employment; (2) refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining; and (3) making unilateral changes in terms and conditions of employment of its employees without notice to and bargaining with the UFW.

(b) In any other manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

3. Respondent San Clemente Ranch, Ltd., their officers, agents, successors and assigns, shall jointly and severally take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Make whole Felix de la Torre, Gonzalo Gutierrez, Jose Gascon and Augustin Romero for any loss of pay incurred because of their discriminatory refusal to hire these employees on April 6, 1978, together with interest thereon at the rate of seven percent per annum.

(b) Make whole Juan Rosas, Gregorio Lopez, Manuel Arellano, Simon Pulido, Jose Carrillo, Casiano Gomez, and Isidro Gonzalez for any loss of pay incurred because of their discriminatory lay-off on April 17, 1978, together with interest thereon at the rate of seven percent per annum.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due employees under the terms of this Order.

4. Respondent San Clemente Ranch, Ltd., its officers, agents, successors and assigns, shall take the following

additional affirmative actions deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the UFW with respect to the effects upon its former employees of its unilateral changes in terms and conditions of employment, and reduce to writing any agreement reached as a result of such bargaining.

(b) Furnish the UFW with the information requested by it relevant to the preparation for and conduct of collective bargaining.

(c) Make whole those employees employed by Respondent in the appropriate bargaining unit at any time between the date of Respondent's first refusal to bargain on or about January 3, 1978, to the date on which Respondent commences collective bargaining in good faith and thereafter bargains to contract or impasse, for any losses they have suffered as a result of the aforesaid refusal to bargain in good faith, as those losses have been defined in Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978).

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due employees under the terms of this Order.

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

(f) Post copies of the attached Notice on its

premises for 90 consecutive days, the posting period and places to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Mail copies of the attached Notice in appropriate languages, within 30 days after issuance of this Order, to all employees employed at any time between January 3, 1978, and the date on which Respondent commences to bargain in good faith and thereafter bargains to contract or impasse.

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

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps taken to comply with it. Upon request of the

Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with the Order.

DATED: January 28, 1980

KENNETH CLOKE
Administrative Law Officer

NOTICE TO SAN CLEMENTE RANCH, LTD. EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to meet and bargain about working conditions with the UFW, and by a supervisor in our employ discriminatorily refusing to hire, and laying off certain employees. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

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

1. To organize themselves;

2. To form, join or help any union;

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

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

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

Because this is true, we promise you that:

WE WILL, on request, meet and bargain in good faith with the UFW about working conditions because it is the representative chosen by Highland Ranch employees and we are a successor to Highland Ranch.

WE WILL reimburse each of the employees employed by us after January 3, 1978, for any loss of pay or other economic losses sustained by them because we have refused to bargain with the UFW, plus interest computed as 7 percent per annum.

WE WILL reinstate Felix de la Torre, Gonzalo Gutierrez, Jose Gascon and Augustin Romero to their former jobs at San Clemente Ranch, Ltd., and give them back pay plus 7 percent interest, for any losses they had while they were off work.

WE WILL, give back pay plus 7 percent interest to Juan Rosas, Gregorio Lopez, Manuel Arellano, Simon Pulido, Jose Carrillo, Casiano Gomez, and Isidro Gonzalez to reimburse them for any loss of work they sustained because they were laid off, and will offer them immediate and full reinstatement to their former positions or substantially equivalent jobs without prejudice to their seniority or other rights and privileges.

WE WILL direct our supervisors not to discriminate against employees in hiring, laying-off or any other way, by reason of their union membership or activities.

Dated: SAN CLEMENTE RANCH, LTD.

By: _____
Representative Title

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

DO NOT REMOVE OR MUTILATE.