Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MERRILL FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-111-SAL 79-CE-276-SAL 79-CE-276-1-SAL 79-CE-294-SAL 79-CE-315-SAL 79-CE-357-SAL 79-CE-370-SAL 8 ALRB No. 4

DECISION AND ORDER

On January 19, 1981, Administrative Law Officer (ALO) Marvin J. Brenner issued the attached Decision in this proceeding. Thereafter, Respondent filed timely exceptions with a supporting brief and the General Counsel filed a brief in reply to Respondent's exceptions.

Pursuant to Labor Code section 1146, the Board has delegated its authority in this matter to a three-member panel.[1/]

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the ALO's rulings, findings,[2/] and

[1/] Member McCarthy did not take part in the consideration of this decision.

[2/] Respondent asserts that many of the ALO's findings are based on erroneous credibility resolutions. As we have often stated, we will only overturn an ALO's credibility resolutions where "a clear preponderance of the relevant testimony shows them to be erroneous." Brock Research, Inc. (May 25, 1978) 4 ALRB No. 32. We have carefully reviewed the instant case and find the ALO's credibility resolutions to be supported by the record.

conclusions,[3/] and to adopt his recommended Order as modified herein.

Layoff of Crew 3

Respondent excepts to the ALO's ruling, allowing General Counsel to amend the complaint to include all members of Crew 3, and to the ALO's conclusion that Crew 3 was unlawfully laid off because of their protected union and concerted activity. Respondent argues that these issues were not fully litigated. We find no merit in these exceptions.

At the close of the hearing, the General Counsel moved to amend the complaint to include all members of Crew 3 as discriminatees. The ALO properly allowed such amendment, since the protected activity of Crew 3 was consistently treated in a general manner, without reference to individuals. Further, Respondent's alleged business justification applied to the entire crew, since none of the workers had seniority and the entire crew was eliminated. In this context, it was reasonable for the ALO to treat Crew 3 as a class of discriminatees, without requiring proof of each element of discrimination as to each crew member. Kawano, Inc. (Dec. 26, 1978) 4 ALRB No. 104, enforced (1980) 106 Cal.App.3d 937;

[3/] The ALO's analysis of Miguel Dias' status concludes that he is not a supervisor, but fails to reach a conclusion as to whether Respondent's employees "could reasonably believe" that Dias was acting on behalf of Respondent when he harassed and humiliated union organizers. Vista Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307, 322. As there is no evidence that Dias did more than drive the bus occasionally, a function which both supervisory and non-supervisory employees performed, the subjective beliefs of the General Counsel's witnesses do not establish Dias' agency status. The allegation regarding Dias is therefore dismissed.

NLRB v. Hoosier-Veneer (7th Cir. 1941) 120 F.2a 564 [8 LRRM 723].

We also affirm the ALO's finding that the initial layoff of Crew 3 was discriminatory, despite the absence of such an allegation in the complaint. The complaint, as amended, alleged that all members of Crew 3 were discriminatorily refused rehire after the layoff, when work became available. In defending against this allegation, Respondent was aware that the union and concerted activities of the crew, the statements and knowledge of its supervisors, and the availability of work were going to be issues at the hearing. These issues are material to both the layoff and refusal to rehire allegations. Since Respondent has not been deprived of an opportunity to produce evidence on any issue relevant to the ALO's findings, and since the two allegations are closely-related and were fully litigated at the hearing, the ALO's finding of unlawful layoff was within his discretion. Prohoroff Poultry Farms (Nov. 23, 1977) 3 ALRB No. 87, enfd. (1980) 107 Cal.App.3d 662.

Since his Decision herein issued prior to our decision in Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18 and the California Supreme Court's opinion in Martori Brothers Distributors (1981) 29 Cal.Sd 721, the ALO was not aware of our adoption of the Wright Line test for discrimination cases involving both lawful and unlawful motives (known as "dual-motive" cases). Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169].

Under Wright Line, once the General Counsel makes a prima facie showing that unlawful discrimination was a motivating factor in an employer's decision to take an adverse personnel action, the

employer then has the burden of producing evidence that the action would have been taken even in the absence of the employee's protected activity. As both the Nishi Greenhouse and Martori Brothers decisions note, this test is essentially the same as the "but for" test that we have used in past dual motive cases and which the ALO used in this case. See e.g., Royal Packing Co. (May 3, 1979) 5 ALRB No. 31, enf. den. on other grounds (1980) 101 Cal.App.3d 826

Applying Wright Line to the instant case, the General Counsel proved that Respondent had knowledge that the members of Crew 3 had signed UFW authorization cards and had participated in a work stoppage, that Respondent's supervisors made several remarks and engaged in conduct which indicated anti-union animus and displeasure at Crew 3's involvement with the union and the work stoppage, and that Crew 3 was laid off abruptly after the work stoppage. These facts establish prima facie proof that the protected activity of Crew 3 was a motivating factor in Respondent's decision to lay them off.

Respondent attempted to prove, in its defense, that even in the absence of their protected activity, Crew 3 would have been laid off because economic factors reduced the need for workers and Crew 3 members had no seniority. The evidence, however, shows that approximately the same amount of work was available after the layoff and that work which had previously been done by Crew 3 on a sporadic basis was performed by Respondent's other crews with occasional help from employees of the Garin Company. Since work was available to Crew 3 on the same sporadic basis, both before and after the layoff, Respondent has failed to prove that lack of work

required the layoff of Crew 3. Since the only remaining explanation for Respondent's layoff of Crew 3 is anti-union animus and retaliation against Crew 3 for its participation in a work stoppage, the ALO was correct in concluding that Respondent violated section 1153(c) and (a) by laying off the employees in Crew 3.

ORDER

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

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against agricultural employees because of their support for or membership in the United Farm Workers of America, AFL-CIO (UFW), or any other labor organization, or for engaging in concerted activity protected by section 1152 of the Agricultural Labor Relations Act.

(b) Promising, granting or timing the announcement of wage increases or other employee benefits where the purpose or the probable effect thereof would be to interfere with the right of employees to freely choose whether to be represented by a labor organization.

(c) Suggesting to agricultural employees that they would be required to choose between unionization on the one hand and wage increases and/or other benefits on the other.

(d) Giving less work-assistance to agricultural employees because of their interest, membership, or activities on behalf of the UFW, than to other employees who lack such interest,

membership, or activities.

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

2. Take the following affirmative actions which will effectuate the purposes of the Act:

(a) Offer all the employees of Crew Number 3, who were laid off on or about August 30, 1979, immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority, if any, or other rights and privileges to which they may be entitled and make them whole for any loss of pay or other economic losses they suffered by reason of their discriminatory layoff, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest at a rate of seven percent per annum.

(b) Preserve and make available to the Board or its agents, for examination, photocopying and otherwise copying, all payroll records and any other records necessary to determine the amount of back pay and other reimbursement due the employee-members of Crew 3 who were laid off on or about August 30, 1979.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by the Regional Director into appropriate languages, reproduce sufficient copies of the Notice in each language for the purposes set forth herein.

(d) Post copies of the attached Notice at conspicuous

locations on its premises for a period of 60 days, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any posted Notice which has been altered, defaced, covered, or removed.

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed at any time during the payroll periods encompassing the dates of April 1, 1979, through September 30, 1979.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate language to the assembled employees of Respondent on company time. The reading(s) shall be at such time(s) and places(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 of their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly employees to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter

in writing what further steps have been taken in compliance with this Order.

Dated: January 22, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member ALFRED H.

SONG, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that Merrill Farms had violated the law. After a hearing at which both sides had a chance to present evidence/ the Board found that we did violate the law by: (1) threatening employees with loss of wage increases for supporting the UFW; (2) promising and granting benefits to induce them to vote against the UFW; (3) laying off Crew 3 because of their support for the UFW and the cooler strike of August 1979? and (4) giving less work assistance to Rodolfo Ocampo because of his activity and support for the UFW.

The Agricultural Labor Relations Board has told us to send out and post this Notice. We will do what the Board has ordered and we want you to know that the law gives you and all farm workers in California these rights:

1. To organize yourselves;

2. To form, join, or help unions;

3. To vote in a secret ballot election to decide whether you want a union to represent you;

4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;

5. To act together with other workers to help and protect one another; and

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

Because 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 threaten employees with a loss of wage increases or other benefits for joining or supporting the UFW or any other union.

WE WILL NOT promise or grant benefits to employees to induce them to vote against the UFW or any other union.

WE WILL NOT discharge or lay off any employee because the employee joined or supported the UFW or any other union.

WE WILL NOT give less work assistance to any employee because the employee joined or supported the UFW or any other union.

WE WILL immediately offer all employee-members of our 1979 Crew Number 3 reinstatement to their old jobs or equivalent jobs and we will pay them any money they have lost, plus interest at seven percent (7%) because we unlawfully laid them off because of their support for the UFW and the cooler strike.

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 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

Dated: MERRILL FARMS

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.

CASE SUMMARY

Merrill Farms (UFW)

8 ALRB No. 4
Case Nos. 79-CE-lll-SAL
79-CE-276-SAL
79-CE-276-1-SAL
79-CE-294-SAL
79-CE-315-SAL
79-CE-357-SAL
79-CE-370-SAL

ALO DECISION

The ALO found that Respondent discriminated against Rodolfo Ocampo by providing him with less assistance than other employees; interfered with employee free choice by raising wages during an organizing campaign; unlawfully asked workers to choose between unionization and wage increases; and laid off Crew 3 unlawfully for engaging in union and other protected activity. The ALO found that Respondent did not grant preferential access to anti-union employees; did not engage in surveillance through Miguel Dias; did not fail to rehire Crew 3 since the members of Crew 3 never requested rehire; did not threaten Valentin Trejo with termination for expressing pro-union sympathies; and did not interfere with employee rights by granting an illegal bonus.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions, including the discriminatory-lay off of Crew 3. The Board found that the issue was fully litigated, though not alleged in the complaint, and that the ALO's conclusion was correct and consistent with the standard for determining motive set out in Wright Line (1980) 251 NLRB No. 150 [105 LRRM 1169].

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
MERRILL FARMS,	)	Case Nos. 79-CE-111-SAL
Respondent,	)	79-CE-276-SAL
	)	79-CE-276-1-SAL
and	)	79-CE-294-SAL
	)	79-CE-315-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	79-CE-357-SAL
	)	79-CE-370-SAL
Charging Party.	)	

Norman K. Sato, Esq. for the General Counsel

Arnold Meyers, Esq.
Abramson, Church & Stave for
Respondent

DECISION

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Officer: This case was heard by me on March 12, April 29, 30, May 1, 2, 5, 6, 7, June 11 and 12, 1980 in Salinas, California. The First Amended Complaint (GC Ex. 13),[1/] dated March 17, 1980 is based on charges filed by the United Farm Workers of America, AFL-CIO (hereinafter the "UFW"). It was stipulated at the pre-hearing conference that the charges were duly served on the Respondent, If Merrill Farms. The Answer to First Amended Complaint (GC Ex. 14)

[1/] General Counsel exhibits will be identified as "GC Ex. ___"; Respondent's exhibits will be identified as "Resp's Ex. ___."

[2/] Charge No. 79-CE-307-SAL contained in the original Complaint, was deleted from the First Amended Complaint.

was duly served on March 26, 1980.

All parties were given a fully opportunity to participate in the proceedings. Charging Party chose not to participate. The General Counsel and the Respondent filed briefs after the close of the hearing.

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

FINDINGS OF FACT

I. Jurisdiction

Respondent, Merrill Farms, is a corporation engaged in agriculture in Monterey County, California, as was admitted by Respondent in its Answer.

Accordingly, I find that Respondent is an agricultural employer within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereinafter the "Act").

Respondent also admitted in its Answer that the UFW was a labor organization within the meaning of section 1140.4(f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices

The First Amended Complaint charges that Respondent violated section 1153(a) of the Act by announcing wage increases during the UFW's organizational campaign, by asking employees to choose between unionization and wage increases, by granting preferential access to anti-union employees while preventing

access to pro-union employees, by engaging in surveillance, by refusing to rehire employees after their layoff because they engaged in protected union activities; and by harrassing employee Rodolfo Ocampo because of his union activities, and by threatening employee Valentin Trejo with termination because of his pro-union sentiment. The First Amended Complaint also alleges that by its harassment of Ocampo and its refusal to rehire the employees after their layoff, Respondent violated section 1153(c) and (a) of the Act.

Respondent, in its Answer to the First Amended Complaint, denied that it had violated the Act and raised several affirmative defenses among which were: (1) that the Board's failure to certify that the July, 1978 election resulted in a "no union" vote by the employees constituted discrimination against Respondent and permitted the union unlawful access in August of 1979; (2) that the doctrine of res judicata should be applied to the charges involving Rodolfo Ocampo in that they were the same charges as were dismissed by the Board in an earlier case filed during 1978; and (3) that any wage increase granted by Respondent was consistent with its historical past practice and was, in any event, effectuated for a legitimate business reason; i.e., an attempt on its part to remain competitive,

Respondent admitted that the following persons were, at all times material herein, supervisors within the meaning of section 1140.4(j) of the Act: Pablo Flores, Manuel Garcia, Jose Luis Torres, David E. Smoot, and Abel Lara.

III. The Business Operation

Merrill Farms, a corporation with its headquarters in Salinas, grows, packs, and ships fresh vegetables at its

operations in the Salinas Valley and Yuma, Arizona. Those vegetables Include lettuce, asparagus, celery, greens, broccoli, cauliflower and seed crops. The farming operation in Salinas is almost year round, February through December. Asparagus starts in February, followed closely by lettuce, which begins in April and goes through October. In October, broccoli, cauliflower, and celery start. Normally, no field work occurs during December or January.

Tom Merrill is Respondent's President and General Manager; Bans Sappok is the controller while Merv Anderson is its lettuce-harvesting supervisor and Mike Lead is supervisor[3/] of the hoeing and thinning of celery, asparagus and broccoli. The lettuce and celery crews are paid piece rate; the remaining workers, such as thinning crews, are paid hourly.

In April of 1979,[4/] the lettuce-harvesting season commenced in Salinas with two crews being put to work during the first week or so of the season. A third crew was added later.

As mentioned above, Merv Anderson was in charge of the lettuce harvesting operation in 1979. In that capacity he directed seven supervisors and foremen;[5/] Manuel Garcia, Jose Luis Torres, David Smoot, Herman Marquez, Aristeo Caballero, Paul Flores, and for a short while, Abel Lara. All of Respondent's

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[3/] Although they were not alleged to be supervisors in the First Amended Complaint, I find that Anderson and Lerda were supervisors within the meaning of section 1140.4 (j) of the Act, at all times material herein.

[4/] Unless otherwise noted, all dates mentioned hereinafter refer to 1979.

[5/] At the prehearing conference, it was stipulated that Respondent's crew foremen were supervisors within the meaning of section 1140.4 (j) of the Act.

lettuce is harvested by ground crews, working in "trio" groups, with two cutters and a packer in each trio.

The lettuce workers are paid on a piece rate. As such, their productive capacity determines how much each worker in a crew earns. As a result, there is peer pressure among the ground crews to work faster because it ultimately means greater earnings for all.

During 1979, Respondent operated three labor camps: Jack's Ranch for unmarried lettuce harvesters and some irrigators, Spreckel's Ranch for irrigators and their families, and Los Coches Ranch in Soledad for both unmarried employees and married employees with families who worked primarily in the thinning and hoeing of crops.

IV. The Seniority System

Respondent has established a crew-seniority and an area-seniority system (Salinas is in the Northern area; Yuma, in the Southern). The seniority system is set forth in Respondent's "Employment Policy Handbook" (Resp's Ex. 1, p. 8).[7/] There is a seniority list that is printed and available for inspection by employees (Resp's Exs. 3 and 4); foremen usually have a copy of the list in their possession. Under Respondent's system, seniority is acquired by working any 30 days within a

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6/Some of the employees who are on the seniority list in Salinas are also on the Yuma list. However, it is not required for a worker in Yuma to move with the season to Salinas in order to maintain his seniority, or vice versa.

7/In July of 1978, after the expiration of the Teamsters contract, Respondent decided it needed to set forth in writing certain of its personnel and employment policies, so it published its policy handbook. Respondent's Exhibit 1 was in effect through all of 1979; in 1980, Respondent published its second edition but no substantial changes were effectuated therein.

90-calendar-day period. The time starts running from the first day of work.

With respect to the lettuce operation, workers may be initially hired as temporaries at the start of the season but about the third day of operation, the highest-seniority employees are usually back to work. As the number of crews is thereafter increased, workers are recalled in order of seniority. If a worker performs no work during a season, he/she is removed from the seniority list.

As to layoffs and recall, the lowest-seniority lettuce harvesters (or those who have failed to acquire seniority) are laid off first, and employees are recalled according to their seniority. Without seniority, a worker has no rights with regard to either layoff or recall.

During 1979, there were three lettuce-harvesting crews, with the more senior employees assigned to work with lower seniority workers in either Crew No. 1 or Crew No. 2. In July of 1979, Respondent decided that having lower-seniority workers in Crew No. 1 might create problems because in the event of a depressed market situation, the size or number of the crews might have to be reduced. Accordingly, Respondent decided to place its most senior employees in Crew No. 1.[8/] Crew No. 3 was formed in late May and laid off in late August. It consisted of the lowest seniority workers who had not acquired seniority at the time of their layoff.

8/As a result, some workers, including Rodolfo Ocampo, who were In Crew No. 1 in 1979 found themselves in Crew No. 2 in 1980. (Resp's Exs. 3 and 4)

V. The Election History

On August 25, 1978, in a representation election held under the provisions of the Agricultural Labor Relations Act,[9/] a majority of the employees voted not to be represented by a union. On September 5, 1978, the UFW filed a Petition to Review and Set Aside the Election with supporting affidavits. A hearing was scheduled on March 6, 1979, but, pursuant to the UFW's motion for a continuance, the hearing was rescheduled for April 23, 1979, and later rescheduled again for June 12, 1979.

The Board never issued a decision on the UFW's challenge to the election. Instead, on September 18, 1979, Deputy Executive Secretary Ann Bailey issued an order dismissing as moot the UFW's Petition, Ms. Bailey stating:

> Since more than a year has passed from the date of the election and a new Petition for Certification is no longer barred, and a new election would be necessary whether the results of the election were to be certified or overturned, the Petition to Review and Set Aside is hereby Dismissed as Moot.

On or about September 26, 1979, Respondent filed a Motion for Reconsideration of the Order Dismissing the UFW's Petition to Review and Set Aside Election and requested that the Board issue an immediate certification of no union to be effective for a one-year period from the date of issuance. Respondent contended that the Board had failed to carry out its statutory duties as set forth in Labor Code section 1152 and the Board's Rules and Regulations, section 20370.

9/The Teamsters Union won the previous election in September of T975 and signed a contract which remained in effect between 1975 and July of 1978.

Respondent's Motion was denied by Ms. Bailey on January 11, 1980. It is the denial of Respondent's Motion that constitutes one of its affirmative defenses to the allegations against it herein.

VI. The Organizational Campaign and the Work Stoppages

A. The Role of Rodolfo Ocampo

Rodolfo Ocampo has been for some period of time one of the most active of all UFW supporters in Respondent's employ. Ocampo was active in both 1978 and 1979. In 1978, he distributed flyers and authorization cards and was the UFW representative on Crew No. 1 prior to the election. In that capacity, he consulted with employees when work-related problems arose and presented those problems to supervisory personnel for resolution.

When the 1979 lettuce-harvesting season began in April, Ocampo immediately began to participate in organizational activities. In April, he distributed flyers to crew-members to announce a Cesar Chavez speech in the area, and he passed out other leaflets to members of all company crews, both at work and in the labor camps. On one occasion, his actions were observed by foreman Abel Lara, a resident of the camp, who approached a worker, asked to see the leaflet, laughed and asked whether Ocampo was still organizing.[10/]

Starting in May and continuing to August, Ocampo made collections for the UFW. He told workers that he was a supporter of the UFW, that they needed union benefits and that they should

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10/Lara admitted seeing Ocampo pass out leaflets at labor camps but only in 1978. He stated he didn't know what message was in the 1978 leaflets but assumed they were in support of the union. Lara testified he didn't remember Ocampo passing out any leaflets in 1979. For reasons set forth infra, I do not credit Lara's lack of recollection.

have another election. Ocampo testified that Merv Anderson and foremen Jose Torres, Abel Lara and David Smoot were present from time to time on these occasions, but that no foreman ever stopped him from collecting.

During the first part of August, Ocampo picked up from the UFW office authorization cards which he distributed to crew-members before work, during the lunch period, and after work. This distribution and solicitation continued throughout the month of August. Ocampo testified that the cards were passed out in clear view of foremen and that this was especially true of the distribution which occurred after work near the buses (as workers prepared to be transported back to the camps) because on those occasions he was clearly observed by foremen who were also serving as bus drivers. During August of 1979, Ocampo also distributed union literature to the celery crews.

B. The Work Stoppages

During 1979, there were three major work stoppages, and Rodolfo Ocampo was involved in each of them. The first occurred in May of 1979 at Spreckels Ranch when Ocampo and one other worker placed UFW flags on top of a stitcher machine before work. The flags remained there for about one-half hour but then the stitchers, members of the Teamsters Union, took the flags down and threw them in a water can. In protest, lettuce harvesting Crews No. 1 and No. 2 stopped working for about ten minutes. No worker received any written warning for the stoppage, There is no evidence that any of Respondent's supervisors were involved in the flag incident.

The second work stoppage occurred about August 10 for

the same reason as the one in May. After the employees arrived at the job site, Ocampo and others put up the flags, and a short time thereafter they were again removed by the stitchers.

Ocampo claims that before he put up the flags, supervisor Manuel Garcia had warned him about it and said it would go against him because the "company didn't like Cesar Chavez."[11/] After the removal of the flags, the lettuce crews walked off the job, after having worked only about five minutes, and did not return that day. Again, Respondent did not discipline any employee for refusing to work, but Ocampo testified that during this same time frame Garcia made two further statements showing anti-union animus. On one occasion, according to Ocampo, Garcia asked the members of Crew No. 1, "What is it you want? You want the UFW flags or you want a raise?"[12/]

On another occasion, Ocampo testified, Garcia told the two crews that employees shouldn't pay attention to Ocampo because he was a union organizer.[13/]

11/Garcia denied making this remark but later, in answer to a question as to whether he had ever criticized Ocampo for any of his activities during that work stoppage, he stated, "I did say a couple of words, but I don't remember exactly what he said or what I told him." Then in reply to the ALO's request for the subject-matter of his conversation with Ocampo, he testified, "It could have been about the stoppage, or it could have been on whether the people wanted to return to work. But I really don't remember." For the reasons set forth, infra, I do not credit Garcia's denial.

12/Garcia also denied making this statement. This is the subject matter of Paragraph 6(b) of the present complaint. See discussion, infra.

13/This too was denied by Garcia. I do not credit this denial either for reasons stated infra.

A third work stoppage occurred on August 27, at which time Crew No. 3 joined Crews No. 1 and No. 2 in the protest. The lettuce workers had come to work on time but learned that the machines which made the boxes were not there and that they would have to wait about ninety minutes for the trucks to arrive from the cooler with the boxes on board. The delay had apparently resulted from a refusal by Teamsters truck drivers to cross the picket lines of the cooler plant employees.[14/]

While the lettuce workers were awaiting the arrival of the trucks, a dispute developed over what pay the field workers were to receive for the period of delay in staring work. A discussion occurred between supervisors Tom Merrill, Merv Anderson, and Manuel Garcia and Ocampo and another employee, Higuera, both of whom were acting as spokesmen for the employees. Ocampo and Higuera claimed that workers should be paid for four hours work, but Merv Anderson stated it should be only one and one-half hours of "stand-by time" pay. At one point, Anderson went to his car, obtained a copy of Respondent's policy handbook (Resp's Ex. 1), showed it to Ocampo, and told him that employees were entitled only to "stand-by time" because they hadn't yet started to

14/The cooler plant is where lettuce is taken after being harvested and is stored prior to shipping. Respondent, along with four other employers utilized the services of the Growers Vacuum Cooler Company which owned and maintained this operation. A strike among cooler plant employees occurred around August 23, 1979. Cooler plant workers are non-agricultural and not covered by the ALRA. They are represented by the Packing House Workers, Local 78.

work.[15/] Ocampo refused to look at it.

Ocampo claims that Merv Anderson then said: "If you don't like working for the company, go away."[16/] Ocampo then asked, "Well are you firing me?" There was no response.

Even after Anderson showed the handbook to Ocampo, the employees still refused to resume work. Crews No. 1 and No. 2 boarded the buses and left the fields. Some of the Crew No. 3 workers had not yet departed but were seated on the buses waiting to leave.

Jose Luis Ramirez testified that Garcia and Anderson approached the buses and that Garcia told the Crew No. 3 workers that if they didn't go to work that day, he couldn't guarantee them work, but that if they did, he would guarantee

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15/The Employment Policy Handbook distinguishes between "Call Time" and "Stand-by Time" as follows:

> CALL TIME
>
> All employees must report for work to the place specified, at the time specified by the Company. In the event the employees commence work they shall be paid a minimum of four (4) hours. Hourly employees shall be paid the hourly rate, and that days average piece rate earnings for piece rate employees. These provisions will not be applied where work is delayed or cannot be carried out because of rain, frost, governmental condemnation of crop, machinery breakdown, or other causes beyond the control of the company.
>
> STAND BY TIME
>
> Any employee who is requested to stand by, at the field, shall be paid for all time standing by, at the hourly rate of pay. This shall not apply to piece rate employees after they commence work. (Resp's Ex. 1 at p. 11)

16/Anderson denied making this statement.

equal work for all.[17/]

At that point, Anderson said: "All of you that want to work, we have work available. Those of you that choose not to work, we'll take you to the camps." According to Garcia, Crew No. 3 members responded that they wouldn't work because the other crews had left.

There was no work performed that day by any workers from any of the three crews. Respondent took no disciplinary action against any of the workers for engaging in the work stoppage.

On the day the third work stoppage occurred, August 27, Ocampo, in the company of approximately fifteen other workers from all three of the lettuce-harvesting crews, left the lettuce fields and went over to where the celery crews were working in order to enlist support for a 48-hour election[18/] and to urge the celery workers to join in the work stoppage. This effort failed, and the celery workers continued working. The effort did, however, according to Anderson, create considerable tension and discord. UFW supporters were shouting at the celery crews, trying to get them to leave their jobs, and some six to ten non-employees entered the field, at which time the sheriff was called to restore order.

The next day, August 28, a non-workday for the lettuce crews, members of all three crews again went back to talk to the celery workers. On that day, Ocampo, along with the other

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17/Garcia admitted he approached the buses but testified he asked, Do you want to work or not?" Anderson testified that Garcia said "Let's go to work."

18/Under section 1156.3(a) (4) of the Act, if an election petition is filed by a majority of employees who are on strike, a secret-ballot election will be held within 48 hours after the filing of the petition.

employees who had tried to enlist support for an election among the celery crews, received written warning notices for their activities of the previous day for "interfering with and interrupting the work of another crew on August 27, 1979."

VII. Respondent's Knowledge of the Organizational Campaign and Ocampo' s Participation

Merv Anderson admitted that he was aware that there was considerable union activity during 1979. He had been informed by foreman Abel Lara that organizers had been coming around to the camps, and he had personally seen UFW pamphlets that had been left there. In addition, Anderson had also found UFW flyers on buses and in the fields staring in June.

Anderson informed Tom Merrill after the May work stoppage that union organizing was going on; Merrill had also seen some union flyers in the field. Merrill testified that, "there was a lot of activity going on and a certain amount of unrest within the crew"; and that he was concerned about the union organizing.

Subsequently, Respondent called a meeting of all its foremen, including Lara, at which Anderson requested that he be kept informed of the organizational activity. Later, he was informed of such activities by Garcia and Lara, i.e., that Ocampo and others were organizing at the camps and that UFW flyers were being distributed.

During August there was a substantial amount of organizational activity. Tom Merrill testified: "They had an intensive effort in 1978, and it renewed again in 1979... It was going on all the time, but it built up in July and August." Merrill said he understood that Respondent could be subject to another election because the one year election bar

period expired in August, and he anticipated that the UFW was attempting to get a 48-hour election.

To counter the intensifying organizing campaign, on August 17, Merrill issued a written statement (GC Ex. 19) to all employees in which he pointed out that union organizers might be approaching them for support, that he believed Respondent was succeeding as a non-union company, and that they should resist any organizational attempts. When asked why this communication was issued, Merrill testified that he was anticipating another UFW organizing campaign, that the UFW had applied for access earlier in the year, and that although the ALRB had not yet ruled on the 1978 election challenge, he figured he had at least one year (August 25, 1978 - August 24, 1979) before another election could be held.

Around this same time it became common knowledge that the UFW had applied for and was granted access by the Salinas Regional Director[19/] (GC Ex. 11). Merv Anderson testified he assumed the UFW had applied for it in order to get an election. In response to the access granted the UFW, Respondent distributed informational bulletins to its foremen as to how they should conduct themselves during the access period. (GC Ex. 32)

Merrill stated that he became aware that several[20/] lettuce-crew workers had gone to members of the celery crews

19/Merrill's view was that although access to the fields was not legal, pending an ALRB determination of the 1978 election, it was not a major concern of his since organizers were already around anyway visiting workers in the camps.

20/It was also Merrill's feeling that there were more workers in the lettuce crews that supported the UFW than among the celery workers.

to ask for their support during the third work stoppage around the time of the cooler strike. It was Merrill's opinion that the UFW was using the cooler strike to intensify its new organizing campaign.

More specifically, Ocampo's views on unionization and his efforts in pursuit thereof were well known to Respondent's management personnel.[21/] High-ranking supervisors testified openly about Ocampo's visibility as a union activist. For example, Merv Anderson testified that during a 1979 meeting of the foremen, Manuel Garcia stated that both Ocampo and another employee, Higuera, were spokesmen for the workers, and that Anderson replied that he already knew this from 1978. Later, some foremen told Anderson that Ocampo had been organizing at the camps.

Likewise, Bans Sappok, Respondent's controller, testified that he was informed by Anderson in 1978 that Ocampo was active in the UFW campaign and that Anderson told him that Ocampo was involved in the August 1979 work stoppage.

Finally, Manuel Garcia testified that he had known for about two years that Ocampo was a union supporter because he observed Ocampo talking about the UFW to other workers in the field and in the camps. He also said that Ocampo was

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21/It is noted that Ocampo filed a charge with the ALRB in 1978 7T ALRB No. 58) alleging that he had been discriminated against because of his union activities. The ALO in that case, Bernard Sandow, concluded, inter alia, that Ocampo "was a strong UFW supporter and union organizer and the most active in union activities and in the election campaign in behalf of the UFW, while being the union's representative in the Jose Luis Torres crew during the entire period." (ALOD at p. 18)

responsible for or of the work stoppages ove the UFW flags.

VIII. The Allegation that Respondent, Through Foreman Jose Luis Torres and Foreman Abel Lara, Acting as "Extras" or "Raiteros" Gave Substantially Less Assistance to Ocampo's Trio than to Other Trios; and the Allegation That Respondent, Through Foreman Abel Lara, Directed the "Extra" or 'Raitero", Ruben Prieto, to Give Substantially Less Assistance to Ocampo's Trio than to Others.~ (Paragraph 5(a) and 5(b) of the First Amended 'Complaint;

A. Facts

1. The "Extra" or "Raitero" System.

Rodolfo Ocampo has been employed by Respondent as a lettuce cutter and packer since 1972. In April, 1979, he commenced working in Crew No. 1 and remained in that crew for the whole season. His supervisors were Merv Anderson and Manuel Garcia; his foreman was Jose Luis Torres and, for part of the year, Abel Lara. [22/] The ground crews, of which Ocampo was a member, were paid on a piece-rate basis, pursuant to which the total amount of money earned by the crew was divided equally among all the workers in that crew. Thus, the more cartons of lettuce packed by the crew in a day, would mean the more money was earned by each individual in the crew. It would follow, therefore, that the amount of money each worker earned would depend on how fast the crew members, as a group, were working. Respondent's witnesses, Sappok, Lara, and Anaya, and General Counsel's witnesses, Ocampo and Silva, all agreed that there was, quite naturally, under the piece-rate plan, peer pressure[23/] exerted by the faster workers on the slower workers to speed up their performance for the economic benefit of all.

22/Sometime, either in late May or in middle June, Lara left Crew No. 1 and went to David Smoot's Crew No. 2. He was replaced by Aristeo Caballero.

23/Anaya testified that, "The people kind of hassle at him [the slower worker] so that he'll work faster."

The lettuce, as mentioned, is harvested by three-person teams called "trios', each of which consists of two cutters and a packer. Each trio ordinarily covers four rows of lettuce (GC Ex. 15). During 1979, there were eight or nine trios in a crew, down from the ten or eleven in 1978.

Sometimes, an employee would show up for work only to find out that he had no trio to work with. In that case, he would usually be assigned just one row. This worker was called an "extra" or a "raitero".[24/] If an "extra" completed his row before the trios finished their assignments, he would often give "rides"[25/] to the slower workers who were behind the rest of the crew. Generally, the foremen did not tell the "extra" whom to help; the "extra" would judge for himself which worker was furthest behind and then go over to assist that person. Ocampo testified that the "extra" was supposed to help all the crews on an equal basis.

2. The allegation that foremen, when serving as "extras", assisted Ocampo's crew less than others.

Employees were not the only persons who served as "extras." There was testimony that foremen, including Torres and Lara, did so from time to time as well. [26/] Whether these foremen, when serving as "extras", discriminated against Ocampo or his

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24/There was some testimony that "extras" and "raiteros" were different. I find the overwhelming weight of the testimony to be that they performed the same task. For convenience's sake, I have referred to such an employee throughout this decision as an "extra" although the First Amended Complaint's paragraph 5 refers to him as a "raitero".

25/To "give a ride to" is to assist the slower employee(s) in catching up with the rest of the workers.

26/A foreman serving as an "extra" did not personally benefit financially but, of course, helped with his own image with his superiors by assisting in increased productivity.

trio because of his union activities by giving him less assistance is a subject of much controversy in this case.

Ocampo testified that although he received help from foremen during 1979, it was less than that given to others. The result of receiving less assistance was that Ocampo and his trio were left further and further behind the other trios, that he became physically tired just putting in the effort to try to catch up, and that his lagging behind evoked displeasure and criticism from the other members of his crew.

Ocampo contended he was singled out for special treatment and gave one example of that. He testified that in August of 1979, Burt Castaneda, at that time working in Ocampo's trio, asked foreman Abel Lara for help but was told, "I'd be glad to help you, but I can't because you're working with him."[27/]

Rafael Silva, a member of Ocampo's crew, confirmed that foremen acted as extras in 1979 and that he observed them giving less assistance to Ocampo than others, thus causing Ocampo's trio to fall further behind, which in turn resulted in pressure from other members of the crew for Ocampo to catch up.

Although a member of a different crew, (Crew No. 3), Jose Luis Ramirez testified that he observed Ocampo on two or three occasions from a distance of around 40 yards when they were working in adjacent fields. On those occasions, Ramirez saw that no foreman was helping the Ocampo trio, although it was far behind the others in the crew. Ramirez stated that he

27/Both Castaneda and Lara denied this conversation.

saw foremen helping other trios but then admitted that although Ocampo was not being helped, on some occasions, neither was anyone else.

Defending the allegation on the merits [28/] for Respondent, Merv Anderson testified that although foremen were in fact assigned to assist trios during 1979, it would occur only occasionally, i.e., when a worker had to leave the field for a short time, because the foreman's chief job was to watch the quality of lettuce being picked by the crew and to oversee production.

Although he at first denied that foremen ever acted as "extras", Abel Lara later admitted that he (and also Jose Torres) had on occasion helped pack one or two boxes; but he testified that he couldn't remember whether he had acted as an "extra" in 1979.

Another of Respondent's witnesses, Jesus Anaya, testified that foremen helped workers when they fell behind, but he stated that this was only on rare occasions and that he never saw Lara or Torres helping any of the workers.

Only Respondent's witness Hurt Castaneda testified that the company changed its policy and that foremen did not give any "rides" to anyone in 1979. He blamed this change of policy on Ocampo whom he said caused the change by making demands in 1978 and 1979.

3. The allegation that Abel Lara directed Ruben Prieto to give less assistance to the Ocampo trio.

28/Respondent denied this allegation in its Answer and, in it's Third Affirmative Defense, argued that the doctrines of res judicata and collateral estoppel must be applied in dismissing Paragraph 5 of the First Amended Complaint on the grounds that identical issues were raised and dismissed by the Board in a previous case involving Respondent, 5 ALRB No. 58.

Ruben Prieto is Abel Lara's nephew. During 1979, he was a cutter and packer in Ocampo's crew. According to Ocampo, Prieto was selected by Torres to serve as an extra in May of 1979. On that occasion, he refused to assist Ocampo's trio and allowed it to lag behind the others. [29/] When Ocampo complained about this, he was told that the reason he didn't receive help was because other workers didn't want to help him; however, on those occasions when Ocampo was ahead in his work, foremen would order him to help others who were behind regardless of whether he wanted to do so.

Prieto confirmed that he worked as an "extra" in May of 1979 but denied that his uncle or any other foreman gave special instructions with regard to Ocampo. On the contrary, Prieto testified that he gave help to whomever was behind including Ocampo's trio. He further testified that Ocampo never complained to him that he was receiving less help than others.

Lara at first denied that foremen would ever direct an extra to assist one trio over another. Later in his testimony, however, he recalled that sometimes he, as a foreman, would direct "extras", who had finished their assigned rows, to help others further behind. Although Lara could not remember whether Prieto served as an "extra" in 1979, he specifically denied directing Prieto that he was to give less help to Ocampo's trios or that he was to treat Ocampo's trio in any special way.

29/There is personal animosity between Ocampo and Prieto. Ocampo admitted he has had arguments with Prieto in the past and once was ready to start a fight with him.

4. The allegation that supervisors and foremen inspected Ocampo's work more frequently and more carefully than before and criticized his work performance because of his union activities.[30/]

Ocampo testified that at the end of May or the beginning of June, 1979, supervisors and foreman began to inspect his work much more carefully. [31/]Ocampo admitted he received no discipline or written warnings based on the quality of his work performance, but he claims he was verbally criticized by Manuel Garcia and Jose Torres. He did admit that part of a foreman's job was to watch over and check on the quality of work produced by the employees.

According to Ocampo, in May of 1979, Lara criticized the slowness of his work, suggested he quit, and made the following statement, "Aren't you ashamed? The people are all getting tired because you make them wait while you pick up all the (authorization) cards. With all the pressure the company has put on you, it's about time that you should have quit. But you don't do it because you're not even ashamed of it."

Lara specifically denied ever having made the above statement which Ocampo attributed to him. When asked whether

30/Although not alleged in the First Amended Complaint, I find that this matter should be considered as an independent unfair labor practice issue. The Board is not precluded from finding a violation of the Act notwithstanding the absence of a specific allegation in the Complaint where the issue is related to the allegations of the Complaint and is fully litigated at the hearing. Harry Carian Sales, 6 ALRB No. 55 (1980) ;John Elmore, Inc., 4 ALRB No. 98 (1978); Prohoroff Poultry Farms, 3 ALRB No. 87 (1977), enf'd in relevant part in Prohoroff Poultry Farms v. ALRB, 107 Cal.App.3d 622, hg den. July 30, 1980. In the instant case, it was argued in the Briefs, as well.

31/Ocampo testified that Merv Anderson checked his work only for a two-week period.

he might have used words to that effect, he replied: "No, I don't remember." Lara also denied that he criticized Ocampo or singled him out for special inspections. He testified that he inspected each trio equally as a required part of his job.

B. Analysis and Conclusion

1. The allegation that Respondent's foremen gave less assistance to Ocampo's trio than to others.

The General Counsel alleges that by giving substantially less assistance to Ocampo"s trio because of Ocampo's union activities, Respondent has violated Section 1153(c) and (a) of the act.

The elements required to prove both of these violations differ although a violation of Section 1153(c) constitutes a derivative violation of Section 1153(a) also. Finding an independent violation of Section 1153 (a) is made upon a showing that the employer's conduct would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 1152 rights. The actual effect on the employee is not relevant. Foster Poultry Farms, 6 ALRB No. 15 (1980). Thus, it is an objective standard and does not require proof of a specific intent to interfere with, restrain or coerce employees in the exercise of their Section 1152 rights. It is the probable or reasonably foreseeable effect and not the motivation for, or the actual effect of the action which determines whether there has been a violation. NLRB v. McCatron, et al., d/b/a Price Valley Lumber Co. et al., 35 LRRM 2012 (9th Cir. 1954), cert den. 384 U.S. 943, 35 LRRM 2461 (1955). An employer could be in violation of (a) but not (c) because the unlawful conduct does not reasonably tend to encourage or discourage union membership.

NLRB v. J. I. Case Co., 198 F.2d 919, 30 LRRM 2624 (8th Cir. 1952), cert den. 345 U.S. 917, 31 LRRM 2468 (1953).

A finding of a violation of Section 1153(c), on the other hand, requires a showing that an employer's discriminatory conduct reasonably tended "to encourage or discourage membership in any labor organization." The United States Supreme Court has held that although the relevance of the motivation of the employer has been consistantly recognized under Section 8(a)(3) of the National Labor Relations Act (hereinafter referred to as "NLRA"), it is also clear that specific evidence of intent to encourage or discourage union activity is not an indispensable element of proof of violations of 8(a)(3). This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct - - -" Radio Officers Union v. NLRB, 347 U.S. 17; 33 LRRM 2417 (1954) at 2428.

Ocampo testified that during 1979 Respondent's foremen, Jose Luis Torres and Abel Lara, worked as "extras" and that despite the fact that they assisted him at times, they gave him less help than others and that he believed they so discriminated against him because of his union activities. As a result, Ocampo and his trio were caused to fall behind the other trios, felt the pressure of having to catch up with the others, and were criticized by co-workers.

If Ocampo’s assertions are true, Respondent is in violation of both Sections 1153 (c) and (a) of the Act. Reassigning a known union supporter to a more arduous turf (from tomato

spraying to picking) has been held to be a violation of Section 1153 (c) and (a) where the reassignment was because of union activity or union sympathy. Kawano, Inc., 3 ALRB No. 54 (1977). Similarly, retaliating against pro-union employees by requiring them to weed with a six-inch knife instead of the usual long-handled tool was held to be discrimination tending to discourage union memberships and therefore a violation of Section 1153(c) and (a). Sam Andrews' Sons, 3 ALRB No. 45 (1977). In Sierra Citrus Association, 5 ALRB No. 12 (1979), the Board held that an employer prevented an employee from working for 50 minutes one day because of his union activities and thereby violated Section 1153 (c) and (a). In another case, the Board found that an employer reduced the work week of its employees by one-half hour per day because they were strong union supporters; its conduct was held to have the reasonable tendency to discourage union membership and therefore was a violation of Section 1153 (c) and (a) of the Act. Arnaudo Bros., Inc., 3 ALRB No. 78 (1977), enf'd by Ct. App., 3rdDist., May 16, 1978, hg. den. June 27, 1978.

The record indicates that foremen Torres and Lara served as "extras" only rarely; serving as "extras", of course, was not one of their principal duties, as Merv Anderson testified. However, I find that when they served as "extras", they intentionally offered less assistance to Ocampo because of his well-known union activities and sympathies. Ocampo testified in a straightforward, candid manner and generally displayed a good memory of past events. I credit his testimony in most respects, including his statement that he heard foreman Abel Lara assert that he would not help a member of Ocampo's trio

because he was working with Ocampo. I also credit Ocampo's testimony that Lara suggested he quit.

I further credit the corroborating testimony of Rafael Silva regarding the harassment suffered by Ocampo. I was impressed by Silva's honest demeanor and believe he testified truthfully.

I do not accord much weight to Jose Luis Ramirez's testimony since, as a member of Crew 3, he could have observed Ocampo only sporadically. However, I do credit that part in which he testified that he often saw Ocampo's trio lagging in work behind the other trios.

I do not credit the testimony of Abel Lara denying that less assistance was given to Ocampo or denying that he had told Castaneda that he would not help a member of Ocampo's trio. I found Lara's testimony to be contradictory and unreliable.[33/] For example, he testified on cross-examination that he didn't know whether Ocampo had been engaged in union activity in 1979 and then replied to a question as to whether Respondent had any labor problems concerning the UFW, "Not that I remember." Yet his supervisor, Merv Anderson, testified that in June of 1979 Abel Lara told him that UFW organizers had been passing out leaflets at the labor camp where he lived. Subsequently,

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32/Torres did not testify.

33/Occasionally during this testimony, Lara burst out laughing at times that were not always funny. For example, when asked whether he told Castaneda that he wouldn't help his trio because he was working with Ocampo, certainly an important issue in the case, Lara laughed openly. I think this is unusual and suspect behavior for a foreman testifying at an unfair labor practice hearing.

Anderson met with all the foremen, including Lara, and asked them to notify him if they learned anything about whether the company was being organized. During that meeting, Manuel Garcia specifically mentioned that Ocampo was one of those involved in the UFW's organizing campaign.

After Lara had denied knowledge of Ocampo's union activities in 1979, or of any labor problems at Respondent's operations, he then admitted he was aware of work stoppages concerning the UFW flags on stitchers' trucks, that Ocampo was involved in those incidents, and that he had heard that Ocampo was responsible for the incident with the flags. [34/] He also indicated that he thought Ocampo was a troublemaker because of the work stoppages and the flag incident; but then, later in his testimony, he denied that Ocampo was a troublemaker.

Lara's testimony about whether foreman ever served as "extras" was confusing. At first he denied it [35/] and then admitted that he and Jose Torres had both so served. At another point, he testified that if an "extra" finished his row and did not then go to the assistance of anyone else, other members of the crew would urge him to help them out. Later, however, he denied that an employee would ever receive peer pressure from co-workers to work faster.

I do not credit the testimony of Castaneda, who denied the Lara statement. He was the only witness who testified that Respondent had actually changed its policy regarding foremen giving rides to workers and that no rides were given in 1979.

34/At this point in his testimony his manner became particularly indignant and hostile.

35/Here again Lara laughed at the question.

This is clearly untrue as Respondent's witnesses Merv Anderson, Abel Lara, and Jesus Anaya all corroborated the testimony of Ocampo and Silva that rides were given in 1979. In addition, Castaneda clearly showed a bias against Ocampo by blaming the purported 1979 change of policy as to foremen giving rides to workers directly on Ocampo's demands in 1978 and 1979.

I find that less assistances was given to Ocampo by Respondent's foremen than to other employees and I further find that Respondent adduced no business justification for this disparate treatment. I also find that Respondent discriminated against Ocampo, the leading union activist in its employ, because of his pro-union activities and sentiments, and that Respondent's discriminatory conduct tended to discourage union membership and union activity. These findings are supported by the following statements attributed to Lara which I find that he, indeed, made: (1) that he refused to assist Castaneda because the latter was a member of Ocampo's trio; (2) that Ocampo's co-workers were getting tired of waiting for him to pick up authorization cards because they didn't want a union, and that with all the pressure the company was putting on him he should quit; (3) that Ocampo was a troublemaker because of the concerted work stoppages he participated in; and (4) that he ridiculed Ocampo's union activities by laughing in front of another worker when Ocampo passed out UFW leaflets at one of the labor camps.

These statements and gestures of Lara, attributable to Respondent based on Lara's supervisory status, are evidence of Respondent's anti-union animus and discriminatory disposition, and underscore the assertion that less assistance was given to Ocampo because of his union and concerted activities.

Respondent makes other arguments not already discussed. First, Respondent argues that, "it defies logic to argue that the foremen picked out Ocampo by giving less assistance to him when there was not a consistent practice to give rides to any of the crew members." (Respondent's post-hearing brief, p. 54). Respondent implies that for discrimination to occur there must have been a consistent or regular practice. I disagree. How often the event occurred is not the crucial question. Since the credible testimony from both Respondent's and General Counsel's witnesses establishes that foremen did from time to time give rides in 1979, the important question is whether, when rides were given, rare though that might have been, they were given to some and not to others for discriminatory, anti-union reasons. I have found that foremen gave less assistance to Ocampo and his trio than to other trios and have credited a statement attributed to Lara, which supports that finding. The record discloses no reason why Respondent's supervisors would single out Ocampo for special treatment, except his highly visible status as a union supporter and activist.

Next, Respondent argues that even if rides were not given to Ocampo's trio, it has not been shown that any harm to Ocampo resulted. "Whenever the ride helps any trio of the crew, the whole crew including Ocampo benefits - not just the members of the particular trio which was helped." (Respondent's post-hearing brief, p. 55)

Respondent's argument fails on two counts. First, it assumes that everytime Ocampo was not being helped, someone else was being helped in his place. There is no evidentiary basis for this conclusion. But more important is the fact that

even if true, it misses the significance of the unfair labor practice allegation. Ocampo testified that other employees kept criticizing him and asking why he was always behind in his work. Anaya pointed out that workers who fall behind get "hassled" to make them work faster. The point is that it was common knowledge that Ocampo was an active union supporter and the reason he received less help than others must have been apparent to all members of the crew - precisely because of his well-known union activities. There could be no other reason. Because he received less assistance, with the resulting embarrassment and criticism from his co-workers, discredit was cast upon the union movement, as well.

Finally, Respondent has made, as mentioned, a res judicata argument. In recommending that the Board find a violation here, I am not unmindful of Respondent's position.[36/] There are some striking similarities between the present case and the June, 1978 factual setting found in Merrill Farms,5 ALRB No. 58 (1979). (Case No. 78-CE-85-M). In that case, Ocampo complained, as here, that foremen refused to assist his trio, thereby making his work harder, and that he felt pressure and was tired. When he complained, foreman Jose Torres said the problem was that no one wanted to work with him. Ocampo also stated that his work was frequently criticized. Torres

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36/Respondent does not strictly argue res judicata in its post-hearing brief, although it raised it as a defense in its Answer. However, Respondent does attempt to show in its Brief the similarities of the charges, asserts that the present charges are as unsubstantiated as the previous ones, and argues that the present case is an attempt by Ocampo and the General Counsel to show their dissatisfaction with the outcome of the previous charge.

denied any discrimination and said he actually helped Ocampo pack lettuce on the day he complained of.

The ALO found a violation of Section 1153 (a), but the Board rejected that finding on the grounds that the evidence did not establish that any act of Torres was based on or related to Ocampo's union activities. The Board stated:

> On the basis of the record evidence, we find that the acts and conduct of Torres did not tend to interfere with, restrain or coerce employees in the exercise of their Section 1152 rights. Accordingly, those allegations of the complaint are hereby dismissed."

If res judicata were to be applied in an unfair labor practice setting, I do not believe this is the proper case for it because the events described occurred in different years and involved (at least in the case of Lara) different foremen. Obviously, there were different facts, incidents and witnesses, as well. The previous case was dismissed by the Board for insufficient evidence. In the event my recommendations are upheld in this case, it will be, I assume, because, unlike the previous case, a violation has been established by a preponderance of the evidence. Certainly, I do not read the Board's decision in the prior case to suggest that the theory of the case, disparate and discriminatory foremen's assistance to a trio based on the union activities of a member of the trio, could not result in a violation given the proper evidentiary basis.

Therefore, for all the foregoing reasons, I conclude that Respondent has violated Sections 1153 (c) and (a) of the Act.

2. The allegation that Respondent, through foreman Abel Lara, directed the "extra", Ruben Prieto, to give less assistance to Ocampo's trio than to other trios.

General Counsel argues that Ruben Prieto, a nephew of Abel Lara, failed to give Ocampo help as an "extra" when he worked in that capacity in May of 1979 and that the reason for this was that he had been so directed by Lara.

While there is evidence that Prieto worked as an "extra" in 1979, which Prieto admits, and while there is a conflict in the testimony as to whether he helped Ocampo, there is not one iota of evidence that Lara or anyone else from Respondent's management directed Prieto to give less help to Ocampo. Neither Ocampo nor any other witness provided any testimony that could support this allegation. Moreover, General Counsel does not argue that Prieto, by the nature of his familial relationship with Lara, enjoyed some kind of quasi-supervisorial or agent status, and there is no evidence of that in any event.

Moreover, it is worthy of note that there exists a personal animosity between Ocampo and Prieto which would detract from the discrimination allegation were there any evidence of same to consider.

I recommend the dismissal of this allegation.

3. The allegation that supervisors and foremen inspected Ocampo's work more frequently and more carefully than usual and criticized his work performance because of his union activities.[37/]

The General Counsel has not met his burden of proving

37/This allegation was not included in the First Amended Complaint. Nevertheless, I find it is a valid independent unfair labor practice issue as it is related to the allegations of the said Complaint and was fully litigated at the hearing and argued by the parties in their post-hearing briefs. Harry Carian Sales, 6 ALRB No. 55 (1980); John Elmore, Inc., 4 ALRB No. 98 (1978); Prohoroff Poultry Farms, 3 ALRB No. 87 (1977), enf'd in relevant part in Prohoroff Poultry Farms v. ALRB, 107 Cal.App.3d 622, hg. den. July 30,1980.

this allegation. The evidence did not show either that the inspections of his work, if they occurred, were any more frequent than the inspections of the work of others or that the criticisms of his work, if they occurred, were not justified. In fact, the only concrete proof of Ocampo's work being criticized was the evidence that a state inspector was dissatisfied with the way he was packing lettuce in a box. At any rate, Ocampo admitted he received no written warnings or disciplinary notices with regard to the performance of his job. And he had no quarrel with the idea that a foreman's job was to watch over and check on the quality of work performed by Respondent's employees.

Although it could be said that Lara's statement, which I have found he made, to the effect that Ocampo's co-workers were getting tired of waiting for him was criticism of his work, I do not regard it as such. Rather, I regard the statement as evidence of a discriminatory intent on Lara's part.

For all the foregoing reasons, I recommend the dismissal of this allegation.

IX. The Allegation that When Ocampo Followed a Bus to a Labor Camp in order to Attempt to Organize Workers there, Respondent's Bus Blocked the Entrance Preventing any Organizing Activity. 38/

A. Facts

Ocampo testified that in August of 1979 he distributed UFW leaflets to the celery crews. One week later he went back

38/This allegation was also not included in the First Amended Complaint. For the same reasons cited in the preceding footnote, I find it to be an independent unfair labor practice issue.

to talk to the workers personally. They had finished work and were congregating around the bus. Ocampo went to the bus and after speaking to them for a short time an unnamed supervisor came over and informed him that he had to transport the workers to the Los Coches labor camp; and that if Ocampo wanted to talk to them, he should follow the bus and talk to them there. Ocampo testified that he then did follow the bus but, when he arrived at the labor camp, he found that the supervisor had blocked ingress by parking his bus directly across the entrance.

Ocampo parked his own car outside and went in. However, by the time he arrived, some of the workers who did not live at the camp (eight to ten of them) were leaving. Thus, Ocampo was able to talk to some workers but only to those who actually lived at the camp. Ocampo claims that because the supervisor parked the bus so as to block the entrance to the camp, he (Ocampo) had to park his car outside and walk in, allowing time for workers who did not live in the camp to leave before he had a chance to talk to them.

Rosaura Hernandez, a witness for Respondent, testified that she recalled that Ocampo and another employee, Valentin Trejo, got on the bus that day and spoke to her crew; and that no one prevented them from doing so. The bus then left, after they had finished speaking, and proceeded to the camp. She stated that it was normal practice for the bus driver to return the workers to the camp, to park the bus at the entrance to let the people alight, and then leave. She confirmed that while the bus was parked in front of the entrance, it was not possible for another vehicle to drive through the driveway.

Another witness for Respondent, David Avila, confirmed that Ocampo spoke to the crew on the bus without interference and added that there was no foreman on the bus at the time. However he disagreed with both Ocampo and Hernandez as to whether the bus had blocked the entrance. According to him, when the bus was parked in front of the labor camp, it was possible for another vehicle to drive through.

B. Analysis and Conclusion

If it can be shown that a supervisor of Respondent deliberately blocked the labor camp's entranceway so as to prevent or delay contact between a union organizer and the employees inside, a violation of the Act has occurred. In McAnally Enterprises, Inc., 3 ALRB No. 82 (1977), a supervisor who blocked a former employee's attempt to get out past the employer's gate in order to speak to some union organizers and other employees who were congregating was found to have violated Section 1153(a) of the Act.

There is no violation here, as there is no evidence that the bus was placed deliberately in front of the labor camp's entrance so as to prevent Ocampo's entry. The bus appeared to be there because, as Hernandez explained, it was usually parked there until after the workers had alighted and then it left. It seems odd that Respondent's supervisors or foremen would allow Ocampo and Trejo to speak to workers on the bus uninterruptedly until they had finished, advise then to follow the bus to the labor camp where they could speak for a longer period if they wanted, and then thwart their plans by parking the bus so as to block the entrance to the camp. Of course, Ocampo's entry was not really thwarted at all. All he

had to do was park his car and walk into the camp, which is exactly what he did. It could hardly be claimed that the seconds or minutes lost in this short walk rose to the level of a violation of state labor law.

I recommend the dismissal of this allegation.

x. The Allegation that about August 10, 1979, Manuel Garcia Talked with Each Trio and Asked Them to Choose between Unionization and Wage Increases (Paragraph 6(b) of First Amended Complaint)

A. Facts

On or about August 10, 1979, the second work stoppage occurred among the lettuce workers. Workers had placed UFW flags on stitcher trucks, but the stitcher workers removed them. The lettuce crews staged a walkout, after having worked only about five minutes, and did not return to work that day.

Ocampo testified that during the morning in front of the entire Crew 1,[39/] supervisor Manuel Garcia asked: "What is it you want? You want the UFW flags or you want a raise?"

Garcia denied making this statement. Both Jesus Anaya and Victor Ahumada, a co-worker and member of Crew 1, testified they could not recall this statement being made by Garcia.

B. Analysis and Conclusion

The test for a violation of Section 1153(a) of the Act does not focus on the employer's knowledge of the law, on the employer's motive, or on the actual effect of the employer's words or conduct. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with

39/Paragraph 6(b) of the First Amended Complaint actually charged that Garcia visited each trio asking that they choose between unionization and wage increases. There is no evidence of that happening. The difference, however, between Garcia's talking to individual trios or talking to the crew as a whole is not crucial to the substantive question of whether the statement was made, as charged, by Garcia to the workers on this occasion.

the free exercise of employee rights under the Act. Nagata Brothers Farm/ 5 ALRB No. 39 (1979), rev, den, by Ct. App., 4th Dist., Div. 1, November 19, 1979; hg. den. December 31, 1979, cert, den. June 16, 1980, __ U.S. __. A violation may be found regardless of the employer's good or bad faith. Anti-union bias is not a factor. Cooper Thermometer Co., 154 NLRB 502, 59 LRRM 1767 at 1768, n.2 (1965).

A statement by an employer that any wage increase might be affected by their insistence upon union organization would be an unfair labor practice and a violation of Section 1153(a) of the Act. Akitomo Nursery, 3 ALRB No. 73 (1977).

Here we have a situation where, in the middle of a work stoppage, supervisor Manuel Garcia, apparently frustrated by his lack of success in getting employees to return to their jobs, is alleged to have suggested that in the choice between unionization (UFW flags) and wage increases, it would be in their interest to return to work and receive the increases.

Certainly, an employer is free to communicate to his employees any of his general views about unionism so long as the communications do not contain a threat of reprisal or force or promise of benefit. NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 at 2497 (1969), However, in this case I think the statement, if made, contains a threat.

Was the statement made? It was. Here again I credit Ocampo's testimony as I found him to be a credible witness. The same is not true of Manuel Garcia.

To begin with, his demeanor was evasive and not believable, When questioned about whether there was any discussions concerning

employees having to choose between a union and a wage increase, supervisor Garcia stated that he couldn't discuss anthing about wages or increases in wages because "I had nothing to do with that. The company is the one that does that, and I only work for the company."[40/] Then, when asked if he ever asked a worker to choose between unionization and wage increases, he replied "Not that I remember."

In addition, some of his answers were incredible and defy belief. He has been an employee of Respondent for twenty-four years and is a supervisor who reports directly to Merv Anderson. During 1979, he supervised four foremen and two lettuce crews. Yet, he testified that he thought there might have been an election in 1978 but then stated that he did not know whether Respondent wanted the union to win or lose. "I don't know what the company wants, whether they want the union or not. That I don't know."[41/] He denied ever reading any company-sponsored pamphlets during 1978 or 1979 (such as G.C. Ex. 19) in which the company's position on unionization was set forth. Next he initially denied knowing what Respondent's position was regarding union Organizers; then he admitted having read a company bulletin

40/He had previously testified that sometime in 1979 Merv Anderson gave him a list of pay increases, and he showed it to two or three workers in each crew. Soon the entire crew had gathered around him to see the list.

41/It is to be recalled that Merv Anderson testified that sometime after June of 1979, he met with supervisors and foremen and asked them to let him know if they felt the company was being organized. Garcia was present and, according to Anderson, mentioned that Ocampo was one of those involved in the organizing attempt.

(G.C. Ex. 32) on what to do if organizers should come on company property.

Furthermore, I find the timing of Garcia's mention of wage increases to be suspicious. Not only was there a union organization campaign underway, but Respondent had just previously on July 31, 1979 increased wages to $4.60 per hour (from $4.20). Thereafter, this raise was made retroactive from July 16 -July 24, 1979, and this was communicated to workers by check attachment on August 13, 1979, just three days after Garcia made the statement (G.C. Ex. 16). Obviously, wage increases was a subject that was being discussed by Respondent's management around that time.

Finally, Garcia demonstrated a bias against Ocampo, the employee who had accused Garcia of making the statement in the first place. When asked on cross what was the cause of the second work stoppage, (August 10), Garcia replied: "Rodolfo Ocampo."

In general, I found Garcia's testimony to be largely evasive, self-serving and contradictory. His testimonial demeanor generally suggested a lack of candor.

Respondent also argues that Jesus Anaya was present when the crew stopped work and did not recall hearing Garcia say anything to the crew about the flags. The problem is that Anaya's testimony is very confusing and inconsistent on this point. At first he testified he remembered only the work stoppage around the time of the cooler strike regarding the four-hour guarantee (the third work stoppage on August 27). Then he testified that he did remember an incident in 1979 concerning flags but that the crews did not stop working at all during that

time. Next he described a day in which the stitchers removed the UFW flags, but it is unclear whether he was talking about the May incident (first work stoppage) or the August 10 one (second work stoppage). Although it's true he said he was not aware of Garcia's saying anything about the flags in 1979, as Respondent argues, it is also true that just prior to that testimony, Anaya gave the following account of his recollection of the UFW flag incident:

> Q. (by Mr. Myers) "Do you remember what Manuel said that day?
>
> A. "No, I don't know."
>
> Q. "Well, you explained to Mr. Sato some of the things you remembered Mr. Garcia saying."
>
> A. "I?"
>
> Q. "Yes."
>
> A. "About the flags?"
>
> Q. "No, no. The day that the flags happened."
>
> A. "I haven't said anything."

Respondent also argues that employee Victor Ahumada could likewise not recall Garcia's mentioning anything about flags during the work stoppage. However, there can be little weight given to this testimony because there is a good reason for Ahumada's failure to recollect any such conversation by Garcia. Cross-examination revealed that on the day in question, he was working as a loader and, as such, worked behind the crews and loaded the boxes that were packed by the packers onto the truck. He testified he spent most of the time on a truck about two or three hundred feet from the rest of the crew where meetings were going on in the field. Thus, he admitted he didn't hear

everything that Garcia may have told the crew.

Respondent's remaining argument is that no other witness corroborated Ocampo's story and that a finding of an unfair labor practice cannot be supported by mere "inference," citing Royal Packing Co. v. ALRB. 101 Cal.App.3d 826 (1980) Royal Packing does not prohibit the Board from drawing its own inference from the evidence adduced; it only requires that the inference be supported by substantial evidence. In any event, Ocampo's testimony is not inferential but direct. It is sufficient to uphold a violation, even if there is no corroboration, if it is credible and Respondent's defense is not. A statement suggesting that an employer will not give a raise unless its workers abandon the concept of unionization is direct and convincing evidence of anti-union motivation. Louis Caric & Sons, 6 ALRB No. 2 (1980). Royal Packing does not hold otherwise.

I find that Garcia made the statement attributed to him by Ocampo.[42/]

For all the foregoing reasons, I conclude that Respondent, by the conduct of its agent, Manuel Garcia, has violated Section 1153(a) of the Act.

42/Ocampo testified that at this same time Garcia stated in front of the crew that workers shouldn't pay attention to him (Ocampo) because he was a union organizer. This remark does not rise to the level of an independent unfair labor practice charge as it was never made clear that the General Counsel was treating it as such and he does not argue it thusly in his post-hearing Brief. Respondent could not have regarded it as an allegation either, as neither Garcia, Anaya nor Ahumada was specifically asked about it. I shall, however, consider the statement as evidence of Garcia's and Respondent's anti-union animus, as I find that the statement was made.

XI. The Allegation that Tom Merrill, While Addressing Workers in the Paul Flores Crew Threatened Valentin Trejo with Termination in Response to Trejo's Expressions of a Desire for Union Representation. (Paragraph 9 of First Amended Complaint)

A. Facts

On August 27, supervisor Tom Merrill decided to personally notify the crews about a wage increase. This was the first announcement of the raise. Merrill had never personally gone to the fields to talk to his employees in this fashion before, but he testified that it was necessary this time for the following reasons: (1) there was much labor unrest at the farm due to the cooler strike (See footnote 14) and there were many pickets around; (2) employees were being harassed in that the cooler pickets had driven onto the ranch, talked to crew members, and tried to get them to leave their work sites;[43/] (3) he wanted to explain the facts of the cooler strike; and (4) he wanted to announce the wage increase.

Because of the labor unrest, Merrill felt it was necessary to assure his agricultural employees that the cooler strikers' activity would not affect their jobs and that Respondent was doing all it could to minimize the turmoil while at the same time protecting the workers and its own property.

According to Merrill, he spoke first to Mike Lerda's two celery harvesting crews at Jack's Ranch at 9:00 a.m., and next he spoke to a celery thinning crew at Los Coches in Soledad

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43/Merrill admitted that the cooler pickets were not successful although on one occasion they rushed the field and a few workers left their jobs and walked off.

between 10:00 a.m. - 10:30 a.m. He spoke in English while Lupe Villalobos from the personnel department translated.

Merrill told the workers that Respondent was raising their wages to $5.10 an hour in order to remain competitive with other growers. At some of the ranches, he mentioned the cooler strike and stated that Respondent was not involved in the strike and was trying to minimize the disruption; however, he did not refer to the cooler strike when he spoke to Valentin Trejo's crew at Los Coches Ranch.

It is precisely what was said by Merrill to Trejo (and not translated by Villalobos), when the speech at Los Coches was given,that .is the subject of this allegation.

Valentin Trejo, an active union supporter, testified that he was first informed of the raise on August 27 when Merrill arrived at Los Coches unexpectedly and spoke to his thinning and hoeing crew. Trejo confirmed that at that time Merrill announced a wage increase of $5.10 per hour, retroactive to August 25, and that the stated reason for the raise was because Respondent wanted to stay competitive with other growers.

Following the speech there was a question-and-answer period and Trejo asked some questions about Respondent's medical plan. At that point Trejo suggested that unions obtained better contracts for workers than what Respondent provided. Trejo then said he heard Merrill say in English,[44/] in a softer voice than he previously had heard him use, that if he (meaning Trejo)

44/Trejo testified at the hearing in Spanish. He represented that he spoke little English but that he understood a lot.

didn't like it, he could go elsewhere. This remark was not translated into Spanish, according to Trejo.

The Trejo testimony is uncorroborated, although Merrill's remark was allegedly made before the entire crew. Trejo stated that he knew of another worker, Gonzalo Casteneda who clearly understood the remark. Casteneda was not called as a witness.

Tom Merrill denied ever making any statement to the effect that if Trejo didn't like Respondent or its personnel policies, he could go elsewhere and also denied that he made the untranslated statement attributed to him by Trejo. Merrill admitted that some of his comments may not have been translated but that they concerned only the subject of comparisons between Respondent's medical plan with that of other employers'.

Lupe Villalobos also testified about this incident. As a member of the personnel department, he accompanied Merrill to the field and acted as translator. When asked why Merrill considered it necessary to personally visit the field, he said he didn't know why.

Villalobos fielded the questions during the question-and-answer period following the speech. At that time Trejo commented that everyone in his crew wanted the election and also began to ask a series of questions about the medical plan. According to Villalobos, Merrill responded that he believed ninety percent of the people were happy with the present medical plan. Then, commenting on the difference between Respondent's medical plan and medical plans available under union contracts Merrill said, "You ought to go to people who have had, or who have worked under, a union contract and ask them." It was this remark of Merrill's

that Villalobos decided not to translate (and no other) because, according to him, he felt that they were not assembled to debate a medical plan but to announce a wage increase.

Villalobos denied that Merrill told Trejo he could leave the company if he didn't like it there.

B. Analysis and Conclusion

Although I am unwilling to definitely conclude as Respondent urges, that Trejo only learned the meaning of Merrill's English statement from another worker, I must say that the record is not clear as to how he came to understand the English words spoken. Trejo testified in Spanish and stated he spoke very little English but that he did understand quite a bit. But his testimony is confusing as to whether he clearly understood the Merrill English statement at the time it was allegedly uttered or whether he depended for its meaning upon what was told him by another worker who did not testify.

On direct examination Trejo testified:

> "When we were talking about all of that, I noticed a word that he used. He said it to the interpreter. The interpreter didn't say it to me, but I don't know what he said to him. But what he said was, if I didn't like it, I could go somewhere else. But they didn't tell me that. I just understood it and there were people who told me that, too. (Emphasis added)

Then, on cross-examination, Trejo admitted that another worker, Gonzalo Casteneda, had understood the statement, that he had told him (Trejo) what Merrill had said in English, and that the two of them had discussed it. Casteneda did not testify.

It is quite possible that Trejo misunderstood the remark. The phrase that was not translated, according to Villalobos, was a response to a Trejo question comparing Respondent's medical plan to plans provided under union contracts.

If Merrill said, "You ought to go to people --- who have worked under a union contract and ask them," emphasis added, it's possible Trejo believed it was he being asked "to go" from the employment of Respondent.

Moreover, Tom Merrill impressed me as being too sophisticated to utter such a remark before an entire crew. After all, there is no evidence that Merrill instructed Villalobos not to translate any of his remarks. Thus, if Tom Merrill had made the statement, he would have felt assured that it would be translated along with everything else he said.

In view of Trejo's language difficulty in English, the lack of corroboration to support his recollection, and the very real possibility that he just misunderstood the English meaning of the words, I find that the General Counsel has not met his burden of proving that Merrill actually made the statement attributed to him. Jackson & Perkins, 5 ALRB No. 20 (1979). See also, Royal Packing v. ALRB, 101 CA 3d 826 (1980). Accordingly, I recommend that this allegation be dismissed.

XII. The Allegation that on or about August 3, 1979 and August 29 1979 Respondent announced wage increases for its employees. (Paragraph 6(a) and (c) of the First Amended Complaint)

A. Facts

1. History of Wage Increases under Teamsters' Contracts The Teamsters Union represented the employees of Merrill Farms for most of the 1970's and negotiated collective

bargaining agreements with yearly increases usually in July as follows:

DATE	HOURLY RATE 45/
1/8/70	$2.30
7/16/73	2.41
7/16/74	2.53
7/16/75	2.95
3/3/76	3.10
7/16/76	3.40
7/16/77	3.55

All of the above raises between 1973 and 1978 were made pursuant to the collective bargaining agreement then in effect between the Teamsters Union and Respondent. There were no bonuses, Christmas pay, or other additional monetary distributions made during this period.

2. Wage increases after the expiration of the Teamsters contract in July, 1978.

The first wage increase in 1979 occurred in March when wages were raised from $3.85 per hour to $4.20. This affected only the hoeing and thinning crews as the lettuce harvest did not commence until mid-April. However, the raise was made applicable to lettuce harvesting workers as well when they returned to work.

45/Piece-rate workers received comparable increases on the dates indicated.

46/In July of 1978, at the expiration of the Teamsters contract, wages, per contract, were $3.55 per hour. Respondent raised them at that point to $3.85 where they remained until March of 1979.

As to the reasons for the March raise, Tom Merrill explained that it was the competitive rate in Salinas at the time and that Respondent had committed itself to its workers through its Policy Handbook to pay the prevailing wage. [47/] Thus, to stay even with the competition,[48/] wages had to be raised. As a further reason for the raise, Merrill mentioned the labor unrest in the Salinas Valley at the time and the fact that many of his competitors were being picketed. [49/] Hans Sappok, Respondent's controller, commented that 1979 was an unusual year in that there was much competition for employees and wages had to be raised accordingly.

The second raise occurred on July 31, 1979, and wages rose from $4.20 to $4.60 per hour. Merrill gave "competitive factors" as the reason for the increase. This raise was communicated to workers through payroll check attachments, although the foremen may have told some workers earlier and the word spread from there.

47/In Respondent's Employment Policy Handbook (Resp's Ex. 1) the following policy is set forth, in part, at page 10 with regard to wages:

> "Merrill Farms has historically paid competitive wages and has been a leader in employee benefits. We constantly monitor the wages and working conditions of agricultural employees and make timely adjustments. Usually, these adjustments take effect during the month of July ----."

48/As competitors, Merrill listed Garin, Royal Packing, D'Arrigo, Hansen Farms, Bud Antle, Bruce Church and Sun Harvest.

49/Later in his testimony, Merrill commented that he didn't consider the wages of companies that were on strike as competitive because those companies couldn't raise their wages.

This July 31 raise was also made retroactive for the period July 16 to July 24, 1979, and this was likewise communicated by check attachment. (G.C. Ex. 16). This retroactive pay was received by the employees around August 13, 1979.

The third pay raise was announced on August 27, but made effective on August 25. Wages went from $4.60 to $5.10 per hour. Merrill indicated that celery harvesting was just starting up (workers had previously been doing hoeing and thinning), and he wanted to adjust the wages. And as a further reason for the raise, competitive factors were again given. Merrill stated that he had heard that other employers in the area were about to raise their wages around that time: "It seemed to be what our competition was doing."

To notify the crews of this raise, Merrill, as has been previously discussed, personally visited the fields to announce it.

The August raise was made retroactive for the period of July 16 through August 24, 1979 (G.C. Ex. 17).

Merrill testified that both retroactive wage increases (G.C. Exs. 16 and 17) were necessary because of competitive factors.

To summarize, Respondent gave three wage increases in 1979[50/] to its agricultural workers; in March, July, and August. The

50/General Counsel urges that I consider a bonus in July of 1979 as part of the alleged unlawful wage increases granted during this period. I choose not to. The bonus was not alleged in the First Amended Complaint as an unfair labor practice. I do not believe this issue was fully litigated at the hearing because I do not think it was made clear to Respondent that it was a matter it was called upon to defend. In any event, it was not a bonus in the traditional sense. Under the Teamsters contract, employees were obligated to make contributions to a pension plan. After the expiration of that contract, litigation (50/ cont. on pg. 50)

July 31 raise was made retroactive from July 16 to July 24; the August 27 raise was made retroactive from July 16 to August 24. Workers were informed by check attachment although some of them had heard of the raises earlier; i.e. by attending the Tom Merrill speech or hearing other workers or foremen refer to it. [51/] Between August and October of 1979, it is possible that an agricultural worker employed by Respondent would have received four separate checks representing either raises or retroactive payments of raises as follows: 1) the July 31 raise; 2) the July 16 to July 24 retroactive check; 3) the August 27 raise; and 4) the July 14 to August 24 retroactive check.

B. Analysis and Conclusion

There is NLRA precedent to the effect that a wage increase can be a violation of the law if its probable effect is to interfere with the organizational rights of workers. Rupp Industries, Inc., 217 NLRB No. 65, 88 LRRM 1603 (1975); International Shoe, 123 NLRB No. 83, 43 LRRM 2098 (1959). The

50/(continued from pg. 49) developed when some employees demanded the return of all monies contributed. Since many workers indicated they'd prefer having cash to a pension, Respondent decided that it would take the $.20 per hour it ordinarily would have contributed to the Teamsters Pension Plan and instead pay a cash bonus of that amount to the employees. The first such "bonus" was announced in October of 1978 of $.20 additional per hour and was paid in January, 1979. It was to cover the period July 16, 1978 to December 31, 1978. The second bonus of $.20 per hour was paid in July, 1979 and represented the period of January 1 to June 30 1979. (G.C. Ex. 18). Another "bonus" supposedly is to be paid for the period of July 1979 to January, 1980. The cash payment went to all workers who had maintained their seniority.

51/For example, supervisor Garcia testified that at some point In 1979 Merv Anderson gave him a list of pay increases, and he went into the field and showed it to two or three workers in each crew.

courts generally have held that an increase in wages or benefits effected during an organizational campaign is presumed to have been done in order to interfere with employees' rights of free choice. Even when the employer's promise of benefits during an election campaign is not expressly conditioned on a vote against the union, an inference may be drawn that the employees were improperly coerced to vote against the union.

In NLRB v. Exchange Parts Co., 375 U.S. 405, 55 LRRM 2098 (1964), the United States Supreme Court held that the employer violated section 8(a)(1) of the NLRA by announcing overtime, holiday, and vacation benefits shortly before an election. The Court found the grant of benefits to be unlawful where it was undertaken with the express purpose of impinging upon the employees' freedom of choice for or against unionization and was reasonably calculated to have that effect.

> "...The damage inherent in well-time increases in benefits is the suggestion of the fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged..." 55 LRRM at 2100.

The timing of the benefit is of paramount importance, particularly in those situations where an election is pending. In NLRB v. Styletek, 520 F.2d 275 (1st Cir. 1975) the Court held:

> "...Justifying the timing is different from merely justifying the benefits generally. Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice. (citations omitted) Granting benefits during the pendency

> of a representation election has been treated as making out a prima facie case of intentional interference with employees' Section 7 rights, (citations omitted)..." 520 F.2d at 280.
>
> See also J.C. Penney Co. v. NLRB, 384 F.2d 479 (10th Cir. 1967).

Moreover, the Styletek court also suggested that once the General Counsel establishes that the benefit was granted, a prima facie case of a violation has been shown, and the burden shifts to the employer to show a legitimate business justification.

Thus, the test must be the balancing of the possible discouragement of a vote for the union stemming from the grant of benefits against the employer's business reasons for the grant.

The ALRB has followed NLRA prcedent on this question and has held that it is illegal to clearly link a wage increase to the union's organizational efforts. Harry Carian Sales, 6 ALRB No. 55 (1980). See also, Coachella Imperial Distributors, 5 ALRB No. 73 (1979); Prohoroff Poultry Farms, 3 ALRB No. 87 (1977), enf'd in relevant part in Prohoroff Poultry Farms v. ALRB. 107 Cal.App.3d 622 (1980), hearing den. July 30, 1980. Otherwise employees are not likely to miss the inference that their benefits are tied to a rejection of the union.

Of course, a consistent past practice or proper business purpose may rebut an inference drawn from a grant of benefits during an organization campaign or before an election. NLRB v. Gotham Industries, 406 F.2d 1306 (1st Cir. 1969). And an employer is not required to suspend normal company procedures which have become incorporated into the working conditions of

the business. NLRB v. Hendel Mfg. Co., 523 F.2d 133 (2nd Cir. 1975).

However, there must be credible proof of that past practice or other proper business purpose. If the employer grants regular wage increases or other benefits, it carries a heavy burden of proving that its said wage increase and benefits are purely automatic. NLRB v. Allis-Chalmers Corp., 601 F.2d 870 (5th Cir. 1979). And in fact, if the past practice would dictate a pay increase either before a possible election or after it, at the employer's option, the employer should wait until after the election is over. J.C. Penney Co. v. NLRB, supra. [52/]

In the instant case, Respondent first argues a historical past practice, reflected in its Employment Policy Handbook (Resp's Ex. 1), indicating that going back to 1973 wage increases were given on a regular periodic basis both pursuant to union contract and while the company was independent of a contract.[53/]

The difficulty with this proposition is that wage

52/In the Penney case, the employer had an established practice of granting a wage increase every 12-15 months. After 14 months (but soon after an election petition had been filed by a union) a wage increase was announced. The NLRB and the Tenth Circuit held that the employer should have waited another month until the election had been held before granting the increase while still remaining within the practice; otherwise, the inference was created that the increase was motivated by a desire to defeat the union rather than a desire to continue the practice.

53/Respondent does not discuss any distinction to be made between company-initiated practices which may become "past practices" over a period of time and "practices" imposed by a collective bargaining contract.

hikes were traditionally given only once a year, usually in July, as Respondent's own Handbook makes clear. While the July raise may be justified on grounds of past practice, the same may not be said for the August raise or the two retroactive wage payments. [54/] There was no past practice for any of these wage increases and retroactivity.

Respondent's reliance on NLRB v. Otis Hospital, 93 LRRM 2778 (1st Cir. 1976) is misplaced. Respondent argues that on the basis of that case, it could have been found guilty of a violation of the Act if it had withheld its wage benefit. The Otis Hospital case, however, sets forth three conditions in which it would be unlawful for an employer to withhold a wage increase during a union organizing campaign: (1) if the increase was promised by the employer prior to the union's appearance; (2) if the increase normally would be granted as part of a schedule of increases established by the employer's past practice; or (3) if the employer attempted to blame the union for the withholding.

Although Respondent arguably would have been in

54/It is interesting to note that while not rising to the level of a past practice, there was some precedent for the March raise, it having occurred once under the Teamsters contract in March of 1976. In any event, the March raise was lawful (the General Counsel has not alleged otherwise in the Complaint) and did not come at a time of organizational activity.

violation of the Act by withholding the July raise, the same could certainly not be said with respect to the August raise and the retroactive payments.

Next Respondent argues an economic justification for the raises and asserts that "competitive factors" were responsible for its March,[55/] July and August wage increases and its two retroactive payments. Respondent argues that 'It made a careful investigation of the wage policies of other agricultural employers in the vicinity. The company was careful to look at only those companies that were not subject to strike activity in order to get competitive wages. The evidence did not show the increase to be 'excessive' or 'unjustified' but to be a reflection of the current wages in the industry." (P. 60 of Respondent's post-hearing brief). I disagree. Whatever form those "careful investigations" of the wage policies to reflect the "current wages in the industry" may have taken, there was no proof of them at the hearing. Respondent does not prove its defense by making the unsupported claim that it raised wages because of the "competitive factor" or because, as Tom Merrill stated, "It seemed to be what our competition was doing." These remarks are conclusionary, and self serving, allege the ultimate fact, and are not the kind of evidence a trier or fact may rely upon. There was simply no evidentiary showing as to which competing companies Respondent had in mind when it raised its employees' wages, how much competitors had raised their rates, and how many times

55/Respondent also gave the labor unrest in Salinas as a second reason for its raise in March.

during the year the competitors of Respondent had raised the wages of its employees.

Further, there was no evidence that Respondent had to raise wages because it was necessary to do so in order to compete for workers. Respondent did not show that it was in imminent danger of losing part of its work force to competing employers or, for that matter, that it was planning on hiring new workers.[56/]

Moreover, the Handbook, upon which Respondent relies so heavily, does not explain why a monitoring of competitors' rates would result in the large number of raises granted by Respondent in 1979. On the contrary, the Handbook gives just the opposite impression and suggests that the monitoring of the wage rates occurs just once a year and that wage increases usually take effect during the month of July. As the Handbook states at page 10, "... We constantly monitor the wages... and make timely adjustments. Usually these adjustments take effect during the month of July." (Resp's Ex. 1)

One is left with the inescapable conclusion that the only reason for the August 27 raise was to discourage or undermine the organizational activity which took place in late July and throughout the month of August.[57/]

56/Of course, even if Respondent could have established the necessity for wage hikes because of the "competitive factor", it still would have to explain why the August raise could not have been deferred until the possibility of the 48-hour election subsided. See J.C. Penney Co. v. NLRB, supra.

57/In drawing this conclusion I am also mindful of the fact that I have credited, in another section, the evidence that Manuel Garcia asked a crew of workers during a work stoppage whether they wanted a raise or a union.

As further evidence that this was the reason for the wage increase and not any "competitive factor", I would point to the fact of Tom Merrill's personal visit to the fields to announce the August 27 raise. There can be no question but that there was intense union activity taking place at that time. There were work stoppages, distribution of union authorization cards, union solicitations by Ocampo and others among employees at the labor camps and in other crews. Lupe Villalobos, who served in Respondent's personnel department and had visited the fields every day, testified that at the time the third wage increase was announced, he heard employees tell their co-workers that they were trying to get a 48-hour election held. [58/] Thus, it is important to analyze Merrill's motivation and purpose in personally visiting the crews, for the first time ever, around that time. Merrill admitted that he went to the fields to announce a wage increase, but he seemed to downplay this factor, giving other reasons for his being there.

First, he argued that there was much labor unrest due to the cooler employees' strike and that there were many pickets around. Thus, he asserted he wanted to personally assure employees that they would be protected. Second, he said that workers were being harassed and that he wanted to reassure them they had nothing to worry about. Third, he stated that he wanted to explain the complete story of the cooler strike to the workers, and finally, he testified he wanted to announce the wage increase personally.

58/Villalobos also testified that the 48-hour election was one of the matters being discussed by the employees when 15-20 of them from the lettuce crews, including Ocampo, visited with the celery workers in an attempt to organize them.

I find it more probable that the only reason for his personal visit to the field was to announce the wage increase and thereby to weaken the union's organizing attempt that was occurring at the time and to thwart the possibility of a 48-hour election. Merrill talked about "labor unrest" and referred to the cooler strike. But the evidence does not support a finding that there existed the kind or degree of "unrest" that would necessitate a personal trip to the fields; i.e. there was no evidence that the cooler employees' strike was violent. Pickets had appeared at the agricultural fields (as opposed to the cooler facility) rather sporadically.[59/] While it is true that on either August 26 or August 27 there were large numbers of pickets around the fields, and that on one day certain cooler-employee pickets rushed the field, these were clearly isolated incidents.

If Merrill were principally concerned about the labor unrest, the harassment of the workers, and the cooler strike, it is likely that, he would have talked to his employees about those particular concerns without combining his speech with an announcement of a substantial wage increase.

Moreover, if the major concern of Respondent in speaking to the workers was the labor unrest arising out of the cooler strike, why speak to the workers at Los Coches in Soledad at all. They were about 25 miles away from the cooler strike activity and would not have been affected by it any way; some of them had not even heard of the strike. Merrill's explanation that he didn't want the Soledad workers to think they were being ignored is unpersuasive. In fact, the evidence

59/There was some question as to whether the cooler employees could lawfully picket the agricultural fields.

shows that Merrill did not even mention the cooler strike to the employees at Soledad; he mentioned only the wage increase. When Trejo asked Merrill why he was there in person, the latter replied that he wanted to assure the workers that wages were being kept competitive in accordance with the Handbook. While the UFW's organizational campaign was not mentioned by Merrill in announcing the wage increase, it is obvious what was on, at least, some of the employees' minds, as evidenced by the question-and-answer period following his speech. Almost all of those questions concerned a comparison between Respondent's medical plan and the plan which the UFW had negotiated in some of its collective bargaining contracts.

I deduce that the "labor unrest" referred to by Merrill as a reason for his personally visiting the fields was actually the organizing efforts by the UFW. I find that that was the principal reason for his visit, and the principal reason for the raise he announced at that time.

The timing of the Merrill speech to announce a sizable increase in wages[60/] is particularly suspect in view of the considerable union activity, the continuing distribution of UFW authorization cards, and the work stoppages that were occurring at that time.

Respondent makes one further argument. It argues that after the 1978 election, the ALRB did not conduct an expeditious hearing on its objections and that in fact the ALRB

60/Wages went up by fifty cents per hour from $4.60 to $5.10, the largest single increase, and the increase was made retroactive from July 16.

never reached a decision on the merits. As a result, the UFW was able to commence organizing during a period when a no-Union certification of election results should have issued, but did not issue, from the Board. That being the case, Respondent argues that any organizational activity by the UFW was illegal. Had the no-union certification issued, the argument goes, any wage increases granted by Respondent would have been unquestionably valid. Thus, Respondent takes the position that the General Counsel has abused the administrative process by alleging the commission of unfair labor practices when in fact Respondent was only engaging in those activities, such as granting wage increases, which it should have had a right to do had the law been properly carried out. Therefore, Respondent concludes that the wage increases of August, 1979, alleged to be illegal in Paragraph 6(a) and (c) of the First Amended Complaint were, in fact, valid; and that what might have been an unfair labor practice under other circumstances should be excused here because it occurred at a time of "illegal" organizational activity and access. Respondent submits no law for this proposition.

Respondent's argument is discussed in more detail in another section. I have found the access to be lawful [61/] because the twelve-month election bar of the Act commences from the day employees cast their ballots, no matter when or whether the Board officially certifies the results of the election.

61/I am inclined to believe that Respondent would not enjoy a blanket immunity as to all unlawful conduct committed during this period even if the Regional Director had erred in granting access. Since I have found a legal grant of access, I do not find it necessary to reach this question.

Palmer Mfg. Co., 103 NLRB 336, 31 LRRM 1520 (1953); Mallinckrodt Chem. Works, 84 NLRB 291, 24 LRRM 1253 (1949); Bendix Corp., 179 NLRB NO. 18, 72 LRRM 1264 (1969).

In any event, the election bar does not prohibit organizational activity among workers; it affects only the time for the holding of another election. Even if a legal election could not have been conducted on August 25, 1979, I do not think an employer has carte blanche to raise wages, absent a clear and consistent past practice or proven economic necessity, where individual employees are participating in their right to organize their co-workers into a union. A wage increase is a violation of Section 1153 (a) if it has a tendency or foreseeable effect to interfere with the organizational rights of the workers. Rupp Industries, Inc., supra.

It is worth noting that Respondent recognized that the August access might very well be lawful, and its conduct reflected the seriousness with which it treated this possibility when it sent a memorandum to its foremen instructing them how to conduct themselves in dealing with union organizers during the access period. (G.C. Ex. 32).

In summary, I find, on the basis of the record evidence, that the August pay raise and the July and August retroactive payments, coming as they did less than one month after the July 31 raise and at a time of intense organizational activity, were unlawful interference with employees' organizational rights. Respondent has failed to prove that these increases were part of a clear and consistent past practice, or were regular, automatic raises known to all its employees, or that the raises were granted solely on the basis of economic

necessity to remain competitive.

I shall recommend to the Board that Respondent, by these acts be found in violation of section 1153(a) of the Act.

XIII. The Allegation that Respondent through its Agent, Miguel Diaz, Engaged in the Surveillance of Employees Who Were Meeting with UFW Organizers; and that Diaz Disrupted said Meeting and Interfered with the Organizers' Communications with the Employees (Paragraph 8 of First Amended Complaint)

A. Facts

Miguel Diaz drove a bus for Respondent in both 1978 and 1979. In the past, only foremen drove buses for Respondent but this practice was changed a number of years ago when the driver classification was encompassed by the Teamster collective bargaining agreement. It was decided that foremen were probably more valuable in the field than in the bus, so rank-and-file employees began driving the buses. In addition, two supervisors lost their certificates to operate farm labor buses at one point and rank-and-file employees, who possessed the proper certificates,were then utilized as drivers. Today there are still some non-foremen who drive buses,[62/] and some foremen who continue to drive buses.[63/]

Ordinarily, Diaz was assigned a particular crew and would transport them to the fields. In 1979 he drove for the thinning and hoeing crew of Manuel Flores and transported a crew consisting mostly of women from Spreckels Camp. After leaving off the crew, he would then proceed to work in the field

62/Rafael Diaz, Francisco Franco, and Bernardo Murillo.

63/Paul Flores, Fernando Flores, Teofilo Rios, and Herman Marquez.

himself. Usually, he would stay behind the crew and cut whatever slower workers left or he would weed what was left behind. He would also help individuals within each crew whenever someone had to stay behind or had to leave the field for any reason.

In addition, Diaz had other duties, including that of timekeeper. He would observe and record the names of the employees on the bus and who worked that day and would also record the total number of hours worked by each employee. These time sheets would then be turned over to the appropriate foremen, and the workers would be paid on the basis of these records. At the end of the work day, it was Diaz's responsibility to see to it that all of the workers got back on the bus and to drive them back to the pick up point. Diaz was paid by the hour, but because of his added responsibilities, he was paid .70 per hour more than regular hourly workers.

Rodolfo Ocampo testified that during the cooler workers' strike around August 27, he went to Jack's Ranch to ask the workers for support for a 48-hour election. UFW representative Quintiro and one other person were present attempting to talk to the workers, who were eating their lunches in the buses. Ocampo was standing at the door of the bus, very close to bus driver Diaz. According to Ocampo, one of the union organizers asked Diaz, "Are you a foreman?", to which there was no answer. At that point, the organizer asked Diaz to step down from the bus. Diaz then is alleged to have stated: "Put me down if you can. You Chavistas, you go a fucking." Ocampo, not wanting any problem, left and approached foreman Herman Marquez and said, "What's the name

of the foreman on the bus?", to which Marquez reportedly replied "Miguel Diaz."

However, another General Counsel witness, Jose Luis Ramirez, a member of Crew No. 3, had a different version of this event. Although not so close to the participants as Ocampo, [64/] he testified that he overheard the same conversation between Diaz and the organizers. He testified that two union organizers obtained permission to go to Jack's ranch and speak with workers during their lunch period. These representatives, along with Ocampo, identified themselves and asked to speak to the employees who were inside the bus. (Some workers were eating in the bus; others were outside the bus). At that point, according to Ramirez, Diaz introduced himself as a foreman, told them to go to hell and said that he didn't want anything to do with them. At this point the organizers retreated and drove to the Los Coches Ranch, hoping to organize the celery workers. Ramirez, Ocampo, and several others soon followed.

Although Ramirez did not work with Diaz during 1979, he gave the following reason why he believed Diaz to be a foreman: (1) Diaz drove a bus and Ramirez believed that only foremen drove buses; (2) Ramirez's wife worked in the Diaz crew, and three or four times during 1979 Diaz came to the Ramirez residence to deliver a check to her; (3) Diaz told Ramirez's wife on one occasion that there was going to be work and what hours; and (4) Diaz gave orders to employees. In August, 1979 at Jack's Ranch he ordered a crew to put their hoes on the bus and to stop

64/Ocampo testified he was two feet away.

working.

Finally, a third General Counsel witness, Valentin Trejo, testified that Diaz was his supervisor in 1978 [65/] but admitted that he had no power to hire or discharge employees at that time. Trejo also admitted that during 1979 he didn't work with Diaz at all.[66/]

Diaz was not called as a witness by either party. The only witness who testified who had any personal knowledge of the relationship between Diaz and the other workers was Maria Espana, a member of his crew. Espana denied that Diaz gave any orders in 1979 and stated that he could not hire, fire or discipline. She testified that he was a worker, the same as the rest of the members of the crew. She did confirm that Diaz passed out checks in 1979 but said that there was nothing unusual about this as she or her friends, who were not foremen, had also done the same thing from time to time for co-workers who had to leave work early. She also confirmed that Diaz kept a record of which employees were present and recorded their hours of work.

Lupe Villalobos, who serves as a personnel officer for Respondent and also visits the crews every day, testified that Diaz had no authority to hire, discharge, or discipline employees or to use independent judgment in directing employees.

At this point, it is important to take note of the fact that on August 25, 1978, a representation election was

65/Diaz's duties in 1978 were the subject of a UFW challenge to his election ballot being counted on the grounds that he was a supervisor. The Regional Director found that he was not. See discussion, infra.

66/There is no evidence that Ocampo or Ramirez ever worked with Diaz either.

conducted under Board processes, in which a majority of Respondent's workers who voted chose not to be represented by a labor union. Many of the ballots cast in that election were challenged by the UFW and one such challenge was to the vote of Miguel Diaz on the grounds that he was a supervisor. The Regional Director, Mr. Lupe Martinez, was thus called upon to determine the same issue which I must decide here, the employment status of Diaz. The Regional Director decided that Diaz was not a supervisor. In his "Report on Challenged Ballots", in Case No. 78-RC-19-M, dated November 21, 1978, Mr. Martinez overruled the ballot challenge and stated the following:

> "On or about February 1978, Mike Lerda, the company supervisor, assigned Miguel Diaz the responsibility of driving the crew bus. Kelly Green is the foreman for the crew but is not a certified bus driver. Diaz was instructed by Lerda that he would receive extra pay solely because his added responsibility in driving the bus. This year, Diaz also acted as a utility man and time keeper for his foreman. He assisted the foreman in implementing quality control in the field but at no time was he given the power to effectively recommend hiring or firing. He did not exercise independent judgment in his work assignments. If he found substandard work, he had to report to this foreman and could not personally discipline any member of the crew. It is therefore recommended that the challenge to the Diaz ballot be overruled and his vote counted since he is not a supervisor.67/

67/During the hearing, I reserved ruling on Respondent's request that I take official notice, pursuant to Sections 450 - 453 of the "California Evidence Code", of official ALRB documents regarding the case of Merrill Farms, Inc., Case No. 78-RC-19-M concerning the 1978 election. I hereby take official notice of said documentation. In addition, the General Counsel was informed at the hearing of Respondent's request as to official notice. Finally, administrative notice of the ALRB's own (67/ continued on page 67)

B. Analysis and Conclusion

The General Counsel argues that Miguel Diaz was a foreman, that during a lawful access period he prevented UFW organizers from speaking to crew members who were eating their lunches and, further, that Diaz coerced employees by verbally harrassing and humiliating said organizers in the presence of the employees.

The initial and crucial question to be determined is whether or not Miguel Diaz is a supervisor under the Act. If he is, then statements or actions by him may be attributable to Respondent. If he is not, Respondent cannot be responsible for Diaz's expressing his opinion not to support a labor union unless other employees would have just cause to believe that he was acting for and on behalf of Respondent. International Association of Machinists etc, v. NLRB, 311 U.S. 72, 61 S.Ct. 83 at 89 (1940). Thus, Diaz's actions and statements to UFW agents on the bus cannot be attributed to Respondent unless a case can be made under some theory of agency. "The acts of non-supervisory employees are imputed to the employer 'if there is a connection between management and the employees' action, either by way of instigation, direction, approval, or at the very least acquienence...'" Perry's Plant's, Inc., 5 ALRB No. 17 (1979), quoting NLRB v. Dayton Motels, Inc., 474 F.2d 328 (6th Cir. 1973), 82 LRRM 2651.

As no evidence was presented at the hearing indicating that Respondent's supervisors were even aware of the

67/(continued)...orders and procedures is proper provided that the facts noted are stated on the record at hearing or in the hearing officer's proposed decision so that the affected party may have an opportunity to rebut or except to them. Sunnyside Nurseries, Inc., 4 ALRB No. 88 (1978).

assertion or acts of Miguel Diaz, if they did occur, it is unnecessary to discuss whether they can be attributed to Respondent.

Section 1140.4(j) which defines the term "supervisor" provides:

> "The term 'supervisor' means any individual having the authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions; if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Miguel Diaz does not come within the statutory definition of "supervisor." The General Counsel failed to call any witness from Diaz's own crew in 1979 who could substantiate the allegation as to supervisory status, nor did he call Diaz himself. Instead, the only evidence in the record relative to the actual duties of Diaz was that of Maria Espana, a member of his crew, who testified that Diaz could not hire, fire, discipline, or exercise independent judgment in directing employees. This testimony was corroborated by a representative of Respondent's personnel department, Lupe Villalobos. I credit the testimony of Espana and Villalobos.

Moreover, the hearsay statement of Ocampo that Marquez's response to his question implicitly suggested that Diaz was a supervisor is not sufficient without more, to bind Respondent on this issue. Likewise, the testimony of Ramirez that he overheard Diaz introduce himself on the bus as a foreman is also not sufficient to prove supervisory status in the absence of other factors. "While an employee's belief that he possesses

supervisory authority may be evidence that he does, supervisory status is to be determined by analyzing the particular authority that the person possesses and not by the individual's legal conclusions about his own status. Karahadian& Sons, Inc., 5 ALRB No. 19 (1979). I do not credit the statement anyway. Ocampo, who stated he was two feet away from the bus during this incident, did not mention the purported admission during his testimony.

The other indicia of supervisory status touched upon in the testimony of Ramirez are not persuasive. It is true that Diaz drove a bus, but I credit the testimony that other non-supervisory personnel also did so. It may be true that Diaz stopped by the Ramirez house on occasion to deliver a pay check to Mrs. Ramirez, but I do not find this to be a controlling factor, particularly in view of the testimony of Espana that she and her co-workers had, from time to time, done so as a favor to workers who had to leave work early. "Sporadic substitution for a supervisor which involves handling routine matters and/or carrying out instructions does not transform an employee into a supervisor." Miranda Mushroom Farms, Inc., 6 ALRB No. 22 (1980), citing Frederich Steel Co., 149 NLRB 5, 57 LRRM 1285 (1964). The same result is reached even if Diaz, in all likelihood acting as a conduit for higher authority, told Mrs. Ramirez on one or more occasions that there was work available and at what hours. Ibid.

Furthermore, supervisory status is not established if on one occasion Ramirez heard Diaz, as he testified, ordering workers to stop working and to put their hoes on the bus. "Occasional isolated instances of actions which might otherwise

be indicative of supervisory authority are generally insufficient to predicate a finding of supervisory status." Anton Caratan & Sons, 4 ALRB No. 103 (1978), citing Commercial Fleet Wash, Inc., 190 NLRB 326, 77 LRRM 1156 (1977). In Canonsbury General Hospital, 244 NLRB No. 141, 102 LRRM 1143 (1979), an acting relief nursing supervisor was held to be a unit employee because she functioned as relief supervisor only sporadically and irregularly even though when she did act as such, she possessed the same authority and earned the same salary as the regular supervisor.

The General Counsel also argues that Manuel Flores, a supervisor for whom Diaz worked, had no foreman under him, and that this somehow supports the theory that Diaz functioned as a crew foreman.

To begin with, there is testimony that it is not unusual for a supervisor to act as a foreman at Respondent's operations. But the crucial point is that the determinative factor in supervisory status is the exercise of independent judgment. Anton Caratan & Sons, supra, citing Montgomery Ward & Co., Inc., 228 NLRB 750, 96 LRRM 1383 (1977). In John Cuneo of Oklahoma, Inc., 238 NLRB No. 200, 99 LRRM 1359 (1978), an individual was held not to be a supervisor because he lacked the authority to exercise independent judgment even though he could orally reprimand others, hire additional help, transfer and/or layoff other employees, resolve minor disputes with members of other crafts, and could authorize small amounts of overtime. The NLRB found it significant that the employee spent most of the day doing the same work as others in the unit, and

when he did give directions, they did not require the excerise of independent judgment. See also, Dairy Fresh Products Co., 2 ALRB No. 55 (1976). The record establishes that Miguel Diaz did not possess or exercise any of the statutory criteria which would qualify him as a supervisor under the Act. I so find.

Finally, it should be made clear that I do not consider myself bound by the findings or conclusions of the Regional Director's Report. My findings are based solely on the record in the instant case.

I conclude that at no time material herein was Miguel Diaz either a supervisor or an agent of Respondent and that his acts and statements are therefore not attributable to Respondent. Accordingly, I recommend dismissal of this allegation of the First Amended Complaint.

XIV. The Allegation that on or about August 9, 1979, Paul Flores Prevented Rodolfo Ocampo from Addressing the Crew, Five Minutes Before the Wore Day Started. (Paragraph 7(a) of First Amended Complaint)

A. Facts

Valentin Trejo testified that during the first week of August and around the time of a well-publicized UFW march in which Cesar Chavez was to participate, Ocampo along with others, tried to organize the celery workers at Respondent's Los Coches Ranch before working hours but that foreman Paul (or Pablo) Flores would not allow him to speak with any of them. In fact, Flores ordered the commencement of work five minutes early (at 5:55 a.m.) so that workers would not be available to listen to Ocampo's speech. Trejo also testified that a foreman (presumably also Flores) made an obscene gesture

because he was angry because Ocampo was there. [68/] However, Trejo admitted that Ocampo did manage to talk to some workers for a short time as they got off the bus, and he also argued that no foreman to his knowledge asked Ocampo to leave. He also stated that some of his information was based upon what Ocampo told him.

Ocampo did not corroborate this version, and his testimony was different. He testified that it was at 6:30 a.m., after work had commenced, when he went to Los Coches to distribute UFW flyers (and not 5:55 a.m. as Trejo had testified) and that Flores told the workers, "Don't take the time to read those leaflets, get to work." In addition, he testified that he actually went into the field, was not ordered to leave, and had the opportunity to distribute his union literature to all of the workers.

B. Analysis and Conclusion

As I find that the General Counsel has not met his burden of proof, I recommend dismissal of this allegation. Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979). I am most persuaded by the fact that Ocampo's own testimony failed to support the allegation of conduct as to which he is the alleged discriminatee. Rather than to prove that Flores intentionally

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68/Trejo also testified that three days later Ocampo again came to his crew - this time at lunch - and that foreman Paul Flores and supervisor Manuel Flores refused to let him come in to pass out leaflets and authorization cards to the two celery crews working there. However, he admitted he did not hear this conversation. This allegation was not included in the First Amended Complaint, and Respondent did not cross-examine about this issue. I do not think it was made clear that the General Counsel considered this an additional issue, and therefore Respondent was not on notice that the conduct involved might be held to be a violation of the Act. As I do not believe the issue was fully litigated at the hearing, I see no need to consider or resolve it. See, Harry Carian Sales, 6 ALRB No. 55 (1980).

prevented Ocampo from organizing or addressing employees during non-working time, or to confirm the Trejo testimony that Flores started work five minutes early, Ocampo's testimony, which I credit, demonstrates that although he approached the field during work, he was nevertheless allowed to distribute his literature to workers without any employer interference. Flores' admonition ("Don't take time to read those leaflets; get to work") if true, was certainly justified in that Ocampo, by his own admission, was distributing the union leaflets during work time. An obscene gesture at that point, if indeed it was made, may have merely reflected the foreman's dissatisfaction that work was being interfered with.

Moreover, Trejo's version of the facts is confusing. On the one hand, he testified that after Ocampo talked to some workers for one or two minutes when they got off the bus, the foreman came over and put the employees to work five minutes early. On the other hand, he also testified that he only saw Ocampo talking to the foreman after the workers had begun to work and that he only found out what really had happened after later talking to Ocampo.

I recommend the dismissal of this allegation.

XV. The Allegation that Paul Flores Allowed Martin Murillo and Maria Espana, Speaking against the Union, to Address a Crew Five Minutes before the Work Day Normally Started and That He Delayed the Start of Work until They Completed their Address. (Paragraph 7(b) of First Amended Complaint.)

A. Facts

Maria Espana worked in the celery and broccoli crews in 1979. Sometime between August 20 and 30 she and co-worker Martin Murillo spoke to the Paul Flores crew at Respondent's Los Coches

Ranch. She testified that she decided to speak out because some workers had been showing an interest in the UFW, to which she was opposed, and that she even considered forming her own labor organization.

She started to speak before work at 5:55 a.m. and spoke about fifteen minutes. Normally, work would have commenced about 6:00 a.m.; but since the actual starting time sometimes depended on how light it was or weather conditions or how soon the workers could get all their equipment together, the starting time varied. On this occasion, it was still dark at 6:00 a.m., so work would not have begun on time in any event. Nevertheless, those workers who supported the union walked away from her speech at 6:00 a.m. and went to work. No foreman held them up or prevented them from doing so.

Another of Respondent's witnesses was David Avila. He worked in the celery crews. He confirmed that Espana started speaking a little before 6:00 a.m., that it was dark that morning because of fog, and that Espana spoke for ten to fifteen minutes. He also testified that after she finished speaking, the crew went to work and that this was about 6:10 a.m. His testimony was confusing on one point. On direct examination, he stated that the workers themselves decided to go to work at the point when it became light enough to do so. But in answer to a question from the ALO, he stated that it was the foreman who ordered the workers to work on this occasion.

Another member of the celery crew, Rosaura Hernandez, also testified for Respondent. Although she differed as to Espana's starting time - she said it was about 6:00 a.m. - she confirmed that it was still too dark to start work---. "There

is a certain time we are supposed to start, but during this time we started ten minutes later because we couldn't see--- it was still dark." As Espana spoke, the workers were taking out their hoes to begin working. According to Hernandez, following the Espana speech, it was still too dark to begin work but after a short while, work did commence.

The General Counsel failed to provide any evidence of this alleged violation during his case in chief. Only on rebuttal did such evidence come forward, at which time Valentin Trejo denied that there was fog or that it was too dark to start work at 6:00 a.m., on that occasion. According to Trejo, the foreman held up work until the Espana speech ended at 6:10.

B. Analysis and Conclusion

The General Counsel argues that the Respondent allowed pro-company workers Maria Espana and Martin Murillo to address the celery crews before work and that a company supervisor allowed them to extend this anti-union activity into work time.

I disagree. The General Counsel has clearly failed to meet his burden of proving this allegation. I find the only favorable General Counsel testimony, the rebuttal testimony of Trejo, to be totally unpersuasive. In fact, when Trejo first testified on this general subject matter on direct examination, he placed the time when Espana spoke to the crew at twelve noon and stated that she was allowed by the foreman to speak ten minutes past the normal lunch period. It was only on rebuttal, after all of Respondent's witnesses had testified about the 6:00 a.m. event, that Trejo asserted, without explaining away his former conflicting testimony, that it was light enough at

6:00 a.m. to commence work.

Moreover, even if General Counsel had established a prima facie case, which he did not, I would still recommend the dismissal of this charge because I credit the testimony of Espana, Avila, and Hernandez that it was too dark to go to work at 6:00 a.m. and that it did not become light enough to work until a short time following the speech. [69/] Both Avila and Hernandez were straightforward in their testimony, and I credit them. As for Espana, I am not impressed with her attempt to be neutral her suggestion that she's for neither the company nor the union - but I credit her testimony generally as to this incident.

I find that she and Murillo were exercising their Section 1152 right to oppose union organization when she addressed the crew prior to the commencement of work on this occasion. The fact that she went beyond the normal starting time is acceptable in view of the credible testimony that it was too dark to start work at 6:00 a.m. [70/] There is no rule engraved in stone that all activity of this nature, either pro or anti-union, must stop at 6:00 a.m. regardless of whether workers could have actually begun work at that hour. It would be just as unfair to deny Espana and Murillo the opportunity to conclude their talk under these circumstances when the clock struck 6:00 a.m., as it would have been to deny pro-union workers such as Ocampo

69/It is not disputed that UFW supporters left in the middle of the Espana speech at 6:00 a.m. and went to work. This does not prove that it was light enough to work since their action may be viewed as of a symbolic nature.

70/Obviously, in the weeding and thinning of crops, it is very helpful to have as much light as possible.

and Trejo the opportunity to finish their speech, had one been given, under similar circumstances.

Finally, it is worthy of note that there is no evidence that Respondent's foremen ever knew the subject matter of the Espana talk. The testimony was that while Espana spoke to the crew, foreman Pablo Flores stood apart, speaking to a supervisor at a distance estimated to be the length of a bus (according to Hernandez) or a bus and a truck (according to Avila). Espana testified that she spoke in a loud voice, but Hernandez did not believe the foreman could have heard the speech. Thus, it is unclear from the record that the Espana comments were overheard by management.

While it appears that both Espana and Murillo were perceived to be anti-UFW employees, I am unwilling to speculate, without probative evidence, that the company foreman had advance knowledge of the subject matter of their talk or that he overheard it.

Accordingly, I recommend the dismissal of this allegation of the First Amended Complaint.

XVI. The Allegation that Paul Flores Allowed Martin Murillo and Maria Espana to Address His Crew during Working Tine Concerning a Meeting of an Anti-Union Committee. (Paragraph 7(c) of First Amended Complaint.?

A. Facts

Maria Espana testified that during August of 1979 she became aware of renewed union activity at Merrill Farms and of talk among the workers about a coming representation election. Besides talking to crews in the fields (which she later did), she felt another way to discourage Respondent's employees from supporting the union cause was to hold a meeting at her house

to persuade them otherwise. Accordingly, in August of 1979,[71/] she and co-worker Martin Murillo sought, during work time, to invite Ocampo and one other union supporter, Cruz, to a meeting at her house for that evening. She approached them in the field between 9:00 and 10:00 a.m. and spoke to them around nine minutes.

In order to invite Ocampo and Cruz, it was necessary for her to get permission to leave her work to go to the field where they were working. To obtain that permission, she told her foreman that she had to attend to some personal business, and she then left the field where she had been working.

At first she testified she couldn't recall whether she returned to work later that day; then, later in her testimony, she testified that she did return to work after having been away for over an hour.

Upon her return, she reported to her foreman (at first she couldn't remember who it was but later said she thought it was Herman Marquez) that her personal business had been completed and that she had "a problem in court." [72/] Although she was observed by foremen in Ocampo's crew, she was never criticized or disciplined by Respondent for being there during work time.

Ocampo testified that he observed Espana and Murillo during work time going to every trio in her crew, inviting them to a meeting, and that this activity took them about

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71/The meeting was held at Spreckels Camp and about twelve workers attended. It was held a few days after Espana gave her morning speech to the Paul Flores crew, discussed in the preceding section

72/She testified that she in fact did have a problem in court and part of the time spent away from her job on that occasion was spent visiting the courthouse.

fifteen minutes. Ocampo also testified that foreman Jose Luis Torres told Espana and Murillo that they could talk to the employees as much as they wanted. Ocampo further stated that neither Espana nor Murillo ever said what the purpose of the meeting was, and that no one in his trio even asked.

B. Analysis and Conclusion

Here again, the General Counsel contends that Respondent showed its favortism to pro-company, or anti-UFW employees by allowing them to organize against the UFW on company time without any objections from supervisors or foremen. Again I disagree. To begin with the General Counsel failed to demonstrate either that Espana's foreman had knowledge of her intention to visit Ocampo and the other employees and/or that he gave her permission to leave her work for that reason. Espana may have lied to or misled her foreman as to her true reason for seeking permission to leave her work site, but there is no proof that her foreman directed her to go, knew where she was going, or knew what she intended to do once she got there. The evidence indicates only that she acted on her own volition, without the knowledge or assistance of management.

However, once Espana and Murillo arrived at the field where Ocampo was working, the matter of whether supervisor Jose Luis Torres became aware of why they were there and whether, having that knowledge, he nevertheless allowed them to solicit or organize employees during regular working hours is another question. There is evidence from Ocampo that once Espana and Murillo got to his crew, Torres told them that they could talk to the people all they wanted. Ordinarily, this kind of statement, assuming arguendo that it was made, might be sufficient

to prove preferential access if it could be shown that the employer had knowledge of why Espana and Murillo were there. But there is simply no evidence that Torres knew why they were there or that he overheard their statements to Ocampo or Cruz or anyone else. As Ocampo himself admitted that Espana and Murillo did not state the purpose of the planned meeting, and as no one in his trio even asked, I cannot assume that Torres, even if he overheard that there was going to be a meeting, knew what it was about. The mere fact that Espana and Murillo were perceived by some workers as anti-UFW employees does not mean that their mere presence in Ocampo's field on any occasion is sufficient evidence that they were there for an anti-UFW purpose and/or that this purpose was known by Torres. The uncorroborated testimony of Ocampo that Torres told them that they could talk to the people as long as they wanted, even if true, does not constitute, to my satisfaction, evidence that he knew the reason for their being there. Torres may just have reasonably concluded that Espana and Murillo were there on some kind of personal business unassociated with unionization issues. For all we know, he may have believed that they had received permission to be there and made no further inquiries. All that the General Counsel has shown here was that Espana and Murillo were permitted by a supervisor to talk to other employees. He has not shown that the supervisor knew why they were there. More than mere suspicion or conjecture is required to find Respondent guilty of a violation of the Act. Rod McClellan Co., 3 ALRB No. 71 (1977); Tex Cal Land Mgmt., Inc., 5 ALRB No. 29 (1979)

I find no probative value in the fact that Espana was at Ocampo's field, observed by Ocampo's foreman, and yet not disciplined. Only her own foreman could have disciplined her for being away from her job without permission; but, as has been shown, she did receive his permission, albeit she may have used a false reason to get it.

Finally, the other conflicts in the testimony regarding this incident are not crucial. Whether Espana visited all the trios in Ocampo's crew or just Ocampo and Cruz, and whether the event took nine minutes or fifteen are of no material significance as to the real issue of whether the activity was conducted with Respondent's knowledge and/or assistance.

I recommend the dismissal of this allegation of the First Amended Complaint.

XVII. The Allegation that Respondent Laid Off Crew 3 because of its Desire to Thwart Union Activity and a Possible Union Representation Election and to Punish Crew No. 3 for Its Support of a Concerted Work Stoppage 73/

A. Facts

1. The Hiring of Crew No. 3

The President of Respondent, Tom Merrill, testified that Respondent started its April, 1979, lettuce season as usual, i.e., with one crew which rapidly increased to two. However, an exceptionally heavy yield of lettuce in late May necessitated some supplemental workers to harvest the crop in early summer. At least 18 to 20 more packers were needed so Respondent added a 3rd crew. 74/ Most of the workers hired for Crew No. 3 were new, and they worked rather sporadically, sometimes for only two or three days a week during the entire summer.75/ There was no period when Crew No. 3 worked consistently over a long period.76/ When hired, they were not told how long

73/Although not alleged in the First Amended Complaint, I find that this matter was fully litigated and is related to and intertwined with the alleged failure-to-rehire issue. Harry Carian Sales, 6 ALRB No. 55 (1980). The matter was extensively argued in the post-hearing Briefs, as well. For example, Respondent's Argument III is entitled, "The Company Laid Off Crew #3 Solely for Economic Reasons. There was no Union Activity by Crew #3 and no Union Animus" (Respondent's post-hearing Brief, pp. 69-73, pp. 37-46).

74/According to Merrill, Respondent never really had a 3rd crew before, and there was none in 1977 or 1978. There was a period of time when they had three smaller crews (6 to 8 packer crews) but in reality they were not any larger in the aggregate than the present larger two crews combined.

75/Just how sporadic can be seen by viewing Crew No. 3's weekly time sheets from the time of first hire on May 15, 1979 to the time of their layoff on August 27, 1979. (Resp's Ex. 6). For example, there was no work at all for Crew No. 3 in the week of May 22 or during the entire month of July up to August 13, 1979. During some weeks, though there was as much as four days work, averaging 4-7 hours per day (weeks of June 12 and June 19); in other weeks, there was only one day of 8 hours (week of August 14). However, the week before the layoff (week of August 21) saw a relatively heavy four-day work week for Crew No. 3.

76/Thursdays and Fridays were usually good production days for Crew No. 3, but Tuesdays and Wednesdays were not.

their employment would last because, according to Merrill, Respondent did not know what the demand for lettuce would be later on in the fall.

2. The Cooler Strike

After harvesting, all lettuce goes through a vacuum cooler, as preceding is mandatory for such highly-perishable items. Respondent, along with four other employers, utilized the services of the Growers Vacuum Cooler Company for this purpose. Usually, following harvest, the lettuce, packed in cartons, was hauled on trucks to the cooler where it was vacuum-cooled or pre-cooled for shipment. It would then be loaded on trucks and rail cars and shipped.

When a strike occurred at the cooler plant on August 23, 1979, inexperienced employees were called upon to process the lettuce through the cooler and did so at a much slower pace then the regular crew. As a result, the Growers Vacuum Cooler Company had to reduce its cooling capacity down to about one-half of what it usually was. This of course affected the amount of lettuce that the partners in the enterprise could process. Thus, the employers who used the cooler had to restrict their lettuce-cutting below what could have been cut had there been no strike. According to Tom Merrill, prior to the strike each employer was allowed to process around 12,000 cartons but during the strike the amount was reduced to 8,000 per employer. Merrill testified that even at that, most employers did not meet the lower limit because the lettuce market was low anyway at the time of the cooler strike. In fact, lettuce production was traditionally poor in August because of a low volume of salable lettuce owing to the fact that other areas of the country were also producing about that time and also that

many private individuals were growing and producing their own, as well.

3. The Decision to Layoff Crew 3 Merrill testified that the cooler-strike problem was aggravated by the low salability problem, which meant there was just not much incentive at that point to ship any more lettuce. Therefore, Respondent made a decision to reduce the size of its harvesting crews to conform to the size of the crop that the market conditions justified harvesting. So Respondent packed the best quality lettuce it had (the only thing that could be sold during this period was premium quality) and the rest went unharvested. As a direct result of this situation, Crew No. 3 was laid off. Merrill stated that if the lettuce demand had been such that Respondent could have sold some of the second and third cuts of lettuce, it would have kept Crew No. 3 at work. However, market demand for lettuce decreased; and the quality of the yield lessened as well, so that Respondent could no longer supply adequate work for the third crew.

4. Union Support among Members of Crew No. 3 and Their Concerted Activity

According to Ocampo, members of Crew No. 3, were strong supporters of the UFW because 100% of them had signed authorization cards during the first week in August.[77/]

Further, Crew No. 3 joined the third concerted work stoppage on August 27, during the cooler strike. At that time, Crew Nos. 1 and 2 left the field, and Crew No. 3 was preparing to do

77/Jose Luis Ramirez, a member of Crew No. 3 agreed that all members of the crew signed authorization cards, but he said they did so about the time of the cooler strike.

the same as they sat on the buses waiting to be returned to the labor camp. Management representatives attempted vigorously to induce them not to join the walkout and to return to the field to harvest the lettuce, stating that otherwise the lettuce would be lost.

Supervisors Merv Anderson[78/] and Manuel Garcia approached the bus, where Crew No. 3 sat and Garcia actually got on the bus. According to Jose Luis Ramirez, Garcia told the workers that if they wanted to work, he would guarantee equal work for all, [79/] but if they didn't, he couldn't guarantee any more work at all. [80/]

Garcia testified that the members of Crew No. 3 refused to return to work, saying that they couldn't because the other crews had left. No work was performed that day by any worker from any crew.

As has been previously mentioned, following the work stoppage, on that same day, Ocampo and several other workers went to the celery crews (where they were met by UFW representatives) to solicit support for a work stoppage and for a 48-hour election. Some of the members of Crew No. 3 accompanied Ocampo. The effort did not succeed, as the celery workers continued at their jobs. The effort did, however, create quite a bit of anxiety, as UFW

78/Anderson denied Ocampo's claim that Crew 3 was comprised solely 5T union supporters and testified that some of that crew's members had told him that if Crew Nos. 1 and 2 did not work, they would. (They didn't.) Anderson explained that that was why he went over to the buses and offered work to members of Crew No. 3.

79/Ramirez testified that he understood "guaranteeing equal work" to mean that if Crew No. 3 went back to work, Garcia would see to it that they'd have the same amount of work as the other two crews for the remainder of the season.

80/Garcia denied making this statement. He stated he went over to the buses and said, "Do you want to work or not?" Anderson testified Garcia said, "Let's go to work."

supporters began to yell at celery workers to urge and encourage them to leave work, and six to ten non-employees actually rushed the fields. As a result of this incident, Ocampo and the others who accompanied him, including the members of Crew No. 3, received written warning notices for "interfering with and interrupting the work of another crew". (Resp's Ex. 2)

5. The Role of the August 27 Work Stoppage in the Decision to Lay Off Crew No. 3

As previously mentioned, it was important to Respondent to harvest the fields on August 27; its managers felt that otherwise the lettuce would be lost, which is apparently what happened. On cross-examination, Merv Anderson admitted that the work stoppage on August 27 contributed, along with the other factors already mentioned, to the layoff of Crew No. 3. "We had three fields to be harvested on the 27th, 28th and, I believe, the 29th. It was very important that we harvest those fields on that day or lose them. Because they didn't harvest them, we ended up plowing those fields under." Anderson then stated that when it became clear that the lettuce was lost, Respondent recommended resuming work with only two crews because there wasn't enough work for three. Thus, August 27, the day of the third concerted work stoppage, was the last day that Crew No. 3 worked because Anderson informed Garcia on the next workday (August 30) that Crew No. 3 would be laid off but to have them check with Respondent from time to time to see whether there was any work available.

6. The Rotation-System Idea

When the cooler strike resulted in limitations being placed on the amount of lettuce which each employer-partner was permitted to have cooled, thereby affecting production, some

workers became worried about the future availability of work for all three crews. Thus, the idea of a "rotation system" [81/] spread, especially among the more junior crews, Crew Nos. 2 and 3. Under a rotation plan, in order to insure that all three crews would continue to work, one crew might be laid off for one day so that another crew, perhaps less senior, would have work for that day. Obviously, Crew No. 3, and to a lesser extent Crew No. 2, were interested in having a rotation plan because it would insure that they, as the more junior employees, would receive more work.

On the other hand, the more senior workers of Crew No. 1 opposed the rotation plan idea. Many of them had been working at Respondent for several years and were year-round employees [82/] (while the workers of Crew No. 3 had been there less than six months) To the workers of Crew No. 1, it seemed that their seniority and long service should entitle them to more work. Obviously, fewer hours worked meant less gross wages and less take-home pay. But in addition, it also would affect Crew No. 1's medical coverage [83/] and vacation benefits, as credits for these fringes were based upon hours worked.

For these reasons, some of the more senior workers opposed having a rotation plan. But there may have been another reason, as well. It was well known that the union supporters

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81/Respondent had never utilized such a system before.

82/Year-round employees generally traveled to Yuma in the winter and back to Salinas in the spring.

83/Medical coverage would not appear to be a major problem for the senior workers, as eligibility began after only 60 hours of work.

wanted rotation because they were interested in keeping the third crew so that in the event a 48-hour election could be held, Crew No. 3 would participate.

For whatever reason, certain workers from Crew No. 1 decided to circulate a petition showing their opposition to the idea of rotation. Respondent's witnesses, Busua and Anaya testified that they gathered a list of thirty signatures (Resp's Ex. 5) in one day during the lunch hour to present to the foreman.

Some workers from Crew No. 1 refused to sign the list; others were not asked. Anaya testified that Rodolfo Ocampo was not requested to sign the petition because it was known he would not sign. [84/] When asked why Ocampo would not sign, Anaya replied that Ocampo was interested in rotation only because he wanted to force a quick election; and with Crew No. 3 still working, he would have a better chance of getting the union voted in.

In any event, after many workers had signed the list, it was presented to Respondent. Respondent's witness, Basua, testified that he himself told Garcia about the list and then showed it to him. Garcia took the list to the office and returned it to Basua the next day.

There was a dispute as to when the rotation idea was first proposed and when the opposition petition drawn up, Ocampo testified that he remembered that the rotation plan was discussed about the time of the cooler strike, and that it was the same

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84/Ocampo testified he would not have signed. He regarded the list as company-inspired.

day a wage increase was announced. [85/] He also testified that he personally became aware of that particular raise in an unusual manner. At that time, the crews were discussing the pros and cons of the proposed rotation system and Manuel Garcia asked, "Why do you want to do that? Why do you want to rotate with another crew? You already got a raise." [86/]

Manuel Garcia agreed with Ocampo's testimony that there was talk about rotation at about the time of the last work stoppage and that the opposition petition was presented to him the next day. He also testified that he knew that the most senior workers in Crew No. 1 opposed rotation because he "was there when they started all that talk about that (sic) they wanted that rotation."

Finally, Rafael Silva, a member of Crew No. 1 who signed the anti-rotation petition, testified that he signed it in August.

On the other hand, Merv Anderson, contrary to Garcia's testimony, testified that the anti-rotation list was brought to him by Basua during the first week in September, after Crew No. 3 had already been laid off; and that rotation was basically an

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85/That would have been the raise announced on August 27, the day of the last concerted work stoppage and the day Crew No. 3 was permanently laid off.

86/Garcia did not specifically deny making this statement. He did generally deny ever discussing raises on the day of the third work stoppage; however, this denial was made in the context of the allegation that he had asked workers to choose between a wage increase and unionization (Paragraph 6(b) of the First Amended Complaint.) Garcia did, however, admit that at some point (he could not remember the date) he received information from Merv Anderson about an upcoming raise, went into the fields and announced it to a few employees.

idea of Crew No. 2's to share work with Crew No. 1 because of a general slowdown in the marketplace. Later in his testimony, however, he stated that Crew No. 2 was interested in rotation because they wanted Crew No. 3 to come back to work.

Anderson also testified that the rotation list sealed the fate of Crew No. 3:

> "This list was the deciding factor that I couldn't hire number 3, because I didn't have enough work for three crews. I had work for two crews, and most of the time... some of the time, I only had work for Crew 1."

There is also a dispute over whether the opposition petition idea originated with Respondent or the workers. Garcia testified that he told the workers that if they wanted rotation, Respondent would adopt the system, but he needed "a list" showing what the crew had agreed to. However, when asked during cross-examination whether he himself had anything to do with the idea of getting the list together, he asnwered this question slightly differently three times. The first time he responded that he told the workers that, "If you want it" (rotation), "just give me the signatures on the list, and we'll do it". Next he responded that he told the workers, "You get a list with signatures of those that want it or don't want it. And I want those from the seniority crew." Finally, he testified that he stated: "I want a list showing those that want rotation and those that do not want the rotation." [87/] Later Garcia testified that, "When he (Basua)gave me that list, I didn't even know they had such a list."

87/On the same day that Garcia mentioned wanting a "list", signatures were collected by Basua and others; the petition was then presented to Garcia the following day.

B. Analysis and Conclusion

"To establish a prima facie case of discriminatory discharge in violation of Section 1153(c) and (a) of the Act, the General Counsel is obliged to prove by a preponderance of the evidence that the employee was engaged in union activity, that Respondent had knowledge of the employee's union activity, and that there was some connection or causal relationship between the activity and the discharge." Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979).

Furthermore, concerted activities are protected, whether or not a union is involved. It is well settled under the National Labor Relations Act that the discharge of employees for engaging in concerted activities which are protected is an unfair labor practice and a violation of Section 8(a)(3) of the National Labor Relations Act (1153(c) of the Agricultural Labor Relations Act). NLRB v. Washington Aluminum Co., 370 U.S. 9, 8 L.Ed2d 298, 82 S.Ct. 1099, 50 LRRM 2235 (1962);,NLRB v. Erie Resistor Corp., et al., 373 U.S. 221 (1963); Shelley & Anderson Furniture Mfg. Co., Inc. v. NLRB, 497 F.2d 1200, 86 LRRM 2619 (9th Cir. 1974) .

A work stoppage by two or more employees to protest wages paid is concerted activity protected by the Act. Tenneco West, Inc., 6 ALRB No. 53 (1980); Resetar Farms, 3 ALRB No. 18 (1977).

In the instant case, there is credited evidence that the alleged discriminatees engaged in union or protected concerted activity during a period immediately preceding their layoff, that Respondent had knowledge of this activity, and that thereafter, the alleged discriminatees were laid off as

part of an asserted economically-motivated work-force reduction. At issue, is whether their selection for layoff was discriminatory.

As is often the case in these proceedings, a conclusion that an employer who has laid off its employees has done so in a discriminatory manner is often supportable only be circumstantial evidence. That is true under the NLRA. Amalgamated Clothing Workers v. NLRB, 302 F.2d 186, 190 (D.C. Cir. 1962), citing NLRB v. Link Belt Co., 311 U.S. 584, 597, 602 (1941).

It is true under the ALRA, as well. In S. Kuramura, Inc., 3 ALRB No. 49 (1977), rev, den, by Ct. App., 5th Dist., August 11, 1980, the Board stated:

> "...Of course, the General Counsel has the burden to prove that the respondent discharged the employee because of his or her union activities or sympathies. It is rarely possible to prove this by direct evidence.
>
> Discriminatory intent when discharging an employee is 'normally supportable only by the circumstances and circumstantial evidence. (citation omitted) The Board may draw reasonable inferences from the established facts in order to ascertain the employer's true motive. Even though there is evidence to support a justifiable ground for the discharge, a violation may nevertheless be found where the union activity is the moving cause behind the discharge or where the employee would not have been fired 'but for' her union activities. Even where the anti-union motive is not the dominant motive but may be so small as 'the last straw which breaks the camel's back,' a violation has been established...."
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> See also, NLRB v. Whitfield Pickle Co., 374 P.2d 576, 582, 64 LRRM 2656 (5th Cir. 1967); NLRB v. Linda Jo Shoe Co., 307 F.2d 355, 357, (5th Cir. 1962).

The instant case presents such an issue; namely, whether the evidence, largely circumstantial, establishes by its preponderance that Respondent discharged an entire crew

because of their protected concerted activity. In weighing the evidence on this question, several general considerations should be considered: (1) Respondent's animus towards unionization in general and/or towards the UFW specifically; (2) the timing and notice of the discharges; (3) whether Respondent had knowledge of the discharged employees' connection with the UFW and its organizing drive; (4) whether the reasons or explanation asserted by Respondent justify the discharges in question.

In focusing on the lawfulness of the "layoffs", several preliminary considerations emerge as significant. First is Respondent's anti-union animus, as demonstrated by the statements and actions of its supervisors and foremen. These statements are attributable to Respondent and provide some proof of Respondent's anti-union animus. It serves to support the General Counsel's assertion that the discharge of Crew No. 3 was unlawfully motivated.

For example, I have creditied the testimony that supervisor Manuel Garcia made the following statements to employees which indicate his anti-union bias: (1) that he asked workers whether they wanted the UFW flags or a raise. (See discussion of Paragraph 6(b) of the First Amended Complaint); (2) that he advised workers not to pay attention to Ocampo because he was a union organizer; (3) that at the time of the second work stoppage he warned Ocampo against putting up the UFW flags and said it would go against him because "the company didn't like Cesar Chavez"; (4) that he made it clear to Jose Luis Rarairez that Crew No. 3 would not be hired back because they signed

union authorization cards. [88/] See, infra; and (5) that Garcia threatened to discharge the members of Crew No. 3 unless they abandoned their August 27 concerted work stoppage and returned to work.

As to the latter statement, it is to be recalled that Ramirez testified that Garcia approached the Crew No. 3 bus on which the workers were awaiting transportation back to the labor camp and told them that if they didn't go to work that day, he couldn't guarantee them work, but if they did, he would guarantee equal work for all. Garcia admitted approaching the bus but testified that he said, "Do you want to work or not?" Anderson testified Garcia said: "Let's go to work". I credit the Ramirez version. In addition to Ramirez's general reliability and candor as a witness and Garcia's unreliability and evasion, I think it is probable that this statement was made because of both Garcia's and Anderson's feelings of desperation about getting the fields harvested at that time. [89/]

88/A statement that an employer refuses to hire someone because of his union activity is as direct and convincing evidence of a discriminatory basis for employer conduct as there can be. It clearly establishes a respondent's knowledge or belief that an individual is involved in union activity and that that is the reason for not hiring or rehiring him. Louis Caric & Sons , 6 ALRB No. 2 (1980) .

89/For example, Ocampo testified that, during this work stoppage (and during the time "call time/stand by time" was being discussed) , Merv Anderson stated to him, "If you don't like working for this company, go away. " Although I believe it would be rare for Anderson to make an un-sub tie comment of this kind, because of the emotionally-charged situation at that time, I find the statement was made. It is also to be recalled that Anderson also testified about Respondent's immediate need for harvesting on August 27. He stated that the failure of any crew to work on that day resulted in the ploughing under of several fields.

Ramirez testified that he understood "guaranteeing equal work" to mean that if Crew No. 3 returned to work, they would share equally in all remaining production with Crew Nos. 1 and 2 for the rest of the season. I think this is a reasonable interpretation of Garcia's words. The failure of Crew No. 3 to acquiesce in Garcia's request was the final straw insofar as Respondent was concerned, especially when Crew No. 3 gave as its reason for not returning the fact that Crew Nos. 1 and 2 had asked them for their support and that those two crews had not gone back to work. The entire episode demonstrates Respondent's frustration at its inability to get Crew No. 3 to abandon the concerted work stoppage.

Likewise, foreman Abel Lara also made statements, which I have credited as being uttered, which illustrate his bias, as well. For example, he told Ocampo that his co-workers were getting tired of waiting for him to pick up the authorization cards because they didn't want a union; and that with all the pressure the company was putting on him, he should quit. Lara also told employee Castaneda that he wouldn't give any assistance to his trio because he was working with Ocampo.

Other examples of Respondent's anti-union animus have been noted earlier - such as providing less assistance to Ocampo than to his co-workers because of his union activities and granting wage increases to thwart unionization.

Furthermore, Merv Anderson admitted that the August 27 work stoppage played a role in Respondent's decision to lay off Crew No. 3. The layoff was perfectly consistent with Garcia's above-mentioned threat that if Crew No. 3 did not return to work on August 27, he could not guarantee them any further employment.

Such threat, Respondent's demonstrated animus against unionization attributable to it through the words and conduct of its supervisors and foremen, and Anderson's statement provided the background for the layoff.

Second is the timing and notice of the layoff. It occurred during a critical time in the UFW organizational campaign. Having obtained permission from the ALRB for access thirty days prior to the expiration of the election-bar year, the UFW concentrated on attempting to organize during the month of August. There was a work stoppage in early August over the placement of UFW flags on a stitcher truck. The latter part of August, especially, saw intense union activity during the cooler strike culminating in the August 27 work stoppage of all three crews, followed by the visit to the celery workers by said three crews and UFW representatives, the resultant yelling of encouragement to the said celery workers, the rushing of the fields and a call to the sheriff. In addition, there was much discussion about an 48-hour election during this time, as well. Finally, there was an increase in wages on August 27, the last day Crew No. 3 worked, made retroactive and announced by Tom Merrill himself on a rare personal visit to the fields.

Third, the layoff also came most abruptly without any prior notice to the employees involved. The affected employees were not even told of their dismissal on the last day of work; there was just no work available for them when they returned on their next scheduled day.

Finally, I believe that Respondent had general knowledge or a reasonable belief that the members of Crew No. 3 were sup-

porters of the UFW. Several factors lead me to this result. First, was the fact that all of Crew No. 3 supported Crew Nos. 1 and 2 in the work stoppage of August 27; and when asked to return to work, replied that they would not do so as long as Crew Nos. 1 and 2 were still out. Second, many members of Crew No. 3, in the company of UFW organizers, went to the celery workers to solicit support for a 48-hour election. Third, is the fact that, according to Ocampo, whom I credit, when he passed out authorization cards throughout August, virtually 100% of Crew No. 3 signed these cards', and this activity was observed by Respondent's foremen, especially following the work day as workers began to enter the buses to be transported back to the labor camp. Finally, Garcia's statement to Ramirez, infra, that Crew No. 3 members need not apply for work "because of the thing about the papers with the union..." [90/] is evidence of Respondent's knowledge that Crew No. 3 workers were interested in UFW representation.

I have also credited the Ramirez testimony that Garcia

90/Respondent argues that any conversation held in Manuel Garcia's restaurant must be disregarded as irrelevant because an employer cannot be responsible for what occurs in a non-work setting. (Respondent's post-hearing Brief at p. 72.) For this proposition, it cites Anchor Rome Mills, Inc., 25 LRRM 1027 (1949). That case, however, concerned a "minor supervisor's" critically wounding a striker with a pistol at a location away from the mill. The NLRB merely held that there was no agency theory by which this type of conduct could be held attributable to the employer "under circumstances which do not even establish that the shooting was directly related to the labor dispute." 25 LRRM at 1030. In the instant case, the conversation between Garcia, Ramirez and Ortega, even if in a restaurant owned by Garcia, was clearly related to the working relationship. Ramirez and Ortega went to the restaurant because Garcia had told them to keep checking with him for work, and the restaurant was one place they knew they could go to if they wanted to contact him.

asked him to spy for the company and to help keep Ocampo in line. See, infra. This also illustrates Respondent's knowledge or belief that Crew No. 3 was being organized and might be sympathetic to the UFW.

Thus, the evidence shows anti-union motive for the discharge, a discharge at a critical point in the union's organizational campaign,and other unfair labor practices committed during the same time frame.

The Board has recently found a discriminatory motive in the discharge of a crew in Harry Carian Sales, 6 ALRB No. 55 (1980). Many of the factors in that case which led the Board to conclude that Respondent would not have discharged the crew but for its anti-union motive are present in this case', i.e., (1) the UFW organizational plans were reaching a peak around the time Respondent discharged the crew; (2) the layoff occurred on the day of a significant amount of organizational activity; (3) the fact that the entire discharged crew participated in a work stoppage on the day of the layoff; and (4) the fact that the employer illegally granted a wage increase on the day the crew was discharged. The Board said:

> "An employer's anti-union animus, demonstrated by the commission of other unfair labor practices, constitutes evidence of employer motive for disciplinary action (citations omitted). The overwhelming evidence of Respondent's anti-union animus during the UFW's organizational campaign strongly supports the inference that its motive was unlawful. 6 ALRB No. 55 at pp. 11-12.

The foregoing factors more than establish a prima facie case that the layoff of Crew No. 3 was discriminatorily motivated and in violation of the Act. But having concluded

that a prima facie case was established by the General Counsel does not end the inquiry. As noted in Syracuse Tank & Mfg. Co., Inc., 133 NLRB 513, at 525 (1961):

> "It is then open to the employer to rebut the presumption by coming forward with a plausible, adequate, and convincing explanation demonstrating that the action taken with respect to such action, was based solely upon non-discriminatory considerations. In the last analysis, determination must turn on which is the more persuasive, the inference of discrimination drawn from the circumstances... or the explanations offered to refute it".

Respondent's Explanation for the Layoff

Respondent asserts an economic reason for its decision to lay off employees and not to recall them to work. It contends that: (1) because of the strike at the cooler plant, Respondent was unable to harvest all of its lettuce and ended up ploughing under several fields; (2) because of the work stoppage on August 27, other fields likewise had to be ploughed under; (3) as a result, when the cooler strike ended, there was insufficient supplies for a market; (4) there was a depressed market around this time anyway making a layoff likely even without a cooler strike; (5) the higher seniority workers expressed their opposition to a rotating system, thus making it clear that it would be better to either layoff Crew No. 3 or not to recall it; and (6) there never was sufficient work to justify calling back Crew No. 3 because the lettuce yields were generally far below those of spring; thus, Respondent did not need as many workers during that time period.

The problem with Respondent's economic argument is

that the lettuce production figures (G.C. Exs. 21-26) [91/] do not bear out its position. For example, Respondent argues (at page 41 of its post-hearing Brief) that "lettuce production, after the cooler strike, never consistently reached the level it was before the strike, but merely averaged 7,000 or 8,000 cartons a day." (Emphasis added). However, in the exhibit placed in evidence concerning the week preceding the cooler strike, the week of August 15 to August 21, (G.C. Ex. 21), the average number of cartons packed per day was below the 7,000 to 8,000 figure anyway; yet, all three crews were employed that week, and Crew Nos. 2 and 3 worked as much as four days (August 15, 17, 20 & 21), All three crews averaged a little less than five hours per day. (Resp's Ex. 6)

The next week, the week of the start of the cooler strike (August 23), shows only two days of work but a third scheduled day was cancelled because of the August 27 work stop-on page. [92/] Only Crew No. 1 worked on August 22, but all three crews worked on August 23, the day the cooler strike started. Crew No. 3 worked 7 hours. (Resp's Ex. 7)

Under Respondent's theory, a serious downturn in production would have occurred the week of August 29 through September 4. The cooler strike was in full effect, and limits had been

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91/Since Respondent's 1979 lettuce season began in April and ended in October, these exhibits cover only a part of the season. They do not reflect any work performed on the one or two days the Garin crews harvested Respondent's lettuce.

92/Workers including those from Crew No. 3 did receive 1½ hours of "call time" pay for that day.

placed on the amount of lettuce to be cooled by each employer/ partner to the enterprise. In addition, the normal decrease in production due to a poor September crop would be reflected as well. Instead, we have a situation where both Crew Nos. 1 & 2 worked all five days, averaged about six hours of work per day and the number of cartons packed per day was as high as around 8,347 (G.C. Ex. 23). [93/]

While it is true that the next week (Sept. 5 to Sept. 11) shows a downturn[94/] (an average of 6,785 cartons per day and only around 4.3 hours of work) (G.C. Ex. 24), the following week (Sept. 12 to Sept. 18) shows a tremendous increase in production averaging around 10,166 cartons packed per day for the 6 days both crews worked.(G.C. Ex. 25) [95/] This would appear to cast doubt on Respondent's argument that its production never got back to where it was before the cooler strike.

The only remaining exhibit relating to the fall lettuce production is for the week of September 19 to September 26 (G.C. Ex. 26). Those records show both crews working about six hours per day and averaging 7,602 cartons per day.

There is no question that Crew No. 3 worked sporadically from the time it was hired in May, sometimes only 2 or 3 days a week. Yet, it was employed in this fashion from May to the

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93/Merrill had testified that lettuce production was low at the time of the cooler strike and that the partners didn't make their limit.

94/However, there was enough work for both crews for five days.

95/This documentation corroborates Ocampo's observation that there seemed to be more work in September after the cooler strike had ended and after Crew No. 3 had been laid off.

end of August, and there is nothing in the production statistics to indicate why this pattern should not have continued after the August 27 work stoppage. Had the production records demonstrated a dramatic downturn in the average number of cartons packed after the cooler strike (as compared to the only pre-cooler-strike statistics placed into evidence (G.C. 21)), then an argument might have been made as to the need to lay off and not recall Crew No. 3. However, there is no such evidence in this record. I do not subscribe to Respondent's argument that there was only enough work for two crews. [96/] Apparently, Respondent utilized three crews throughout the spring and summer. If production figures before the layoff of the third crew do not differ significantly from those after the layoff (and in some cases production totals were actually higher after the layoff), then there is no reason to suppose that conditions at Respondent had changed to such an extent as to

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96/The records in evidence show that while it is true that on some individual days the crews worked only the minimum 4 hours (both before and after the cooler strike), at no time was the average for the entire week this low (although it did approach it the week of September 5 to September 11 (G.C. Ex. 24)). But there were several weeks when the average was closer to 6 hours (G.C. Exs. 23, 25 and 26) following the August 27 work stoppage. The average hours worked in the week immediately preceding the cooler strike when all 3 crews were employed was around 4.9 hours per day (G.C. Ex. 21). Further,exhibits show only 2 days when only one crew worked, and one of these days was prior to the cooler strike. (Aug. 22, G.C. Ex. 22 and Sept. 5 G.C. Ex. 24). On several days after the work stoppage, workers worked 7 hours or more and on one occassion, August 30, $8^{1/2}$, (G.C. Ex. 23).

justify the layoff from a business point of view. [97/] One is led inescapably to the conclusion that it was the union organizing campaign, the threat of a 48-hour election and Crew No. 3's participation in the work stoppage that played a dominant role in the determination to layoff the entire crew.

In Harry Carian Sales, supra, the Board held:

> "The fact that Respondent presented evidence of a business justification does not preclude a finding that the discharge was discriminatory. Our ultimate inquiry is not whether the Mayo crew worked too slowly and whether that fact, in the abstract, justified a discharge, but whether Respondent would have discharged the crew members but for their union activities. 'Where a discharge is motivated by an employer's anti-union purpose, it violates Labor Code section 1153(c) and (a) even though additional reasons, of a legitimate nature may exist for the discharge.' " .Abatti Farms, Inc.',(May 9, 1979} 5 ALRB No. 34, p. 27 enf'd in part Abatti Farms v. ALRB (1980)107 Cal. App. 3d 317(emphasis added."

Finally, I reject the idea that the anti-rotation petition assisted Respondent in making a business judgment to lay off Crew No. 3. In the first place, Respondent's position is contradictory. Merv Anderson stated that the anti-rotation petition first began to circulate after Crew No. 3 had been laid off during the first week in September and that it was the deciding factor in not hiring back Crew No. 1. The problem with this argument is that it was contradicted by Manuel Garcia. Both Garcia and Ocampo agreed Crew No. 3 was still

97/For this reason, I have rejected as not applicable here the case of Jack T. Baillie Co., Inc., 3 ALRB No. 85(1977), on which Respondent relies. In that case, for example, there was evidence that after the date of the layoff of the celery crew, there was definitely no more work in celery, and no replacements were hired to perform that function. Here there were workers hired after the layoff, including a crew from the Garin Company. See, infra.

working when rotation was discussed and when the list was circulated. Further, counsel for Respondent, during the hearing, represented that the existence of the rotation list influenced Respondent's decision to lay off the third crew, and Respondent's brief reflects the same idea (Respondent's post-hearing Brief at p. 41). Finally, it would seem only natural that rotation would have been discussed at the time of the last work stoppage (rather than after Crew No. 3 left) because that event concerned how many hours of pay (call time or stand-by pay) agricultural employees were to receive in the event of the unavailability of work because of a shut-down of the operation, in this case the refusal of Teamster Truck drivers to cross a picket line. Logically, the subject of a method by which all three crews could continue to be employed would have been an active area of discussion around this time.

Therefore, I find that the rotation idea was being discussed while the third crew was still working and that the petition in opposition was being circulated around the time of the work stoppage on August 27.

Was Respondent in favor of rotation? No, because the implementation of such a system would have resulted in the retention in the work force of a strongly pro-UFW group of employees. I find that Respondent was well aware that the workers who supported rotation were mostly pro-union. First, it was common knowledge that the more senior workers opposed rotation while more junior workers, most of whom worked in Crew No. 3, favored it. Second, Respondent was aware that large numbers of Crew No. 3 had supported the work stoppage, visited the celery fields and signed authorization cards.

Third, it was known that if rotation were employed, the possibility existed that a 48-hour election could be held and at a time when a strongly pro-union group would be eligible to vote. For example, Garcia asked Ocampo why he wanted rotation when he had already received a raise. This remark demonstrated that rotation was seen as a device by which an election could be held while pro-UFW workers were still employed and eligible to vote. Since workers received a raise on August 27, Garcia was telling Ocampo that the workers no longer needed rotation since they no longer needed a union. Respondent's witness Anaya admitted that any worker who signed the anti-rotation petition would have known he was also ruling out the possibility of a quick election and that that's why he (Anaya) never bothered to solicit Ocampo's signature. Although Anderson denied viewing rotation as a union demand, he identified Jose Higuera, a known union activist, [98/] as being a spokesman for the rotation idea.

Was the anti-rotation petition initiated by and managed by Respondent? I believe the evidence falls short of establishing that the rotation petition idea was a company-sponsored endeavor, despite Garcia's inconsistencies when asked to explain his role in it. However, that is not to say that Respondent did not profit from the dissension among the crews during this period. It seems logical, in view of Respondent's attitude towards unionization and the unfair

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98/For example, during the labor difficulty arising out of the cooler strike, Anderson testified he spoke to both Ocampo and Higuera because they seemed to be spokesmen for the crews.

labor practices it committed during this time, that it became troubled by the possibility of rotation because it would mean that all three crews might have to be retained for the remainder of the season. The existence of an anti-rotation list, however, might have helped provide a further business justification for the discharge of Crew No. 3_f which is precisely what Respondent argues here. But, I reject as pretextural this business necessity argument of Respondent for the same reasons, as I have rejected its previous business justification.

I conclude that the evidence establishes that the reason for the layoff was discriminatory, and I shall recommend that Respondent be found to be in violation of section 1153 (c) and (a) of the Act. The evidence has convinced me that Respondent, in order to avoid a possible union election, decided to rid itself of workers who comprised a large segment of that support by discharging them through the pretext of business necessity. No such necessity, however, is demonstrated by the evidence.

XVIII. If The Board Does Not Find a Discriminatory Discharge, Did Respondent Unlawfully Refuse to Rehire Members of Crew No. 3? 99/

A. Facts

Jose Luis Ramirez testified that Manuel Garcia personally ^k told him to keep checking with him for work after the layoff. Ramirez did check with Garcia for several days during a two-week period but with no luck. At times, Ramirez would also go to the labor camp to check with his ex-foreman, Aristeo, who lived there, but also without success. He also observed other workers inquiring about work. 101/

Finally, Garcia advised Ramirez not to check with him anymore because there was no more work for Crew No. 3. According to Ramirez, when he asked why, he was informed that it was because of the thing about the papers with the union. 102/

99/An analysis of this allegation only becomes necessary in the event that the Board disagrees with my recommendation that Crew No. 3 was laid off for discriminatory reasons. It is to be recalled that the General Counsel did not allege a discriminatory discharge but only an unlawful refusal to rehire. This section will be discussed as if there were no finding of discriminatory discharge.

100/Ramirez knew Garcia from before as he had been his foreman in previous years before being promoted to supervisor. It was the nature of this previous familiarity that resulted in a conversation much earlier (around July) between these two men that bears upon the present case. Garcia owned a restaurant in Salinas which was often frequented by Ramirez during those periods of time when Crew No. 3 was not working. On one occasion, according to Ramirez, he and co-worker Rafael Ortega, who did not testify, were chatting with Garcia when he {Garcia) asked Ramirez to become a union representative of Crew 3 so that he could inform Garcia what was happening as well as to keep Ocampo in line. Ramirez declined the offer.

101/Ocampo likewise testified that he had seen several workers from Crew No. 3 asking for their jobs back after the layoff but that they were not rehired.

102/Ramirez testified that he took "papers to the union" to mean the fact that Crew No. 3 had signed authorization cards.

After this conversation, Ramirez did not check back again until 6 days later when a worker from Crew No. 2 told him that there were new hires working for Respondent. 103/

Garcia admitted that he had received several phone calls from Ramirez and a couple of visits from him and Rafael Ortega at his restaurant inquiring about work, but that he had to tell both of them that he didn't know anything or that he didn't know what was going to happen in the cooler strike, and that he would have to get an order from higher ups. Initially, he testified that he told them to keep checking with officers, foremen, or himself; when cross-examined about the futility of checking with foremen, he corrected himself and stated he meant for them to check with foremen on those occasions when he himself was not available.

Garcia denied ever telling Ramirez that there was no work available, and that he should stop calling. Although he was not asked specifically about the conversation concerning "papers with the union", he generally denied talking to workers about union activities in 1979.

Garcia recalled a visit to his restaurant by Ramirez and Ortega and when asked if Ocampo's name came up, replied, "They might have said something, but I don't pay attention to what they say". Then he recalled that Ramirez told him that Ocampo was pushing him to be a representative and asked Garcia if he should accept. Garcia said, "Well, that's your problem, not mine". Garcia specifically denied that he told Ramirez

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103/Ocampo also testified that he saw at least two new workers in Crew No. 2.

to become a crew representative so that he could keep Garcia informed as to what was happening with Ocampo.

Garcia also testified that he learned from Ramirez on this occasion that he (Ramirez) was angry at Ocampo and wanted to fight him.

With one possible exception,[104/] no one from Crew No. 3 was rehired, and none of them had obtained seniority at the time of their layoff, indicating the sporadic nature of their work during 1979. Respondent did, however, use an entire crew from the Garin Company in mid-September after the 3rd crew had been laid off. Merv Anderson testified that it was during a period when Respondent for a short period had more work than two crews could handle and that this was a practice that had occurred off and on every year since he'd been with the company. When asked why he didn't hire back Crew 3, he replied that it wouldn't be fair to the employees as he couldn't guarantee them employment,

There were also new workers hired subsequent to the layoff. Although denied by Anderson, Garcia admitted that, in fact, one or two new workers were hired to work in Crew No. 2 as cutters or packers after the layoff of Crew No. 3.

104/Under Respondent's seniority system, employees with the lowest seniority would be laid off first and would be recalled according to their seniority. There is no formal recall procedure; it's generally done by word of mouth. If a worker has not obtained seniority, however, he has no right to recall. But previous work record and experience would be given some consideration so that a non-seniority employee would have at least a chance of recall provided he could be contacted. Very few, if any of this crew obtained seniority, and Respondent was operating with only two crews at the time of the hearing. Of those workers specifically identified as being members of Crew No. 3 in the First Amended Complaint, only one, Ismael Martinez, obtained seniority. But he did not obtain his seniority while he worked with Crew No. 3; it was afterwards (October 16) that he achieved it. (He had apparently been rehired to work with one of the other lettuce crews after the layoff.

During this same time period, Ocampo observed that there was a lot more work in September after the cooler strike ended and that his own crew was working harder than during the time when Crew No. 3 was employed. He testified that work was as heavy as it had been back in May when Crew No. 3 was first hired. Thus, there was more work available after the cooler strike ended in September. For example, according to Ocampo, workers were packing 640 boxes per trio after the cooler strike but only 300 - 400 during the strike.

B. Analysis and Conclusions

Failure or refusal to rehire employees on account of their union activity or union sympathy violates Labor Code section 1153(c) and (a) because such conduct constitutes discrimination in regard to hire or tenure of employment which tends to discourage union support or membership, and because it tends to restrain employees from exercising their right to join or assist labor organizations, Louis Caric & Sons, 6 ALRB No. 2 (1980).

Ordinarily, to establish a violation, it must be proved that a proper application was made by the former employee at a time when work was available, the position was later filled and the employer's refusal to rehire the employee was motivated by his or her union sympathies. Prohoroff Poultry Farms, 5 ALRB No. 9 (1979). However, there are situations where it is not necessary to prove that work was available at the time of application or that the employer had a policy of recalling former employees when work became available. Golden Valley Farming, 6 ALRB No. 8 (1980). See also, George Lucas & Sons, 5 ALRB No. 62 (1979) (no application necessary where foreman

promised to contact the entire group, and members of the group shared a common understanding that if anyone of them heard from the foreman, word would be passed to the others); and Ron Nunn Farms, 4 ALRB No. 34 (1978) (no application necessary where employees had reasonable expectation of being rehired the same way as prior season because priority was given to workers with seniority).

There is also another exception in those cases where making a proper application for rehire would be an exercise in futility. Kawano, Inc., 4 ALRB No. 104, enf'd, Kawano, Inc. v. ALRB, 106 Cal. App. 3d 937 (1980); Abatti Farms, Inc., 5 ALRB No. 34 (1979), enf'd in relevant part in Abatti Farms, Inc., v. ALRB, 107 Cal. App. 3d 317 (1980).

In the instant case, the record reflects that Ramirez and Ortega applied for rehire at Respondent. Although Garcia told them to keep checking with him, it is now obvious he had no intention of rehiring them and finally told them that no Crew No. 3 member need apply for work "because of the thing about the papers with the union."105/ Garcia initially gave both Ramirez

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105/I credit Ramirez that Garcia made this statement. For reasons already discussed I have found Garcia's previous denials of anti-union statements to be unreliable. I find his denial unreliable here, as well. Generally, I do not credit his testimony. In contrast, I have found Ramirez to be a truthful witness. I think it's likely the statement was made. After leading both Ramirez and Ortega on, by asking them to keep checking for work with him while at the same time failing to inform them when work did become available, this would have been his final blow - telling them work was being denied them because they signed the authorization cards. Garcia's particular animus may have been fueled by Ramirez's refusal of his offer to become a Crew No. 3 representative and spy for the company, a statement attributed to Garcia by Ramirez, which I also credit. Garcia's version of this event is contradictory and simply not believable. On the one hand, he testified that Ramirez told him that Ocampo asked him to become Crew No. 3's representative and he asked Garcia if he should accept. On the other hand, Garcia also testified that Ramirez told him in this same conversation (footnote 1Q5 continued on next page)

and Ortega the "runaround" by telling them that he didn't know anything about their chances for work, when, as a supervisor, he either knew or could have easily found out. Next Garcia told them to check with him or foremen, when he should have known, as he admitted on cross examination, that foremen would not have had any information on available jobs. Finally, Garcia admitted to at least two other new employees being hired after Crew No. 3 was laid off. Yet he made no attempt to contact either Ramirez or Ortega both of whom he knew, of course, were quite anxious to return to work.

Although it is not clear that work was available when Ramirez and Ortega asked to be rehired [106/], Garcia's discriminatory conduct towards them leads me to conclude that it was Respondent who did not meet its obligation under the law and is in violation of Labor Code section 1153 (c) and (a) in failing to rehire them.

In Shawnee Industries, Inc., 140 NLRB 1451 (1963), 52 LRRM 1270 enf'd, 333 F.2d 221, the NLRB held:

> Under the Act an Employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment is made. Consequently the Act is violated when an employer fails to consider an application for employment for

[105/]footnote [105/] continued that there was hostility between him and Ocampo, as he (Ramirez) wanted to fight him. If there were animosity between Ocampo and Ramirez, would the former offer the latter the responsible worker position of crew representative? And if Ramirez was angry enough at Ocampo to want to fight him, would he need to ask Garcia for his advice on whether to become a crew representative?

106/The evidence is that in addition to the two new workers hired after the layoff, an entire Garin crew was also hired. However, the time of these events is uncertain.

reasons proscribed by the Act, and the question of job availability is relevant only with respect to the employer's backpay obligation.

With respect to the other members of the crew, however, I draw a different conclusion. Although there is evidence that others from Crew 3 besides Ramirez and Ortega inquired about getting hired again [107/], the vast majority of Crew No. 3 apparently did not reapply for work. The question then becomes whether their duty to do so was waived on the grounds thay such an act would have been an exercise in futility.

There is no evidence here of widespread patterns of discriminatory hiring practices or roadblocks being placed in the way of applicants attempting to reapply for work as was the case in Kawano, Inc., supra (where in previous years workers were recalled to work by contacting their "raiteros", but in 1976 and 1977, these same workers were told they had to see John Kawano personally).

There might, of course, have been a different situation if Ramirez or Ortega had reported Garcia's discriminatory statement to other Crew No. 3 workers or if news of that statement had reached said workers and based upon that information, they had decided not to reapply for work. George Lucas & Sons, supra. But there is no evidence of this.

Finally, this was the first year that a full third crew had been added, and none of the members thereof had obtained seniority. There was no evidence that Respondent had a

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107/The evidence is silent as to who these employees were, to whom they spoke, regarding which crops, when this occurred, and what Respondent's response was.

policy of recalling non-seniority former employees when work became available or that the workers themselves entertained this expectation. Ron Nunn Farms, supra; Abatti Farms, Inc., supra. I am not convinced that the other members of Crew 3 were relieved of their duty to reapply for work.

For the foregoing reasons, I recommend Respondent be found to have violated sections 1153(c) and (a) of the Act by its failure to rehire Jose Luis Ramirez and Rafael Ortega because of their union activities.

XIX. May the First Amended Complaint be Amended so as to Include in the List of Discriminatees All of Crew No. 3 as a Class?

Paragraph 10 of the First Amended Complaint reads as follows:

> "Respondent has retaliated against the members of crew three listed below, for having engaged in protected union activities, by refusing to rehire them to their former or substantially equivalent positions, after their layoff on or about August 29, 1979". (Emphasis added).

The complaint goes on to list the names of seventeen workers who were presumably members of the allegedly discriminated-against crew.

At the close of the hearing, General Counsel moved to conform the pleadings to the proof and by that explained that he meant to expand the list of workers identified in Paragraph 10 to include all members of Crew No. 3 as a class.

Respondent vigorously opposed this amendment on the grounds that the General Counsel was attempting to change its theory of the case in mid-stream, that this was not a class action brought on behalf of others not specifically named in the First Amended Complaint, and that General Counsel was limited to a remedy, if a violation was found, only for those discrimi-

natees named in the Complaint.

I reserved judgment on whether the General Counsel could amend the Complaint to include any other workers not so listed until such time as I had made a determination as to whether, there had been a violation of the Act. Having found such a violation, I now turn to the amendment-of-Paragraph 10 question.[108/]

In its post-hearing Brief, Respondent argues that allowing such an amendment would be a "clear travesty on Employer's due process rights", and that the "class of all Crew #3 members has not been fairly and fully litigated or even raised during the hearing. (page 68 of Respondent's post-hearing Brief).

I disagree. The First Amended Complaint makes clear, and througout the hearing General Counsel argued, that Respondent had laid off an entire crew for discriminatory reasons, and that position was consistently taken during all the proceedings. By moving to amend the Complaint to make it clear that any remedy was to apply to all the members of the crew, whomever they might be, the General Counsel was not changing his theory of the case. Moreover, the cases relied on by Respondent are inapposite. In Jastar Mfg. Co., 246 NLRB No. 16, 102 LRRM 1610 (1979), the General Counsel moved to amend retroactively the complaint in order to allege an 8(a)(3) charge of unlawful discrimination. Respondent had objected to certain evidence on this issue and asserted that

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108/The First Amended Complaint did not allege a discrimination discharge of all members of Crew No. 3, which I have found, but instead was limited to a claim that Respondent failed to rehire the crew for having engaged in protected union activity. When General Counsel moved to conform the pleadings to the proof, he had in mind only the refusal to rehire allegation, I assume. However, the issue has relevance to the discriminatory discharge question, as well,

it was litigating only against the 8(a)(1) allegation. The NLRB held that the matter was not fully litigated as the Respondent did not have proper notice of this allegation. In the instant case, General Counsel represented that he was not aware at the time of the hearing of any other members of Crew No. 3, aside from those named in Paragraph 10, and that the amendment was merely an attempt to insure that other workers not so listed, if any, were included in any remedy, should a violation be found.

Respondent also cites NLRB v. Olympic Medical Corp., 102 LRRM 2905 (9th Cir. 1979) for the proposition that an unfair labor practice may be found on the issues tried or that the Administrative Law Officer could order an amendment to conform the pleadings to the proof even though no specific allegation was made in the original complaint so long as the issue had been fully and fairly litigated. I agree, and I have indicated that it is my belief that the issue as to the discriminatory layoff and refusal to rehire of all members of Crew No. 3 was fully litigated at the hearing. Respondent argues, however, that the General Counsel has attempted to expand the scope of the Complaint so as to prevent Respondent from properly defending against the allegations and from putting on witnesses as to each and every individual who had been allegedly discriminated against. However, Respondent never defended this allegation by presenting evidence regarding each individual [109/] named in Paragraph 10 but rather defended by attempting to show that

[109/]The only evidence relating to the individuals listed in Paragraph 10 was in connection with whether or not they had obtained seniority at the time of their layoff. Since none had, Respondent argued that it was not obligated to retain them at the time of the layoff or to rehire them subsequently.

Crew No. 3 as a class, was laid off because of economic necessity. This, of course, was designed to counter the General Counsel's position that the discrimination alleged in Paragraph 10 of the First Amended Complaint was perpetrated upon Crew No. 3 as a class Kawano, Inc., 4 ALRB No. 104, (1978), enf'd, Kawano, Inc., v. ALRB, 106 Cal. App. 3d 937 (1980).

If Respondent has a defense as to the backpay claim of Crew No. 3 that would bear upon its liability, it can of course, present it at the compliance stage of this proceeding.

I hereby grant General Counsel's motion to amend the First Amended Complaint.

XX. The Election Bar Issue - Was the Access Legal?

Section 20900 (e) (1) (C) of the ALRB Regulations reads as follows:

> (C) Access under this Section shall not be available to any labor organization after the 5th day following completion of the ballot count pursuant to Section 20360 (a) in an election conducted under Chapter 5 of the Act, except that where objections to the election are filed pursuant to Labor Code Section 1156.3(c), the right of access shall continue for 10 days following service of and the filing of such objections. Access under this section recommences 30 days prior to the expiration of the bars to the direction of an election set forth in Labor Code Sections 1156.5, 1156.6 and 1156.7 (b). Nothing herein shall be interpreted or applied to restrict or diminish whatever rights of access may accrue to a labor organization certified as a bargaining representative.

It will be recalled that the employees of Respondent voted not to be represented by a labor organization on August 25, 1978. Therefore, the Regional Director permitted the UFW to take access 30 days prior to August 25, 1979, that date being one year from the date of the last election and the end of the one year

election bar period. [110]/

Respondent claims that said grant of access was unlawful and that those allegations dealing with preferential access (Paragraph 7 of the First Amended Complaint) [111]/ ought to be dismissed because the election bar referred to in the Regulations only applies to situations where a valid election has been held and a certification issued or where the election has been set aside. As the Board never issued a certification of the employees' "no-union" choice, (and since this election was not set aside), Respondent argues, without citing any precedent, that there was no expiration of the election bar because the bar does not begin to run absent some "final action by the Board" [112]/(Page 62 of Respondent's post-hearing Brief).

It is not clear where Respondent gets its "final action of the Board" language on which it bases its election-bar argument. The language does not come from the statute. Section 1156.5 of the Act clearly states that:

> "The Board shall not direct an election in any bargaining unit when a valid election has been held in the immediately preceding 12-month period." (Emphasis added)

110/The Regional Director rejected as untimely an earlier UFW request for access filed in May, 1979. (Resp's Ex. 7).

111/During this hearing, Respondent indicated that it was its position that unlawful access was also a defense to unfair labor practice charges contained in Paragraphs 5, 6, 8, 9, and 10 of the First Amended Complaint, as well. However, in its post-hearing Brief, Respondent has apparently abandoned this defense with respect to Paragraphs 5, 8, 9, and 10. It is worth noting that Respondent's Fifth Affiroative Defense requests only that Paragraph 7 be dismissed,

112/Presumably, under this theory, there cannot be another election at Merrill Farms until January 11, 1981, one year from the date the Executive Secretary denied Respondent's Motion for Reconsideration of Order, which dismissed the UFW's election objections as moot.

Section 1156.6 states:

> "The Board shall not direct an election in any bargaining unit which is represented by a labor organization that has been certified within the immediately preceding 12-month period or whose certification has been extended pursuant to subdivision (b) of Section 1155.2".

Respondent in its "Motion for Reconsideration of Order" of September 26, 1979 in the RC case [113/] argued before the Board that its rights had been thwarted. Conceding in its argument that Labor Code Section 1156.5 provides that "if the employees voted no union, an election is barred for one year from date of election", Respondent argued that the statute invoked a double standard, [114/] that the UFW capitalized on this double standard to start the investigative hearing, and that the UFW manipulated the law to its own advantage.

Despite Respondent's "double standard" argument, NLRB precedent is clear that when no union is the choice of a majority of the voters, the twelve-month period within which a second election may not be held, begins to run from the date of the earlier election. Mallinckrodt Chemical Works, 84 NLRB No. 32, 24 LRRM 1253 (1949); Fruitvale Canning Co., 85 NLRB No. 122, 24 LRRM 1451 (1949); Palmer Mfg. Co., 103 NLRB No. 18, 31 LRRM 1521 (1953).

In Bendix Corp., 179 NLRB No. 18, 72 LRRM 1265 (1969),

113/Official notice was taken of this document, as well as others from the same case, in Merrill Farms and UFW, Case No. 78-RC-19-M.

114/A1though Respondent does not directly present its "double standard" argument in its post-hearing Brief, its Second, Fifth and Sixth Affirmative Defenses still bear upon the issue.

the employer made an argument somewhat analogous to that of the Respondent herein. A Court of Appeals decided the election-objections question some four years subsequent to the original election. On the question of a new election, Bendix argued the election bar did not begin to run until the Court of Appeals decided the issue. The NLRB rejected this argument:

> It is settled Board practice in construing this part of Section 9(c) (3) to hold that in circumstances where a union loses an election, the Act allows the 12-month period to be measured from the date of the holding of the election. Furthermore, we find no merit in the Employer's contention that it is entitled to a 'year of quiet,' from the date the representation issue is finally resolved in the courts, irrespective of the length of time it has taken to resolve such issue. We can find no basis for such view in the language of Section 9(c) (3) or in Congressional intent expressed in its enactment.

In any event, Respondent certainly was on notice that access had been granted and acted accordingly. It received the UFW's "Notice of Intent to Take Access" around August 15, 1979 (G.C. Ex. 11) and on the same date wrote to Mr. Martinez, the Salinas Regional Director, protesting the Director's action. It then distributed to all its own employees a leaflet indicating Respondent's completion of the first year as a non-union company and encouraged employees to resist the "union organizer's propaganda." (G.C. Ex. 19). Finally, on August 23, it sent a memorandum to its foremen informing them that access had been granted by the ALRB and stating rules they should follow with respect to union organizers coming on Respondent's property. (G.C. Ex. 32).

I reject Respondent's Affirmative Defenses. The language of the statute is clear on it's face, as Respondent seems to recognize itself in its "Motion for Reconsideration of Order."

Respondent's dissatisfaction seems to stem from the language of the statute rather than any action of the Board. I conclude that access was lawful, and I decline to recommend the dismissal of Paragraphs 6 or 7 of the First Amended Complaint.[115/]

115/I have recommended the dismissal of Paragraphs 6(a), 7(a), 7(b), and 7(c) but on different grounds from the election issue which Respondent urges here.

XXI. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 1153(c) and 1153 (a) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

ORDER

Respondent, its officers, agents, supervisors and representatives shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against agricultural employees because of their association with, membership in, or sympathy with and/or support of the United Farm Workers of America, AFL-CIO.

(b) Promising, granting or timing the announcement of wage increases or other employee benefits where the purpose of the probable effect thereof would be to interfere with the right of employees to freely choose whether to be represented by a labor organization.

(c) Suggesting to agricultural employees that they would be required to choose between unionization on the one hand and wage increases and/or other benefits on the other.

(d) Giving less work-assistance to agricultural employees because of their interest, membership or activities on behalf of the UFW, than to other enployees who do not possess such interest.

(e) Discriminating against any agricultural employee in regard to discharge, layoff, or rehire, or any other term or condition of employment to discourage any employee's membership in or activities on behalf of the UFW.

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

2. Take the following affirmative actions which will effectuate the purposes of the Act:

(a) Offer all the employees of Crew Number 3 immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority, if any, or other rights and privileges to which they may be entitled and make them whole for any loss of pay or other economic losses they have suffered by reason of their discriminatory discharge, plus interest thereon at seven percent (7%) per annum, and minus their net interim earnings.

Preserve and make available to the Board or its agents, for examination and copying, all payroll records and any other records necessary to determine the amount of back pay and other rights of reimbursement due the persons included in sub-paragraph (a) under the terms of this Order.

(b) Sign the attached Notice to Employees and, after its translation by the Regional Director into appropriate languages, reproduce sufficient copies of the Notice in each language for the purposes set forth herein.

(c) Post copies of the attached Notice to Employees at conspicuous locations on its premises for a period of 60 days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any posted Notice which has been altered, defaced, covered, or removed.

(d) Mail copies of the attached Notice to Employees in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed at any time during the payroll periods encompassing the dates of April 1, 1979 through August 30, 1979.

(e) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice to Employees in appropriate languages to the assembled employees of Respondent on company time. The reading(s) 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 of their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly employees to compensate them for time lost at this reading and the question-and-answer period.

(f) Hand a copy of the attached Notice to Employees to each of its present employees and to each employee hired during the six months following the date of issuance of this Order.

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: January 19, 1981 Agricultural Labor Relations Board

By: Marvin J. Brenner
MARVIN J. BRENNER
Administrative Law

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its evidence, the Agricultural Labor Relations Board has found that we unlawfully discriminated against employees and that we also interfered with the rights of our workers. The Board has told us to send out and post this Notice.

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

The Agricultural Labor Relations Act is a law that gives all 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 threaten employees with a loss of wage increases or other benefits for joining or supporting the UFW.

WE WILL NOT promise or grant benefits to employees to induce them to vote against the UFW.

WE WILL NOT discharge or lay off any employee because the employee joined or supported the UFW.

WE WILL NOT give less work assistance to any employee because the employee joined or supported the UFW.

WE WILL immediately offer to our 1979 Crew Number 3 and to the following named employees, though not limited thereof, reinstatement to their old jobs or equivalent jobs and we will pay them any money they have lost, plus interest at seven percent (7%) because we laid them off in violation of the ALRA:

1. Genaro Lizama
2. Jorge Perez
3. Manuel G. Martinez
4. Jose M. Espinosa
5. Carlos T. Gonzales
6. Armando B. Ramirez
7. Civile V. Cordova
8. Jose Luis Ramirez
9. Armando Cardona
10. Valentin F. Avitia
11. Jesus G. Salazar
12. Ismael Martinez
13. Francisco D. Mora
14. Isidro Carlos Mariposa
15. Rafael B. Ortega
16. Jesus Trujillo
17. Emilio Lopez

Dated:

MERRILL FARMS

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.