Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROTHERS COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case Nos. 79-CE-177-SAL 79-CE-217-SAL 79-CE-301-SAL 79-CE-314-SAL 79-CE-408-SAL 8 ALRB No. 45

DECISION AND ORDER

On March 25, 1981, Administrative Law Officer (ALO) Marvin J. Brenner issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent and the Charging Party each timely filed exceptions and a supporting brief. Respondent and General Counsel each timely filed a reply brief.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the ALO as modified herein, and to adopt his recommended Order, with modifications.

We affirm the ALO's conclusion that Respondent discriminatorily discharged Gabriel Valencia in violation of Labor Code section 1153 (c) and (a). Although the ALO did not cite Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] in his Decision, we find that he applied the correct Wright Line analysis in determining

that General Counsel established a prima facie case of discriminatory discharge of Valencia, that the burden of going forward with the evidence then shifted to Respondent, and that despite Respondent's asserted business justification, Valencia would not have been discharged but for his protected concerted and union activities,

We affirm the ALO's conclusion that Respondent violated Labor Code section 1153(e) and (a) by unilaterally increasing wages in nine categories and setting wages for a new commodity in August 1979. Additionally, we find that Respondent unlawfully increased the wage rate for celery workers on June 14, 1979, and unlawfully decreased wages for mixed lettuce workers on May 9, 1979. We also affirm the ALO's conclusion that these wage changes, although not alleged in the complaint, were related to the subject matter of the complaint and were fully litigated at the hearing.[1/]

However, we overrule the ALO's conclusion that Respondent unlawfully increased wages for five categories of workers on March 4, 1979. During the hearing the ALO indicated that he would not consider evidence of violations for which there was "a Statute of Limitations problem." In its exceptions brief, Respondent

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[1/] At the close of the hearing, General Counsel moved to conform the pleadings to the proof offered at the hearing. The ALO never ruled on this motion, apparently because General Counsel indicated he would file an amended complaint within ten days. Although he failed to file the amendment, Respondent's opportunity to litigate the issues during the hearing cannot be said to have been limited by such failure. National Labor Relations Board precedent does not require an amendment of the complaint to conform to proof as a prerequisite for finding an unalleged violation. (NLRB v. International Association of Bridge, Etc. (9th Cir. 1979) 600 F.2d 770.

argues that the March 1979 violation is barred by the six-month limitation contained in Labor Code section 1160.2. We hold that in view of the ALO's statement, Respondent had no, fair opportunity to litigate its Statute of Limitations defense (or any other defenses it may have had) to the unalleged March 1979 wage increase, and we therefore decline to find a violation.[2/]

Having found a number of Respondent's unilateral wage increases to be unlawful, we now consider whether imposition of a makewhole remedy for the violations is appropriate.[3/]

Pursuant to J. R. Norton v. ALRB (1979) 26 Cal.Sd 1, this Board in D'Arrigo Brothers (May 30, 1980) 6 ALRB No. 27 reexamined the remedial order it had issued against Respondent in 4 ALRB No, 45, and concluded that Respondent's election challenge was reasonable and that it had litigated in good faith the validity of the certification of United Farm Workers of America, AFL-CIO (UFW) as exclusive collective bargaining representative of its agricultural employees. As a consequence, we vacated our original makewhole order.

Respondent's apparent position, as expressed in the testimony of its Labor Relations Manager, Kelly Olds, was that Respondent had no duty to bargain with the UFW until a final decision regarding the validity of the Union's certification

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[2/] In accordance with his Dissenting Opinion in George Arakalian Farms (May 20, 1982) 8 ALRB No. 36, Member McCarthy would dismiss the ALO's finding of time-barred violations irrespective of whether Respondent had pleaded the pertinent section 1160.2 proviso as an affirmative defense.

[3/] In his Decision, the ALO did not discuss the issue of makewhole,

issued from the California Supreme Court. However, National Labor Relations Board (NLRB) precedent clearly holds that an employer has a continuing duty to bargain with a certified bargaining representative during the period of time when it is seeking judicial review of the NLRB's certification. (NLRB v. Winn-Dixie Stores, Inc. (5th Cir. 1966) 361 F.2d 512; Dixon Distributing Co., Inc. (1974) 211 NLRB 241 [86 LRRM 1418].)[4/] The Board's vacating of its original makewhole order based on Respondent's "technical" refusal to bargain in 6 ALRB No. 27, supra, did not relieve Respondent of its duty to bargain over unilateral changes pending its appeal of the certification in court. Unlike its "technical" refusal to bargain, Respondent's unilateral wage changes were not necessary as a means of obtaining judicial review, since Respondent had already protected its right to judicial review by "technically" refusing to bargain.

The circumstances that have led us to deny the makewhole remedy for unilateral wage changes in prior cases are not present in the instant case. In Kaplan's Fruit and Produce Co. (July 1, 1980) 6 ALRB No. 36, we declined to order the makewhole remedy because the union had specifically refused to discuss the wage issue both before and after the wage increases were granted. In N. A. Pricola Produce (Dec. 31, 1981) 7 ALRB No. 49, we found that where the union was primarily responsible for delays in bargaining, the employer had not generally shown an unwillingness to bargain

[4/] In his discussion of Respondent's duty to bargain, the ALO inappropriately cited cases concerning an employer's refusal to bargain after election but before the union's certification.

about wages or other working conditions, and the wage increase had brought workers' wages up to the prevailing rate, a makewhole remedy for the employer's unlawful wage increases should not be imposed.

In the present case, there is no evidence that the UFW failed or refused to bargain or delayed bargaining, nor are there any other circumstances indicating that ordering the makewhoie remedy would be inappropriate. Respondent's position that: it had no duty to bargain while the Union's certification was being reviewed in court is indefensible under NLRA precedent, which we are bound to follow. Therefore, our Order will include a makewhole remedy for Respondent's refusal to bargain over wage changes.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent D'Arrigo Brothers Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) 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 (UFW) or any other labor organization.

(b) Instituting or implementing any change(s) in any of its agricultural employees' wages or any other term or condition of their employment without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning such change(s).

(c) In any like or related manner interfering with,

restraining, or coercing any agricultural employee in the exercise of the right to self-organization, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in section 1153(c) of the Agricultural Labor Relations Act (Act). 2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer to Gabriel Valencia immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights or privileges.

(b) Make whole Gabriel Valencia for all losses of pay and other economic losses he has suffered as a result of his discharge, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed at a rate of seven percent per annum.

(c) Upon request, meet and bargain collectively with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes heretofore made in its employees' wage rates, and other terms and conditions of their employment.

(d) If the UFW so requests, rescind the unilateral changes heretofore made in its employees' wage rates.

(e) Make whole its employees for all economic losses they have suffered as a result of the unilateral changes Respondent

made in their wages from May 9, 1979, to August 30, 1979, plus interest thereon computed at the rate of seven percent per annum.

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

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

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from May 9, 1979, until the date on which the said Notice is mailed.

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

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional

Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order co compensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: June 22, 1982

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, 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 we had violated the law. After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Agricultural Labor Relations Act by discriminating against an employee by discharging him because of his union activity and also by changing our employees' working conditions without first notifying the United Farm Workers of America, AFL-CIO (UFW) as your representative. The Board has told us to post and publish this Notice and to mail it to those who worked at the company between May 9, 1979 and the present. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

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

WE WILL OFFER Gabriel Valencia his old job back and we will pay him any money he lost, plus interest computed at seven percent per annum, as a result of his discharge.

WE WILL REIMBURSE all employees who worked for us at any time between May 9 and August 30, 1979, for all economic losses they suffered as a result of unilateral changes we made in their wages during that period, plus interest computed at seven percent per annum.

WE WILL NOT discharge, lay off, or otherwise discriminate against any agricultural employee with respect to his or her job because he or she belongs to or supports the UFW or any other union.

WE WILL NOT change your wages or wage rates or our wage system or other working conditions without first notifying the UFW, as your representative and giving them a chance to bargain with us about these changes.

Dated: D'ARRIGO BROTHERS COMPANY

By: _____
Representative Titles

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) 443-3160

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

D'Arrigo Brothers Company (UFW)

8 ALRB No. 45
Case-Nos. 79-CE-177-SAL
79-CE-217-SAL
79-CE-30I-SAL
79-CE-314-SAL
79-CE-4OS-SAL

ALO DECISION

The ALO found that the Employer had discriminatorily discharged a worker because of his protected concerted activities, and had unlawfully granted unilateral wage increases to certain categories of workers in 1979. Although the wage increase violations found by the ALO were not alleged in the complaint, the ALO found that they had been fully litigated at the hearing and were sufficiently related to the subject matter of the complaint to warrant findings on the issues. The ALO did not discuss the issue of makewhole as a remedy for the unilateral wage increases.

BOARD DECISION

The Board affirmed the ALO's findings of discriminatory discharge and unilateral wage increases, and found additional unlawful wage increases on the part of the Employer. The 3card awarded makewhole for the unlawful wage increases.

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
D'ARRIGO BROTHERS,	)	
Respondent,	)	Case Nos. 79-CE-177-SAL
	)	79-CE-217-SAL
and	)	79-CE-301-SAL
	)	79-CE-314-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	79-CE-408-SAL
Charging Party.	)	

Norman Sato and Jose Lopez
for the General Counsel

Sarah Wolfe
Dressier, Stoll, Quesenbery, Laws and Barsamian
for the Respondent

DECISION

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Officer: This case was heard by me on May 14, 28, June 2, 3, 4, 5, 6,- 9, and 10, 1980. The complaint issued December 17, 1979 and alleged that Respondent, D'Arrigo Brothers, violated Sections 1153(a), (c), and (e) of the Agricultural Labor Relations Act, hereinafter referred to as the "Act", by threatenening and harassing Gloria Ledesma because of her concerted and union activities; by discharging Francisco Leon and Gabriel Valencia because of their

support for the United Farm Workers of America, hereinafter referred to as the "UFW"; by unilaterally changing the working conditions of its employees in regard to absences, without negotiating this change with the certified collective bargaining representative, the UFW; and by granting a raise to crews on October 17, 1979 without negotiating this change with the UFW.

All parties were given full opportunity to present evidence[1/] and participate in the proceedings. The General Counsel and the Respondent filed post-hearing Briefs in support of their respective positions.

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

FINDINGS OF FACT

I. Jurisdiction

I find that Respondent D'Arrigo Brothers, is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

I find that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices[2/]

The Complaint raises three areas of alleged violations.

1/Hereafter, General Counsel's Exhibits will be identified as "G.C. No.___", and Respondent's Exhibits as "Resp's No.___ ".

2/At the request of the General Counsel who represented that his witnesses were unavailable, I permitted the severance of Case Nos 79-CE-181-SAL, 79-CE-182-SAL, 79-CE-253-SAL, and 79-CE-313-SAL In so doing, the following allegations were thereby deleted. from the complaint: paragraphs 6(b), 6(c), 6(e), and 6(g). My reasons for doing so were (footnote 2 continued on pg. 3)

First, it charges that Respondent violated Sections 1153(a) and (c), of the Act by discriminating against Gloria Ledesma because of her protected concerted and union activities, and by discharging Francisco Leon and Gabriel Valencia because of their protected union activites, conduct which allegedly interfered with, restrained, and coerced them and other employees in the exercise of rights guaranteed in Section 1152 of the Act. Finally, the Complaint charges that Respondent violated Section 1153(e) and (a) of the Act by unilaterally changing the conditions of its employees work in regard to absences, and by granting a wage increase without negotiating these changes with the certified collective bargaining representative of its employees, the UFW.

The Respondent denied it violated the Act in any way and stated as an affirmative defense that any and all speeches made by supervisors of Respondent are expressly protected by Labor Code Section 1155 and could not serve as the basis for an unfair labor practice charge. [3/] Respondent

2/(continued) as follows: (1) the facts of the severed allegations relate to subject matters and events different from the remaining allegations so that they, are each independent from each other; (2) the severance motion was made prior to the presentation of any evidence on any of the severed counts; (3) there was no showing that the General Counsel had acted in any way other than in good faith in his unsuccessful attempt to locate the missing witnesses and I did not perceive his conduct to be dilatory; (4) in balancing the possible harm to the alleged discriminatees should their cause of action be dismissed with the possible harm to Respondent, should the case be continued, I determined that the equities were on the side of the General Counsel. Although Respondent objected to the severance during the hearing, it has not raised the issue in its post-hearing Brief.

3/At the pre-hearing conference on May 15, 1980, Respondent withdrew the First and Third Affirmative Defenses set forth in its Amended Answer to Complaint of January 7, 1980.

admitted in its Answer that the following were supervisors within the meaning of Labor Code Section 1140.4 (j): Kelly Olds, Valentin Rivera, Juan Guillen, Pedro Santiago, Jess Aragon, and Teodoro Diaz. Respondent also admitted at the pre-hearing conference that Antonio (Tony) Ayala and Joel P. Cooper were also supervisors within the meaning of the Act.

III . The Employer's Operation

Respondent is a corporation with its principal office in Salinas, California. The company maintains farming operations in the Salinas and Imperial Valleys. The Salinas manager is Jim Manassero. Under him is the lettuce harvesting manager, Don Burgess, and the specialty harvesting manager, Joel Cooper. In Salinas, Respondent grows mainly lettuce, green onions, rapini (mustard greens), broccoli, celery, sweet anise, and cactus.

A. The rapini crop

There are two rapini seasons; the first commences in the latter part of March and runs to early June; the second begins in August or September and goes to December. Rapini, a very leafy plant, grows from one to five feet tall, and each bed will be crowded with the plant. It is packed in loose fashion in cardboard cartons, twenty pounds to the box. The total crew boxes packed daily are divided by the total number of workers to determine the pay. The individual then receives the crew average.

The rapini crews perform their duties in the following fashion: flat boxes are delivered to the field by truck;

loaders then make the boxes, and workers pick them up at the end of each row and place the boxes ten to fifteen feet ahead of them. The worker then proceeds down the row picking the mustard and placing it into a box until it reaches twenty pounds, at which point he/she carries it to a weigh station where it is checked for quality and weighed by a checker.[4/] The worker stops by the checker until the box is weighed and checked for quality, then he picks up another box and takes it back into the row.

B. The green onion crop

Tables are placed in the rows in the field. The workers pull up the onions in clumps and bring them to the tables where they bunch them and lay them on the ground next to the tables. An employee called a "counter" arrives and verifies the number of bunches per worker and places them in a large bin which is then transported to a packing house. As with the mustard, the individual worker receives the crew average as his pay.

IV. The Discharge of Francisco Leon (Paragraph 6(d) of the Complaint.)

A. Facts

In July of 1979 Francisco Leon, a lettuce packer since 1975, was fired by Juan Guillen, his foreman. General Counsel alleges it was because of his support for and activities on behalf of the UFW.

1. The Discharge

Leon's immigration papers had expired on June 28, 1979,

4/There is one checker for every eighteen to twenty pickers.

and he testified it was necessary for him to return to Mexico to make a personal appearance to straighten the matter out.[5/] Accordingly, he requested a leave of absence on July 6 from Guillen for three days to travel from Salinas, California, his place of employment, to Mexico (close to the Imperial Valley). The request was granted without any problem.[6/] The leave was to officially start July 9, a Monday, but Leon actually left after work on July 6, a Friday.[7/] As to when he would return, Leon testified that there was no discussion regarding it but that he had intended to return within about three days. Then, he inexplicably stated that these three days "was the three days of the permission."[8/] He then admitted,

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5/Leon testified he had lost his "mica" or green card some time before so that every six months for the last one and one-half years he had to travel to his point of entry to renew his documentation.

6/Leon testified that in past years it wasn't even necessary to advise Guillen he was leaving or ask for such permission, but he did so anyway on this occasion because he really needed to travel to Mexico and felt that on this occasion, there might be a problem. He stated that at previous times (once for as long as two months) he had not advised Guillen he was leaving for Mexico but merely informed him that that was where he had been upon return. On each of those occasions he retained his employment. On none of those-occasions was he reprimanded for the length of his stay.

7/It was not unusual for workers to leave for Mexico over a weekend ahead of any pre-arranged leave, as this was their own free time; and there was no duty to inform their foreman of such an early departure. Other workers often traveled to Mexico over the weekend returning to work on a Monday without missing any work.

8/When he went to the UFW office to file a charge following his discharge, he explained that he had received permission to travel to Mexico but failed to mention how much time it would be for.

however, that he never told Guillen the date he would be back to work.[9/]

There was substantial unforeseen delay in the finalization of the immigration matter to the extent that it took Leon the entire week of July 9 through July 13 to obtain the renewal of the necessary documents, so that he returned to work on Monday, July 16. At no time during that week did Leon notify Respondent that he was going to be delayed even though he admitted that he knew Respondent had fields and an office in the Imperial Valley and that there was no reason why he could not have contacted company personnel to inform them of his unexpected problem.

On July 16 when he reported for work, Leon testified he was given no opportunity to explain the reason for his delay in returning to work, but was instead informed that his position had been filled.

Juan Guillen had been a foreman thirteen years, the last five years with Respondent. He had supervised Leon for two lettuce seasons, 1978 and 1979. Guillen testified that he discharged Leon because he had failed to notify him. (Guillen) or anyone else at Respondent's that he was going to be absent from work. Guillen stated that Leon had taken leaves in the past but had always asked permission and indicated how long he would be gone. Guillen denied that Leon told him on Friday, July 6, about his plans to go to Mexico or that he had previously

9/Leon was of the opinion, and so testified, that it was not necessary to state precisely when one would return as the custom was that employees would always get their jobs back even when their leaves took longer than expected.

stated that his immigration papers had expired and that he had to leave town to take care of this problem. Guillen did recall, however, that Leon had previously lost his papers and assumed that at some point Leon would have to travel to Mexico to receive new documents.

Guillen testified that Respondent had a consistent company-wide leave of absence policy, [10/] in effect since he first started working, which required an employee to orally [11/] request any time off he/she needed from a foreman or supervisor.[12/] Usually, the employee would also state the length of time the leave would entail.[13/]

10/Kelly Olds, Manager of Labor Relations, testified that this "policy" had never been formalized into a written form.

11/Respondent maintains written forms which require the employee to state the date he/she wishes to leave and the date the employee will return. Guillen testified he had never used these forms. Kelly Olds testified that supervisors were supposed to require the written form requests if the leave was in excess of three days.

12/Guillen admitted he never discussed this policy with other foremen and that, for all he knew, they may have been handling personal leaves of absence differently from him.

13/The General Counsel argues in his post-hearing Brief (at p. 28) that the leave of absence policy was changed to become much more formal and rigid and that any such change should have been negotiated with the UFW. as this matter was not alleged in the Complaint and not fully litigated at the hearing, I do not regard it as an independent allegation of an unfair labor practice. Harry Carian, 6 ALRB No. 55 (1980).

Furthermore, under Respondent's procedures three[14/] written warnings, prior to discharge, were to be given to an employee who was absent from work without permission. Guillen stated that the purpose of these warnings was to call the absentee problem to the attention of the employee, presumably so that he could take steps to correct his conduct.[15/]

On July 10, 1979, Guillen prepared a warning for Leon for his missing work for that day (G.C. No. 17); on July 11, he prepared a warning for the second day (G.C. No. 18}; and on July 12, he prepared number three warning (G.C. No. 19). These three notices were then all given to Leon at the same time upon his return to work on July 16. [16/]Although this warning system was never explained to the employees, Guillen explained that this was unnecessary as they were all accustomed to it.

Guillen also testified that he always granted a requested leave regardless of how much time off the employee reauested. However he admitted that on occasion a worker would

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14/Guillen testified this was a written policy, but Kelly Olds, stated it was not. I requested production of this document, if written, but it was never produced.

15/Kelly Olds also testified that the purpose of the policy was that "in the event that the employee says 'Well I was never warned', there's written evidence that the employee was warned."

16/Guillen was unaware of any other written warning, either for unauthorized absences or poor work performance, ever received by Leon.

miss a day of work without having obtained prior permission, but would, nevertheless be allowed to return to work so long as an explanation was given at that time.

A short time after his discharge, Leon sought and obtained a meeting with Guillen's supervisor, Jim Manassero, the District Manager in charge of all Salinas operations, in the hopes of presenting his side of the case and getting his job back. At that time, Manassero told Leon that he was discharged because of the work days he had missed and because he (Manassero) had been informed by Guillen that Leon's work was of poor quality. [17/] Manassero then showed Leon his termination notice (G.C. No. 16), which he (Leon) had not yet received. The termination was dated July 6, 1979, the same date Leon had left on his leave to go to Mexico and indicated that Leon's last day of work was July 6, 1979.[18/]

In his defense, Leon explained to Manassero that he had requested permission to be absent from work, and that it had been granted. It was agreed between the two of them that the matter needed further investigation; therefore, another meetina IV was arranged. Three or four days later it was held by[19/] which

17/Guillen testified that Leon was a "stubborn" worker and that he was too rough with the lettuce, for which he was criticized several times during 1979. Leon testified that his work was criticized for the first time ever (by Guillen in 1979).

18/Guillen testified that the termination notice was written on July 12, the date of the third warning (G.C. No. 19), and that the date of July 6, as the last day worked, was a mistake which should have borne the date of July 12. He stated he first discovered the error upon testifying in the hearing in the instant case.

19/Manassero denied that Guillen was ever present at any of -he meetings between Leon and him. Guillen stated he was at one such meeting but for only three or four minutes.

time Jim Manassero testified he had talked to Guillen and learned that he (Guillen) had told Leon he could go to Mexico, but that he had to report back to work the following Monday (July 9); and that, in fact, he did not return to work until a week later:

> Q. "Was there any discussion between you and Mr. Leon about whether or not he had permission to leave in the first place?"
>
> A. (by Manassero) "Oh, there was never any question. He said that he did and Juan confirmed that he did."
>
> Q. "Okay."
>
> A. "Very definitely."

Manassero admitted that the July 6 date representing the supposed date of discharge was an incorrect date and that the form was not really filled out on that date because the payroll department data processing time stamps (G.C. No. 14) indicated that the discharge occurred sometime thereafter. As to the significance of the July 16 date under the designation "presented for work", (G.C. No. 16) Manassero admitted that he wrote that date but that he could not recall what it meant.

Manassero upheld the discharge. In doing so, he also conceded that he gave no consideration to Leon's prior record or length of service. However, he testified that he did suggest to Leon that he seek work in another crew. Leon did so (Ayala's crew) but without success.[20/]

20/Leon was also discharged a second time. Subsequent to the filing of charges with the ALRB, Leon was rehired by Respondent in the Imperial Valley around November of 1979. During this time, he became ill and missed three days of work. Although he personally failed to inform Respondent of the (20/ continued on p. 12]

2. Leon's Concerted and/or Union Activities

In June or July of 1979, union organizers arrived at Respondent's field and attempted to encourage workers to participate in a work stoppage. At that time,they were successful in speaking with all the members of Leon's crew. While the organizers spoke to the employees, Leon testified that he was observed talking to the organizers by Guillen, who was about fifty feet away. However, he admitted that he was just one of many workers from the crew who was observed by Guillen either talking to or listening to the organizers:

> Q. (by Administrative Law Officer): "Do you know whether Juan saw you talking to the workers about the work stoppage?"
>
> A. "He saw everyone, not only me."

Subsequently, there were indeed work stoppages that occurred (among lettuce, onion and mustard crews); and at one of them, a foreman asked members of the crew, two or three at a time, including Leon, why they had stopped work. However, Leon, although at first testifying that he was somewhat of a leader for the employees during the work stoppage, later denied that he was a spokesmen: "No, I didn't speak. .We listened to the friends from the union." In fact, Leon testified that it was several others who spoke up on this occasion.

During redirect examination, Leon testified (for the first time) that he, along with others, talked to some workers who were reluctant to join in the work stoppage, tried

20/(continued) reason for his absences, he testified that he had sent co-workers to notify his foreman but was discharged anyway. This discharge was not alleged in the Complaint and was not fully litigated and was not addressed in the General Counsel's post-hearing Brief. I do not believe that this discharge is related to or intertwined with the allegation in the complaint. See Harry Carian Sales, 6 ALRB No. 55 (1980)

to encourage them to do so, and that Guillen was close by and observed this event.

Leon testified that he never presented any employee grievances to Guillen during 1979 nor was he the one selected as the crew representative. In fact, he admitted that, except for his participation in the work stoppages (both in the Salinas and Imperial Valleys), he was not involved in any other concerted or union activity during 1979.

Guillen testified that he recalled that UFW supporters came to the fields just prior to the work stoppage, but that he never saw them talking to Leon. All workers participated in the stoppage, according to Guillen, but he could not specifically recall if Leon was one of them and denied any knowledge that Leon supported the UFW. He also confirmed Leon's testimony that he (Leon) never presented him with any grievances on behalf of himself or other co-workers.

ANALYSIS AND CONCLUSIONS

I. The Prima Facie Case

"To establish a prima facie case of discriminatory discharge in violation of Sections 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); John Van Wingerden, et al., 3 ALRB No. 80 (1977).

Thus, under Section 1153(c) and (a) of the ALRA an essential element in finding a discriminatory discharge is that the employer knew or believed that the employee in question was a union supporter. See also, Howard Rose Co., 3 ALRB No. 86 (1977); NLRB v. Whitin Machine Workers, 204 F.2d 883, 32 LRRM 2201 (1st Cir. 1953). Such knowledge bears heavily on the issue of whether the discharge reasonably tended to discourage union activity, or constituted unlawful interference, restraint or coercion of employees.

The General Counsel points to the following factors in support of her contention that Leon's union or concerted activities were known to Respondent and that he was discharged because of them: (1) that Leon participated in the work stoppages and was somewhat of a spokesman for the employees; (2) that foreman Juan Guillen was usually nearby when UFW representatives came to the fields to induce the employees to join in a work stoppage, observed them talking to Leon and overheard the conversation; (3) that Guillen was angry about the work stoppages and made threatening statements and tried to find out why the employees had left the fields; and (4) that Guillen harassed Leon by criticizing his work.

In fact, Leon's involvement with the union representatives was quite minimal. When the representatives visited the fields, they spoke with all the workers; they did not single out Leon. Moreover, Leon admitted that this was exactly what Guillen would have observed, as well. Furthermore, although there was evidence that Guillen saw the said representatives, at a distance of fifty feet, talking with the crew members, there is no

evidence that he overheard [21] what was being said or, if he did, took any retaliatory action.[22]

When the work stoppages occurred, all the members of the crew participated, not just Leon or a few others. By his own admission, Leon did not stand out as a spokesman for the group;[23] in fact, he admitted that it was others who spoke up while he remained silent. Leon also admitted that he was not a crew representative, although one was elected, and that, except for the work stoppage, he did not participate in any other concerted or union activity during 1979. Nor did Leon discuss any of the work related problems or union questions with Guillen.

21/General Counsel argues in his post-hearing Brief, at page 17,that Guillen admitted he overheard some of the conversation between the organizers and Leon. This misstates the evidence. Guillen testified that from time to time employees would voluntarily talk to him about the union, but there was no testimony of what was said or whether Leon was mentioned.

22/General Counsel also argues that, following the work stoppage, Guillen retaliated against Leon by criticizing the quality of his lettuce packing. Although Leon denied this had happened prior to 1979, there is insufficient evidence that it was unjustified on this occasion, that Leon was treated differently from other employees, or that there was any connection between his having participated in a work stoppage and his being criticized at work.

23/On redirect Leon testified for the first time that on one occasion he, along with others, attempted to induce reluctant workers to join in the work stoppage and that Guillen was close enough to observe this event. I do not give much credit to this testimony. First, the timing of it - redirect - is not convincing; and second, there is again no evidence that Guillen probably overheard the conversation or associated Leon with the leadership of the work stoppage.

Finally, General Counsel argues in his post-hearing Brief (at pp. 18-19) that Guillen threatened the workers that they would be fired if they took part in the work stoppage and that he stated, "Why did you leave the field? The union people did not have any sticks or anything to make you leave."

There is no evidence that Guillen ever threatened the workers not to engage in work stoppages, Leon's own personal apprehensions or beliefs of what might happen aside. I do not regard Guillen's inquiry as to why employees under his supervision left the fields to be a threat. I also note that Leon testified that this remark was addressed to all the members of the crew, not just to Leon.

In short, Leon was one of an entire crew that was spoken to by UFW representatives sometime in June or early July of 1979, and he was a member of the crew which participated in the work stoppage.

Assuming, arguendo, that Leon's minimal concerted or union activities were known to Respondent, the General Counsel has still not carried his burden of establishing the elements of a discriminatory discharge. Lu-Ette Farms, Inc., 3 ALRB No. 38 (1977). To constitute a violation of Section 1153 (c), the discrimination in regard to tenure of employment must have a reasonable tendency to encourage or discourage union activity or membership. An employer may discharge an employee for any activity or reason, or for no reason, without violating that section, so long as its action does not have such a tendency.

NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); NLRB v. South Rambler Co., 324 F.2d 447 (8th Cir. 1963).

A conclusion or an inference that the discharge of an employee would not have occured but for his unibn activity or protected concerted activity must be based upon evidence, direct or circumstantial, not upon mere suspicion. NLRB v. South Rambler Co., ibid. Evidence which does no more than create suspicion or give rise to inconsistent inferences is not sufficient. Schwob Mfg. Co. v. NLRB, 297 F.2d 864 (5th Cir. 1962); Rod McLellan, 3 ALRB No. 71 (1977). Mere suspicion of unlawful motive is not substantial evidence; an unlawful or discriminatory discharge purpose is not to be lightly inferred. Florida Steel Corp. v. NLRB, 587 F.2d 735 (5th Cir. 1979); Lu-Ette Farms, Inc., supra.

Thus, under the case law, no matter how unfair[24/] Lean's discharge may have been, unless there was some causal connection between the union or concerted activity and the discharge, there can be no violation of the Act. Here, one can only speculate as to the real reason for Guillen's discharge of Leon and refusal to reinstate him after the meeting with Manassero. [25/] However,

24/For example, it could be argued that Leon was treated quite unfairly by Guillen. I note in this connection the fact that Guillen testified that he had not given Leon permission to leave for Mexico; yet apparently had told Manassero, shortly after the event, that he (Guillen) had indeed given Leon permission to be gone for four or five days.

25/For example, I noted Guillen's dislike of the fact that upon Leon's return to work after Mexico, he sent his sister to intercede in his behalf, instead of seeing Guillen personally. Further, Guillen indicated that Leon's sister (who did most of the talking at the Manassero meeting) had irritated him by swearing at him in the fields one day and blaming him for the discharge.

insofar as the unfair-labor-practice charge is concerned, it is difficult to conclude on this record that Respondent singled out Leon for his protected concerted activity of having participated in a work stoppage while leaving untouched all the other members of his crew, some of whom were active spokesmen, who likewise participated. Accordingly, it cannot be concluded that Leon was discharged because of his concerted activity. The General Counsel has not proved that there was a discriminatory basis for Respondent's discharge of Leon. Although there is some conflict in the testimony, the evidence, taken in the light most favorable to the General Counsel, does not substantiate the claim of unlawful discrimination. Moreover, there is no credible evidence of anti-union animus here. "In the absence of a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." Borin Packing Co., Inc., 208 NLRB 280 (1974); Lu-Ette Farms, Inc., supra; Hansen Farms, 3 ALRB No. 43 (1977). Seemingly arbitrary discharges, even if harsh and unreasonable, are not unlawful unless motivated by a desire to discourage protected union activity. NLRB v. Federal Pacific Electric Co., 441 F.2d 765 (5th Cir. 1971). The Act does not insulate a pro-union employee from discharge or layoff. It is only when an employee's union activity or concerted activity is the basis for the discharge that the Act is violated. Florida Steel Corp. v. NLRB, supra.

Where the Board could as reasonably infer a proper motive as an unlawful one, the act of management cannot be found to be unlawful discrimination. NLRB v. Huber & Huber Motor Express, 223 F.2d 748 (5th Cir. 1955).

I conclude that it has not been established by a preponderance of the evidence that there was any causal relationship between Leon's concerted activity and his discharge. Jackson & Perkins Rose Co., supra. Thus, even if it could be said, arguendo, that the Respondent had knowledge of Leon's activities, there is no evidence that Respondent's action at the time were in any way related to those considerations. C. Mondavi & Sons, d/b/a Charles Krug Winery, 5 ALRB No. 53 (1979), rev. den. by Ct. App., 1st Dist. Div. 2, June 18, 1980; hg. den. July 16, 1980. I find that the minimal concerted activity of Leon had no relationship to Respondent's decision to discharge him. Further, in that I can see no connection between the discharge and the concerted activity, I find it unnecessary to analyze the just cause (or lack of it) for the discharge.

Finally, in determining whether the discharge may have violated only Section 1153(a) of the Act, a similar conclusion is reached. It cannot be said that Leon's discharge, unfair though it may appear, would reasonably tend to interfere with, restrain, or coerce other employees in the exercise of their Section 1152 rights.

I conclude that Respondent did not violate either Section 1153 (a) or (c) when it discharged Francisco Leon, and I shall therefore, recommend dismissal of this allegation of the Complaint.

V. The Discharge of Gabriel Valencia (Paragraph 6(b) of the Complaint.)

A. Facts

Gabriel Valencia worked for Respondent only during the 1979 season. He was hired in May for the broccoli crop by Pedro Santiago, who remained his foreman during the entire time he worked. Santiago also served as a bus driver.

Valencia was considered a good worker. His original crew (Crew No. 2) was laid off; yet, he was retained and transferred to Crew No. 1 because Santiago apparently liked his work. Although his actual work performance was never criticized, Valencia did receive one warning for being absent from work for four to five days without permission, this incident occurring a few days before the incident for which he was discharged.

Valencia's concerted activities were well known to Respondent. As an alternate crew representative, elected by the crew, he had frequent contact with Respondent's personnel. If co-workers had work-related problems, his duties would be to present them to management, which he did on several occasions, especially during the month of July. This was because during July, there suddenly arose a large number of complaints in the broccoli crew regarding a certain "stacker", an employee ordinarily stationed on top of the broccoli bin, whose duty it was to wait for the broccoli to arrive off the conveyor belt and then to see to it that the broccoli was kept at a normal level (usually six inches above the top) so that it would not fall off on the side. The problem with this particular stacker, however, was that he had a habit of packing the broccoli too high,

thereby causing some of it to drop off and fall to the ground. As the ground crews were paid by the bin, the result of the stacker's negligence was a loss of money for the crews.

When this problem first arose, Valencia)'as a crew representative, approached Santiago to complain about this stacker and asked that he be replaced, to which Santiago explained, according to Valencia, that because of the worker's seniority, there was nothing he could do about it.

This unsuccessful result prompted Valencia to help organize a series of short work stoppages, the longest one lasting only an hour. During one of them, according to Valencia, Santiago angrily approached Valencia and demanded that he send the workers back to work. Valencia also testified that, during another work stoppage, Santiago told him that had he known what Valencia was, he would not have hired him in the first place. Finally, Valencia also testified that on yet another occasion, Santiago stated: "Don't be talking about the union; I will fire you."

Eventually, the problem leading to all the work stoppages was solved by the replacement (by supervisor. Cooper not Santiago) of the stacker. However, according to Valencia, he was discharged just twenty days thereafter.

During the same time period, Valencia engaged in many activities on behalf of the UFW. He spoke to workers about better pay and the advantages of unionization, and he handed out UFW flyers. When UFW organizers came to the fields during July on four or five occasions, Valencia met with them and spoke to other employees, all of which, according to Valencia, was observed by foremen. Valencia also testified that

he passed out pamphlets in the fields publicizing an upcoming Cesar Chavez march in Salinas, and that he was observed on this occasion by Santiago who was close to him and looking in his direction.

Around the latter part of August, Valencia was on Respondent's bus returning from the fields at the end of the workday when several of the employees on the bus (Valencia estimated 10 to 12 out of 25 to 30 passengers) began playfully throwing small portions of food or paper wads at one another. Valencia, seated in the back of the bus, was one of those participating, and he threw a small piece of carrot. The throwing continued for about five minutes when the bus driver, foreman Santiago, cautioned first one, then a second, and finally a third employee against throwing any more food. Valencia testified that he was not warned.

After the bus arrived at its destination (on Market Street) and workers began to disembark, Santiago took Valencia aside and, according to the latter, told him that he was fired because he was observed throwing a carrot. The other three workers who had been warned by Santiago were not discharged or disciplined.

Valencia testified that food-throwing was a common occurrence , although this was the first time he had ever done it, and that never before had he heard Santiago caution anyone against it. Nor was Valencia aware of anyone else ever being fired for this activity.

Pedro Santiago's testimony confirmed that there were many complaints during 1979 about the stacker, but he denied that they came from any one individual, although he did admit

that Valencia complained to him about this problem once or twice in May or June.

Santiago also recalled that there were many work stoppages (sometimes one or two daily) over the stacker problem and that one of them occurred the same day Valencia had complained about the problem. Santiago testified that during some of the work stoppages, Valencia spoke out for the group but on other occasions, it was other employees who did the talking.

It was Santiago's testimony that UFW organizers frequently came to the fields during 1979; and that they spoke to the crews during the work stoppages, but Santiago did not recall seeing them speak to Valencia. Santiago also denied knowing Valencia was a union supporter or ever seeing him pass out pamphlets or knowing he was a crew representative.

With respect to the actual discharge, Santiago testified that there had been a frequent problem caused by workers throwing food on the bus, and Santiago found it necessary to caution employees against it because of the safety problems such conduct created. Santiago testified he warned employees often, but he could not definitely say if Valencia was present on any of those occasions. In any event, the problem was serious enough that Santiago had inquired of his supervisors, Kelly Olds and Ben Lopez, about one and one-half weeks prior to the Valencia discharge, how to handle this situation should it recur. According to Santiago, he received permission [26/] at that time to fire employees who threw

26/This claimed authority to discharge is uncorroborated. Although Kelly Olds testified, he was not questioned about this matter. Lopez did not testify.

food or other items, and he decided he would fire the very next person who participated in this conduct. Nevertheless, he admitted that he never informed any employee that the continued throwing of food would result in his/her discharge.

The food-throwing did continue, but Santiago testified that he never personally saw anyone else thrown anything until he observed Valencia. On that occasion, Santiago testified that while driving workers back to their pick-up point, he saw objects being thrown in the bus but did not actually see which workers threw them. However, at one point, he looked through the rear view mirror and saw Valencia stand up and throw something; he did not know what it was. Santiago testified he parked the bus, asked Valencia if he remembered being warned, to which he replied "Yes" [27/] and then told Valencia he was terminated. When Valencia protested that he was being singled out for special treatment when others had also thrown things, Santiago replied that he (Valencia) was the only one observed and that that was sufficient.

Santiago admitted that even though he knew other persons had thrown food, he made no attempt to ascertain if they were throwing at Valencia, thereby causing his response. There was no damage to the bus, and no one was hurt in the incident.

ANALYSIS AND CONCLUSION

It is well settled by the National Labor Relations

27/Santiago stated this for the first time during his cross-examination and in answer to a question from the Administrative Law Officer.

Board that to discharge an employee for engaging in concerted activities which are protected under Section 7 of the National Labor Relations Act is an unfair labor practice. NLRB v. Washington Aluminum Co., 370 U.S. 9, 8 LEd2d 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, (9th Cir. 1974), 86 LRRM 2619.

Likewise, under the ALR& an individual's own actions are protected and held to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all affected employees. Foster Poultry Farms, 6 ALRB No. 15 (1980).

A mere conversation may be protected concerted activity if its object is initiating, inducing or preparing for group action or if it has some relation to group action in the interest of the employees. Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3rd Cir. 1964). Even a "miniscule controversy" may be protected concerted activity. St. Regis Paper Co., 192 NLRB 661 (1971).

It is alleged in paragraph 6(f) of the Complaint that Valencia was discharged for engaging in protected "union activities. The General Counsel argues that foreman Santiago used the incident on the bus as a pretext to fire Valencia for his past union and concerted activities.

The General Counsel has shown that Valencia engaged in protected concerted and union activities, that his participation was known to Respondent, and that there may well have been a causal connection between that activity and the discharge. Jackson & Perkins Rose Co., supra. Once this burden has been met, the employer has the burden of proving

that it was motivated by legitimate objectives. Maggio-Tostado, Inc., 3 ALRB No. 33 (1977); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979). The General Counsel must then establish that the employer would not have been discharged but for the protected or union activity or that the protected or union activity was the motivating cause behind the discharge. Royal Packing Co._v. ALRB, 101 Cal.App.3d 826 (1980).

Naturally, it is not always simple to prove the true reason for a discharge by direct evidence. As is often the case, such matters can be demonstrated by circumstantial evidence only. As the Board said in S. Kuramura, Inc., 3 ALRB No. 49 (1977), rev. den, by Ct.App., 5th Dist., August 11, 1980:

> ". . .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.' Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 302 F.2d 186, 190 (C.A.D.C. 1962), citing NLRB v. Link-Belt Co., 311 U.S. 584, 597, 602, 61 S. Ct. 358, 85 L.Ed. 368 (1941). 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. NLRB v. Whitfield Pickle Co. 374 F.2d 576, 582, 64 LRRM 2656 (5th Cir. 1967).

There are several reasons that lead me to the conclusion that but for Valencia's concerted and union activity, he would not have been discharged. There are several circumstances concerning the manner in which Valencia was discharged which suggest that Respondent's purported reason - throwing a small piece of carrot - was pretextual. These circumstances were as follows: (1) Santiago was ambiguous as to whose idea it was to terminate the next employee who threw something on the bus. At first, he testified it was his idea; later, in answer to a question from the ALO, he suggested it was the idea of Ben Lopez or Kelly Olds; (2) When asked if he discharged Valencia, Santiago attempted to blame his supervisors for the act as if he were just following orders. His previous testimony had been, however, that he had merely received permission to discharge if he wanted to exercise it, not that he was required to do so; (3) After having received permission to discharge an employee who threw items on the bus, and having concluded that he would fire the very next one who did so, why would he not have announced this (or at least that the possibility of discharge existed) to the employees under his supervision; (4) By his own testimony, he saw objects being thrown on the bus by others prior to having seen Valencia. Is it to be believed that his new discharge policy was effective only for the first person he actually saw in his rear mirror, and all other incidents were to be excused? If Santiago were serious about discharging the next employee for this act, would he not have stopped the bus immediately upon noting an object had been thrown (prior to Valencia's activity) and tried to ascertain who threw the object or, if this was unsuccessful, to caution the employees

against further throwing? (5) Santiago testified that the food-throwing went on for some time after he received authority to discharge for such conduct but would have us believe that Valencia was the very first person he actually saw' throwing an object after having received that authority. If Santiago observed Valencia through the rear-view mirror, why was he unable to so observe others. Even if he were unable to identify their faces if they were standing up, could he not have stopped the bus and determined who they were at that point?; (6) When asked if he determined if Valencia had been present during the previous alleged warnings against throwing, Santiago gave contradictory answers. At first he testified he did not make this determination, but next stated he specifically asked Valencia this question; (7) The severity of the discipline for such a minor offense is an important consideration, particularly in view of the fact that no employee, including Valencia, had ever received even a written warning for this conduct. As described in other sections of this Decision, Respondent does employ a progressive disciplinary program of three-written warnings prior to discharge for such matters as absence from work, (see discussion regarding Francisco Leon, supra), and has also given employees merely a written warning for such matters as insubordination or being away from the job site without permission (see discussion regarding Jesus Rodriguez , infra.); (8) I am also influenced by the fact that no other employee was discharged for throwing except Valencia, a known activist.

In addition, I credit Valencia's testimony that he frequently presented his co-workers grievances to management, that he was observed by foremen passing out union literature, and that he was especially visible to Respondent as a spokesman during the period in which workers were complaining about the problem with the stacker. I note that Santiago admitted that Valencia was one of those complaining about the stacker problem and that he was a spokesman at some of the work stoppages.

I also credit Valencia's testimony that Santiago demanded during a work stoppage that he (Valencia) send the workers back to their jobs, that Santiago told Valencia that he never would have hired him had he known what he was, and that on another occasion Santiago warned Valencia directly that he would be terminated if he continued talking about the union. Valencia testified in a forthright and convincing manner, while Santiago's testimony was contradictory and confusing. For example, when examined at the hearing as to whether he spoke to Valencia personally about the problem of the work stoppages, Santiago at various times denied it, couldn't recall, said he spoke to all the employees, and finally admitted he did talk to Valencia about it. At another point in his testimony he testified that he did not ask Valencia if he had previously been warned against throwing objects in the bus, but later said that he did ask him if he had.

I find that the statements attributed to Santiago

were made. These coercive statements [28] constitute direct evidence of Respondent's anti-union animus. It clearly establishes Respondent's knowledge or belief that Valencia was involved in union and concerted activity and that that was the reason for discriminating against him. Louis Caric & Sons, 6 ALRB No. 2 (1980)

For all the foregoing reasons, I recommend that Respondent be found in violation of Section 1153 (c) and (a) of the Act for its discharge of Gabriel Valencia.

VI. Did Respondent unilaterally change the conditions of its employees work in regard to absences, without negotiating game with the UFW? (Paragraph 6(h) of the complaint)

A. Facts

The General Counsel's only witness as to this allegation was Jesus Rodriguez. Rodriguez worked as one of Respondent's irrigators and was, for the past two or three years, normally under the supervision of Ranch Foreman Ed Vasquez. Vasquez, however, was out of work for surgery during the summer of 1979, and his duties were taken over by two others, Teodoro Diaz (also known as Lolo), a foreman, and Jesus Aragon, a supervisor.

1. The alleged unilateral change

Rodriguez testified that in the past, under foreman Vasquez, irrigators were allowed to take up to one-half hour [29]

28/Since Respondent did not argue this point in its post-hearing Brief, it is not clear what Respondent means when it contends in its First Amended Answer that supervisors' statements cannot serve as the basis for an unfair labor practice charge as they are free speech under Section 1155 of the Act. By its clear terms, Section 1155 excludes coercive and threatening statements from the protection of the Act.

29/Rodriguez testified that Respondent would not pay the employee for personal leaves over thirty minutes.

as time off for personal business, provided, of course, that they had received permission; and that under those circumstances Respondent did not deduct that time off from the employee's pay. However, according to Rodriguez, this policy was suddenly changed under acting foreman Diaz.

For example, during the period in which Vasquez was out for surgery, on one occasion Rodriguez left work to get gas for his car, returned within one-half hour but was not paid for time off. 30/ In fact, Rodriguez testified that Diaz had intimated that if he left work on personal business again, he would lose the entire day. As a result of these events, Rodriguez urged that a meeting be held with supervisor Jesus Aragon and the other irrigators.31/ Such a meeting did occur. According to Rodriguez, Aragon confirmed that employees would no longer be paid for personal leaves because Respondent's insurance would not cover paid employees leaving the fields on personal business.

Jes s Aragon is the production manager at Respondent's, in charge of all farming, and he is the supervisor of seven foremen. During the middle of August, he helped fill in for Ed Vasquez, who was absent on sick leave. On one occasion, Teodoro Diaz, the acting foreman, had called Aragon and asked him to attend a meeting that Rodriguez desired in order to discuss

30/Rodriguez's testimony as to when he actually felt the effects of this alleged unilateral change is confusing. At one point he testified it took place during the Vasquez absence; but at another point, he seemed to indicate either that the change was not put into effect until May 29, 1980 or that it did not occur until about one week prior to his testimony at the hearing herein.

31/The record is unclear whether the idea of having the other irrigators present originated with Rodriguez or whether it was Aragon who wanted everyone present when he spoke to them.

a problem. Rodriguez also wanted the other irrigators present. That day Aragon met with eight employees, all irrigators, including Rodriguez. At that meeting, Rodriguez complained that he had had to attend to some personal business, that in the past he had taken off from work for short periods and been paid for it by Respondent, but that this time Respondent had seen fit to deduct from his pay check one and one-half hours of pay.

Aragon testified that he informed Rodriguez that Respondent had never paid employees for personal time off when he was Ranch Foreman, including a time when Rodriguez had been under his supervision, and that Respondent's unwritten policy since at least 1965[32/] was that time off for personal business would either be deducted from the employees's pay check or the employee would be given the opportunity to make up the lost time on a later date. According to Aragon, it was not unusual for an employee to be allowed to take off for short periods of one-half hour to go into Salinas on personal business but that the policy was still the same; the employee would only be paid for the time actually worked and would not put personal time off on the time sheet, usually filled out by individual irrigator himself. In fact, Aragon stated that

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32/Aragon testified he recalled that he had explained this policy to" foremen in the past but not within the past four years. He believed most foremen were aware of it anyway, however, because many were former tractor drivers or irrigators (like Vasquez) themselves who had risen from the ranks.

his checking of the records indicated that Rodriguez himself had in the past taken time off for personal business and did not claim this time on his time sheet.[33/]

Aragon testified as to the reason for the policy. He stated that Respondent's absence policy was necessary because it did not want to be liable in case the employee had an accident while off on his own time. In addition, Aragon stated that it would be unfair to other agricultural workers to allow only irrigators to be paid for personal time off.

Aragon further testified that following his meeting with Rodriguez and the others, he regarded the leave of absence matter as having been settled in that Rodriguez did not question his explanation. Aragon also asked the other assembled irrigators if they had similar gripes, to which they replied that they did not. As a favor to Rodriguez, however, whom he had known since 1966, Aragon said he would check with Vasquez to see if his (Vasquez's) absence policy was different somehow from that of Respondent's. Aragon testified he did check two to three weeks later and found that the Vasquez policy was consistent with Respondent's.

Aragon denied that if an employee left work for a short period, he would lose the entire day's pay and stated that any foreman who may have told Rodriguez such a thing was absolutely wrong.

33/Rodriguez was not called as a rebuttal witness and this statement stands uncontradicted. I credit it for reasons cited infra.

Ed Vasquez, a former irrigator and tractor driver and for the past four years a Ranch Foreman, also testified. He corroborated the Aragon testimony regarding Respondent's personal leave of absence policy and its long term, consistency. He stated that frequently irrigators sought and obtained permission (which the foreman would note in his records) to run to town for short personal errands when the employee could afford to be away from his work; i.e., when the water had to be kept running in a field and it wasn't necessary that the employee be there to watch it. In those instances, according to Vasquez, that time off - even for a short one-half hour interval - was not paid for by Respondent. Vasquez also denied that an irrigator could request a break from work and use that time in town for personal reasons.

ANALYSIS AND CONCLUSION

1. The Unilateral Change

The General Counsel argues that in the past irrigators were given permission to leave the job site on personal business and that no deductions were made for the time they were away. The General Counsel argues that there came a time when this practice was abolished and that Respondent had an obligation to negotiate any such change with the UFW which it failed to do.

Respondent denies that it ever paid its employees for personal time off and further denies that it had any obligation to bargain with the UFW even if there were a change

effectuated.[34/]

I credit Jess Aragon's testimony that the policy of Respondent has consistently been to either deduct time off for personal leaves (for whatever time period) from the employee's pay check or to allow him/her to make up the time at another date. Aragon testified in an honest and straightforward manner,[35/] while Rodricruez's testimony is confusing and rambling.[36/]

Moreover, even if, for whatever reason, during some period of time, a foreman had at some point allowed Rodriguez to take a short break and to be paid for it, this would not establish the existence of a past practice, especially where the employee himself had followed what he knew to be the actual policy of the company.[37/] In order for a past practice

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34/Respondent makes the same argument here as it does with respect to other unilateral changes it is accused of making. Its position is that it was under no duty to negotiate with the UFW so long as the certification was being contested and especially since the Board later found that make whole was inappropriate as Respondent had had a reasonable good faith belief that the certification was invalid (D'Arrigo Bros., 6 ALRB No. 27), (See more extensive discussion of this argument, infra).

35/Aragon also readily admitted his knowledge of Rodriguez's union affiliation and that he was a very good worker.

36/I also find it significant that not one other irrigator (including those who might have been present at the meeting with Aragon) was called by the General Counsel to corroborate Rodriguez's interpretation of the past practice.

37/Again I emphasize the fact that Rodriguez was not called as a rebuttal witness to confront Aragon's testimony that records indicated Rodriguez knew of Respondent's real practice, that he had in fact taken personal leaves and did not claim that time on the time sheets which he himself filled out.

to be binding on both parties, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time, and (4) a fixed and established practice accepted by both parties. Elkouri and El'kouri, How Arbitration Works 391 (2nd ed. 1974).

It is, of course, possible that Rodriguez was merely trying to test out how far he could go with a new foreman while his regular foreman was still on sick leave.

I recommend the dismissal of this allegation.[38/]

2. The alleged discriminatory warning letter[39/]

38/General Counsel argues in his post-hearing Brief (pp. 28-29) three additional unilateral changes. First, he argues that Respondent reduced the daily hours of irrigators. Second, he argues that Respondent initiated a change regarding the issuance of warning notices to irrigators for time taken off of work. Finally, he argues that Respondent instituted a change in the practice of assigning work to irrigators. None of the three allegations were mentioned in the Complaint. I do not believe the General Counsel ever made it clear during the hearing that he regarded these matters as independent unfair labor practice allegations. As the matters were not fully litigated, I do not consider them here.

39/The issuance of the warning notice was not alleged as a violation of the Act. Respondent objected to the evidence on this subject matter, but her objection came after the matter had been litigated. General Counsel represented that he would formally amend the complaint to allege that the said warning notice was issued to Rodriguez because of "his protected activity - presumably his protesting an allegedly unreasonable work assignment and the alleged change in the leave of absence policy. However, the General Counsel failed to submit a formal amendment. Nevertheless, in that the matter was arguably related to the charge of a unilateral change in work rules and was fully litigated at the hearing, I regard it as an independent unfair labor practice issue. Harry Carian Sales, 6 ALRB No. 55 (1980)

The dispute involved in this allegation concerns a disagreement Rodriguez had with the new foreman, Teodoro Diaz, over the conduct of his irrigation work.

During the afternoon of August 24, 1979, Diaz told Rodriguez that he was to leave the water running in the field in which he had been wording and that he was to advance to another field where he was instructed to poison gophers. Rodriguez admitted that he objected to being asked to go to another field to perform work when, in his opinion, he had not yet finished irrigating the first field. After being told he did not have to finish the first field, Rodriguez announced that since there was no further work for him, he had business to do in Salinas; and he left to do it. Rodriguez stated, "I told him that if they didn't need me, that the gophers weren't causing danger, that there was more danger caused by the running water there and that if they didn't need me, that I had business to take care of in Salinas...."

As a result of this incident, Rodriguez received a warning notice (G.C. No. 15) for leaving his work site and refusing to obey an order.

Rodriguez testified that this was the first time he ever received such a disciplinary warning and he testified it was in retaliation for his union activities. Although he stated there was no union activity he was involved in at Respondent's during 1979, Rodriguez had been a member of the Ranch Committee for at least two years prior to 1979 and had met, from time to time with officials of Respondent over grievances.

Aragon testified on this issue, as well. He admitted that he was aware that Rodriguez was a union supporter and commented that he (Rodriguez) was very open about it, having told Aragon as early as 1966 about his sympathies for the UFW. But it was Aragon[1]s position that Rodriguez received the warning notice only because he refused a work assignment and left the work site.

Aragon also testified that the amount of irrigation a field may need usually depends upon the amount of water penetration that is occurring at the time and how fast the crop is growing. Thus, at times irrigation for only two to three hours is sufficient; at other times, the water must be left running twenty-four hours a day; and it isn't necessary for anyone to look after it. Under the circumstances of the present case, Aragon believed the order for Rodriguez to leave the water running and to move on to another field was quite reasonable, even though the field Rodriguez was irrigating was not yet finished. According to Aragon, as that field was going to be soaked until late that night, there was no necessity for the irrigator assigned to that field to remain and watch the water when there were other duties he could perform elsewhere. Aragon further stated that it was likewise not unreasonable to assign Rodriguez the task of killing gophers, time permitting, since the average irrigator spent about ten percent of his time doing that work.

Before issuing the warning, Aragon stated he discussed the matter with Diaz and Vasquez. Although insubordination was a dischargeable offense at Respondent's, it was decided that

a warning notice would be sufficient since Rodriguez had a good work record and had not engaged in this type of conduct before.

Vasquez testified that he had returned to work from sick leave around this time and that he signed the warning notice, although he relied solely on what Diaz told him about the incident since he had no personal knowledge of the event. However, Vasquez testified that he did have a conversation with Rodriguez when he personally delivered the notice on August 25. According to Vasquez, Rodriguez admitted that he did, in fact, refuse an order and leave the job site. When asked if he would have done the same had Vasquez been there, Rodriguez replied, "No."[40/]

ANALYSIS AND CONCLUSIONS

It is difficult to perceive General Counsel's theory on this allegation. In his post-hearing Brief (at pp. 26-27), General Counsel argues that the warning notice "appears to be a retaliatory and discriminatory act against Jesus Rodriguez because of his organizing of the workers and meeting with Jess Aragon to protest the changes initiated by Teodoro Diaz, the foreman." Yet, at no time does General Counsel deal in any way - as if it doesn't exist - with the important issue of Rodriguez's insubordination and independent decision to leave the job site because he didn't agree that he should perform the task of poisoning gophers. His own testimony makes clear

40/Rodriguez was not called as a rebuttal witness and thus, did not deny making this statement. This statement also stands uncontradicted in the record. I credit it for reasons stated, infra.

that he disagreed with the Diaz order, thought his judgment was better, and left work out of frustration: "I told him that if they didn't need me, that the gophers weren't causing danger, that there was more danger caused by the running water there and that if they didn't need me, that I had business to take care of in Salinas...."

In addition, Rodriguez also testified that he did not believe the new foreman Diaz knew anything about irrigation, and in fact, that he believed himself to be a much better irrigator. This attitude is reflected by his admission to Vasquez that he probably would not have acted this way had Vasquez (the regular foreman) not been on sick leave. I credit the Vasquez statement, as I found him to be a truthful witness.

Thus, as General Counsel's Exhibit No. 15 makes clear, Rodriguez received the warning notice because he refused an order and left the job site, not because of any previous protestations of the leave of absence policy or because of his union activities. If the latter, Respondent picked an unusual time to retaliate since 1979 was a year in which, Rodriguez admitted, his union activities were not very extensive at all, especially when compared to previous years.

I recommend the dismissal of this allegation.

VII. Did Respondent, Beginning in April of 1979 Threaten and Harass Gloria Ledesma Because of Her Concerted and Union Activities (Paragraph 6(a) of the Complaint)

A. Facts

Gloria Ledesma has been employed by Respondent for a number of years in the rapini (mustard greens) spring harvest, onion harvest, and sometimes in fall rapini crop. Her supervisor for the past five years was Paul Hernandez.

Prior to 1979, Ledesma was not very active in union activities, but she testified that during 1979 she passed out UFW literature to the broccoli, cactus, and onion crews. While working in onions, she, along with several others, carried UFW flags and placed them on the counting tables where, she testified, she was observed by Paul Hernandez. Ledesma also testified that she was never a UFW representative but that she was elected a UFW delegate, although she admitted that Respondent's managers were not aware of that fact.

Paul Hernandez, rapini harvesting supervisor for the past seven or eight years, testified that he knew that Ledesma was a UFW sympathizer and that when UFW organizers would come to the fields, frequently in both onions and rapini, Ledesma was often one of the first people they spoke to. In addition, in November of 1979 there was a work stoppage concerning retroactive pay questions, and Hernandez acknowledged that Ledesma was one of the participants in this dispute.

Hernandez also testified that union pamphlets concerning the pace of negotiations were distributed to onion crews in June, 1979 and that he had heard from the onion supervisor that workers had placed UFW flags on tables where the onions were banded together.

1. Was Ledesma discriminated against by the rapini weighing and inspection process, and particularly by the action of supervisor Paul Hernandez's wife, Maria Hernandez?

Ledesma commences working in rapini in March and works there until May, then goes to onions for two to three months and then sometimes returns to rapini work in December. In rapini there are cutters and checkers. The cutters pack the product into boxes and then carry the boxes to the checkers where they are weighed. The scales are set at twenty pounds, and the checker's job is to inspect the quality of the product and then to weigh the box. If there is a problem with the quality, the checker calls it to the attention of the foreman who then discusses it with the employee. If there is no such problem, the employee obtains another box and returns to his/her row. Cutters are paid piece rate per box (the crew average) with an hourly minimum.

A dispute developed in the early part of the spring rapini season concerning the work of one of the checkers, employee Maria Hernandez, wife of supervisor Paul Hernandez. Some employees felt that Mrs. Hernandez was (1) taking too much time in weighing the boxes, which resulted in a decrease in the wages earned by the piece rate, (2) informing her husband of private information she learned from the crews; and (3) showing a bias against certain employees when performing her duties. [41/] Ledesma testified that she was one of the employees

41/It was not uncommon, even under ordinary circumstances, for tension to exist between checkers and cutters. Whether a box did not meet quality standards; i.e. whether the box contained too many stems or leaves, was often a judgment call so that the system lent itself to possible conflict. In addition, whenever there was a line at the scales, there would be gripes that the process should be expedited so that the employees, who were, after all, on piece rate, could obtain another box and begin picking the rapini again.

Maria Hernandez was biased against in that her (Ledesma's) boxes were weighed more slowly than others. Ledesma testified as to one example of this. When she came to the scales and found another rapini worker's box being weighed by Mrs. Hernandez, which was taking an unusually long period of time, Ledesma left to pick more rapini. When she returned, Mrs. Hernandez told her she was not going to weigh her box although no other person was there; they all had left the weigh station.

2. Was Ledesma harassed and discriminated against by the actions of foreman Tony Ayala?

Ledesma testified that she complained to Mrs. Hernandez about these matters, who accused her, in turn, of a grave insult. As a result of this altercation, Ledesma testified that she was assigned by foreman Tony Ayala to do four rows when the number usually worked would have been two.[42/]

Ledesma testified she told Ayala she could not do four rows[43/] and would do only three, to which she says Avala replied that if she didn't like it, she could quit or he would fire her.[44/] Ultimately,

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42/Paul Hernandez denied that a worker would normally be assigned as many as four rows but that it was not uncommon to be assigned that many at the time of the fourth or fifth picking where many of the rows had already been pretty thoroughly picked clean by previous crews. However, in those circumstances the entire crew would be assigned the task of the four rows and not just one person.

43/Ledesma testified that the real reason she didn't want to work in four rows was because this was during her menstrual period but that she was too embarrassed to tell Ayala.

44/This kind of a statement might not be out of character for Ayala. Although Ayala did not testify, Paul Hernandez did and acknowledged that Ayala had some problems relating to employees under his supervision because of his hot temper.

Ayala, according to Ledesma, just told her to go home[45/] and that she could return the next day, which she did.

Later in the afternoon of that same day that Ayala had sent her home, Ledesma and three others met with Kelly Olds,[46/] Labor Relations Manager. At that time, according to Ledesma, the following complaints were presented to Olds: (1) that Mrs. Hernandez's delays were costing the employees money, that she was acting as if she were a foreman, and that her husband was showing her favoritism; (2) that Respondent was not making the boxes for the employees;[47/] (3) that Respondent was not bringing water to the employees; (4) that Respondent was not cleaning the bathrooms; and (5) that Respondent should nay Ledesma for the day she was sent home by Ayala.

Kelly Olds testified. He admitted meeting with Ledesma and others on these problems, but he was not sure as to the dates of their meetings. He generally agreed with Ledesma as to the matters that were discussed but stated he was not informed at the first meeting that she had been sent home by Ayala.

45/Ledesma claims that this day plus the day of the Immigration Servies raid, infra, were the two days she lost because of Respondent's discriminatory treatment of her.

46/This was the first of three meetings during 1979 between Olds and Ledesma. The second occurred during the late part of the spring rapini and the third occurred in the early part of the onion season. Ledesma testified she had never met with Olds prior to 1979.

47/The boxes were coming off the trucks folded, and the cutters had to make the boxes themselves. Prior to 1979, the cutters were not required to perform this task.

As a result of this meeting, Olds testified he investigated the Maria Hernandez problem by speaking with Paul Hernandez, and verified the employees' complaints that, as an inspector, she was much too critical and took too much time doing her job. In addition, Olds decided it would be better if she were not in the same crew as her husband. As a consequence, Respondent moved Mrs. Hernandez out of the rapini crew,[48/] shortly after the meeting.[49/]

The next meeting was at the end of May or in the early part of June. At that meeting, Ledesma testified she requested a raise in the onions, complained that employees were moving from rapini to onions without seniority, complained that she was being "put down", and told Olds she wanted a union.

Olds denied that any labor organization was discussed at any of these meetings, although he admitted that one of the members of the group stood in the parking lot holding a UFW flag. He also denied knowing that Ledesma was a supporter of the UFW or seeing her wear a union button, carrying a union flag, or passing out union literature.

48/Paul Hernandez was aware of the complaints Ledesma had about his wife and other complaints about work, as well. He testified his wife was removed from this position after one of the meetings with Olds, but he estimated this to have been in November. Ledesma's testimony as to whether or when Hernandez was removed from the crew is confusing. At first she testified that Mrs. Hernandez was removed from the crew for a short time only, and then added that nothing permanent was ever done about the problem. I credit Olds that Hernandez was removed from the crew after the first meeting between him and Ledesma.

49/As to whether any other changes were effectuated besides the removal of Mrs. Hernandez from the rapini crew, Ledesma testified that Respondent remedied the box and water problem but only for a few days.

3. Was Ledesma discriminated against by the "raitero" system?

The members of the rapini or onion crews who, for a number of reasons, work the fastest are sometimes 'assigned by foremen to work in rows where slower workers have fallen behind, in order to assist them in catching up to the others. These faster workers are called "raiteros." However, because employees were paid on a piece-rate, sometimes even the slower ones would complain if a raitero helped them because, in cases where the row had a plentiful stock of plants and had not previously been picked, such workers did not want to have to share their wages with anyone else.

However, looking at the situation from a raitero's viewpoint, there were certain advantages in being selected for this position, especially if he/she had been working a poor row; i.e., when there was a sparseness of plants in the row. In such circumstances, some of the workers who found themselves ahead of the rest of the crew would complain if they were not selected to work as raiteros.

Ledesma testified that, starting in 1979, raiteros were assigned to help her when she did not need them; i.e., when she had good rows to pick, and that she was thereby forced, in effect, to share her wages with others. On the other hand, she complained she was not assigned to work as a raitero when she wanted to be; i.e., when she had poor rows. In fact, Ledesma testified she was at times reassigned from good rows to poor ones.

Paul Hernandez testified that Ledesma occasionally had complained about the raitero system and that she was making less money as a result of its utilization. However, according

to Hernandez, such complaints were seldon made since raiteros were not used too often, anyway. Nevertheless, Hernandez testified that despite employee complaints, Respondent did not intend to change the system as he did not favor allowing any employee to fall behind the rest of the crew when a raitero could be used to help that employee catch up with the others.

Respondent offered into evidence a document showning Ledesma's days and hours worked, units harvested, and amounts earned for the 1979 rapini and onion harvest (Resp's No. 6). This document purported to show that on only three occasions in 1979 (April 26, May 12, and May 14) did Ledesma fail to make her piece rate minimum guarantee in rapini and only twice (June 22 and July 4) did she fail to make her minimum piece rate guarantee in onions. Thus, Respondent argued that even when the raitero system was used, there was rarely any real loss of pay to Ledesma.

4. Was Ledesma discriminated against during the hiring of the fall rapini crew during 1979?

Ledesma testified that in 1979, while she was still working in onions, she requested[50/] work in the fall rapini crop (after onions ended) but was refused. She claimed she was able to transfer from onions[51/] in previous years, although she admitted not applying for such a transfer in 1978 because she was pregnant.

Hernandez testified that some spring rapini employees (like Ledesma) moved to onions when the season started and

50/It is unclear from whom she requested permission. She testified that she asked someone named either Ian or John, whom she identified as her foreman in onions in 1979. But there is no evidence she asked the fall rapini forman for permission to transfer or that she spoke to Paul Hernandez about it.

51/At the time of the hearing, Ledesma had been working in onions for only three previous seasons.

that this was determined by seniority, as there was a separate seniority list for each crop. As to going from onions to fall rapini, he stated that it was a simple transfer, usually only affecting about ten employees with a slight overlap of seasons of about a month. According to Hernandez, an employee would have to apply for the work by talking to his/her present foreman and the fall rapini foreman, after which the two foremen would decide, given the overlap, whether and when the transfer could be made. Usually, those who applied were accommodated, especially since they would have had preference in any event because of their seniority from spring rapini; their work in onions would help them, as well. Hernandez recalled that Ledesma usually went from spring rapini to onions and that he had known her to move from onions to fall rapini, but not in 1979. Hernandez stated that he did not recall whether Ledesma sought fall rapini work or whether she ever talked to any foreman about it.

5. Did Respondent, through its agent Paul Hernandez, discriminate against Ledesma by calling the Immigration Service and reporting that she was an undocumented worker?

While driving in the morning towards the workers' "pick-up point" on Market Street in Salinas,[52/] Ledesma testified that she observed cars owned by the Immigration and Naturalization Service (INS) behind her. She then observed these autos stopping at the pick-up point, and INS agents began to check papers, and to escort some employees away with them. Ledesma did not

52/May workers drive to this central location, park their cars, and then are transported by buses to the fields. This Market Street location is the pick-up point for many other growers, as well as Respondent.

go to work that day[53/] after witnessing this event, but she claimed compensation for the missed day. It is unclear whether Ledesma received any discipline for missing work.[54/]

Ledesma further testified that Hernandez knew she had advised other employees to talk over their complaints with Olds and that as a result Hernandez sent the Immigration authorities after her and others the very next day, although she admitted she neither saw him nor heard him contact the INS. She also testified that she had informed Hernandez once before, in 1976,that she had no papers so he was aware of it; however, she admitted that he had never called Immigration before.

Hernandez denied contacting Immigration but confirmed that there was indeed an INS raid during the spring of 1979. He also testified that it was common knowledge that Ledesma was an undocumented worker.

B. Analysis and Conclusion

The General Counsel argues that Ledesma was one of the most active UFW supporters at Respondent's operations during 1979 and because of that support, was discriminated against in various ways.

a. Discrimination by Maria Hernandez

It is argued that Maria Hernandez, a rank-and-file employee and the wife of supervisor Paul Hernandez, discriminated against Ledesma during the inspection and weighing process for rapini

53/At first she claimed this occurred the day before her first meeting with Kelly Olds; then she testified it happened the day after.

54/Initially she claimed she had received no discipline; then she testified she did.

by being overly critical and causing her a loss of income, while processing other employees' boxes much more quickly.

It is true that, as rapini supervisor Paul Hernandez acknowledged, Ledesma was a known UFW supporter who had frequent contact with organizers when they came to the fields. Moreover, her concerted activities on behalf of her co-workers were likewise well known to Respondent through her meetings with Kelly Olds where worker complaints were voiced.

The question here is whether there was any connection between that activity, Respondent's knowledge thereof, and the manner in which she was treated. Jackson & Perkins_ Rose Co., supra.

Of course, the General Counsel has the burden throughout of establishing the elements of her alleged discriminatory treatment and this burden never shifts. NLRB v. Winter Garden Citrus Prod. Coop., 260 F.2d 913, 916 (5th Cir. 1958); Indiana Metal Products Corp. v. NLRB, 202 F.2d 613, 616 (7th Cir. 1953); Lu-Ette Farms, Inc., 3 ALRB No. 38 (1977).

In the first place, General Counsel seems to assume that a rank-and-file employee, such as Maria Hernandez,- takes on a quasi-supervisory status by sole virtue of her marriage to Paul Hernandez. Therefore, under the General Counsel's theory, Maria's discriminatory treatment of Ledesma, if it occurred, is attributable to Respondent on an agency theory. The problem with the theory is that there must be some evidence that Maria Hernandez was clothed with some kind of authority either from her husband or from some other representative of Respondent to bring her within the supervisory classification. Miranda Mushroom Farms, Inc., 6 ALRB No. 22 (1980); Anton Caratan &

Sons, 4 ALRB No, 103 (1978). There is no such evidence. Ledesma merely testified, referring to Mrs. Hernandez, "Even though she didn't give orders, she was higher than a foreman. In other words, she wanted to do more than the foreman."

Moreover, General Counsel has failed to demonstrate that the difficulties between Mrs. Hernandez and Ledesma were in any way related to her concerted activities. The one example she gave of being deliberately made to wait for her inspection, although it is difficult to ascertain the exact nature of the disagreement from the Ledesma testimony,[55/] seemed to arise more out of personal animosity and pique than from any other reason. As Paul Hernandez testified, tension between checkers and cutters was frequent, expecially given an atmosphere where cutters would commonly complain that the checker was taking too long in the inspection and weighing, thus provoking an emotional response from the checker.

In addition, the complaints about Mrs. Hernandez's work performance, her attitude, and biases were group complaints and presented in this fashion to Kelly Olds at their meetings. In fact, when the Mrs. Hernandez problem was discussed at those meetings, it was not in the context of personal harassment of Ledesma. While it is true that some of the complaints were about Mrs. Hernandez acting like a supervisor or being overly critical, assuming arguendo that she was given supervisory

55/Maria Hernandez did not testify.

authority, there is no evidence that she exercised such authority in retaliation for Ledesma's concerted or union activities.

b. Discrimination by Foreman Tony Ayala

The General Counsel further argues that "when Ledesma protests; the manner in which Mrs. Hernandez treated her, Ayala retaliated against Ledesma by assigning her four rows of rapini to pick (when the usual assignment was only two), by threatening to fire her if she refused, by relieving her of her duties for a day, and by sending her home.

Putting aside the obvious question of whether Ledesma's conduct on that occasion was sufficiently insubordinate to justify the one day suspension; i.e., refusing an order that was not patently unreasonable, I find it difficult to credit Ledesma's account because she was impeached by a prior inconsistent statement she had made in a signed declaration given to a representative of the UFW.

In that declaration, Ledesma stated that it was a person named Maria (presumably Maria Hernandez) who had directed her to cut the four rows of rapini.[56/] This discrepancy was not adequately explained away by Ledesma; I do not credit her testimony. I conclude that Respondent did not discriminate against Ledesma for her concerted or union activities during the weighing and inspection process for the rapini or by

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56/It is to be recalled that Paul Hernandez testified that it was not uncommon on the fourth or fifth picking for a rapini cutter to be assigned four rows. (Here there is no evidence of how many pickings had occurred on this particular field.) It is also to be recalled that Ledesma testified that but for her menstrual period, which she was too embarrassed to mention to Ayala, she would have taken the assignment and completed the work.

assigning her four rows of rapini to cut and sending her home for the day for refusing to do it.[57/]

c. Discrimination under the raitero system

The General Counsel argues that Ledesma was discriminated against because of her concerted and union activities through the utilization of the raitero system in that she was assigned a raitero when she did not need one and was never selected to work as a raitero, herself.

The General Counsel has not carried his burden of establishing the elements of Ledesma's discriminatory treatment. Lu-Ette Farms, Inc., supra. In the first place, despite Ledesma's complaints of the workings of the raitero system against her, there is no evidence that she ever complained about it during any of her meetings with Kelly Olds or that she ever complained about her treatment to any of her supervisors or foremen at the time it supposedly occurred. In fact, the record contains insufficient evidence as to which foreman purportedly assigned a raitero to help her at the wrong time(s) and when they occurred. From the record, it is unclear whether Ledesma's resentment about being assigned a raitero stems from actions taken by a raitero or actions

57/General Counsel also argues that Ledesma was segregated from other employees on the day she was allegedly ordered to work the four rows. Isolation of known activists is an independent violation of Labor Code Section 1153(c) and (a), as well as evidence of anti-union animus. Kawano Inc. v. Agricultural Labor Relations Board, et al., 10"6 Cal.App.3rd 937 (1980). There is a paucity of evidence concerning this allegation (Ledesma never once complained about her "isolation" at any of the meetings she held with Kelly Olds to discuss grievances). In any event, as this matter was not alleged in the Complaint and was not fully litigated at the hearing, I make no findings or conclusions with respect thereto. Harry Carian Sales, 6 ALRB No. 55 (1980).

taken by Maria Hernandez. Likewise, the record contains insufficient evidence to support a finding that Ledesma received disparate treatment when Respondent assigned a raitero to help her under the circumstances she described in her testimony; i.e., when she had a particularly good row, or whether other employees were similarly treated.

Moreover, although Ledesma complained that she was never assigned as a raitero, there is no evidence in the record that she worked fast enough to move ahead of others in the crew thereby placing her in a position to be so assigned. As to those occasions when she believed she should have been assigned to serve as a raitero, there is insufficient evidence of when this occurred, who failed to assign her,[58/] whether other employees were assigned in her stead, who they were, and their physical location vis-a-vis the rest of the crew.

I was left with the distinct impression that Ledesma wanted to be selected to work as a raitero, which would have required her to help a co-worker in a plentiful field (good row); but that was exactly the kind of activity that she, had she been in the co-worker's place, would have complained about.

Although Ledesma may have felt that she was being discriminated against, her testimony was at times confusing and did not convince me that a prima facie case of discrimination had been made.[59/]

58/Ledesma did testify, however, that it was Ayala who would take her off a good row and put her on a bad one and that she was the only one to be treated in this fashion.

59/In making this determination, I have not relied upon the fact that Ledesma may have failed to make the minimum piece rate in spring rapini only three times (Resp's No. 6). Just because an employee suffered no pay loss under her minimum, does not mean that he/she was not discriminated against; i.e., she could have made even more money than she did or even if she had suffered no pay loss, her work may have been more arduous because of the discrimination,

d. Discrimination in Not Hiring Ledesma for the Fall Rapini Crew

The General Counsel argues that prior to 1979 Ledesma had always worked, in the spring rapini, then transferred to the onion harvest, then went to the fall rapini when the onion harvest ended; but that in 1979 Ledesma was refused employment in the fall rapini.

Paul Hernandez outlined the relatively simple steps necessary for transfer from onions to fall rapini. An employee would have to speak to his or her present foreman, and then to the fall rapini foreman, after which the two foremen would try to work it out between them and the employee. The record does not establish that Ledesma was refused employment in the fall rapini, mainly because it is not clear that she even applied. She gave only the sketchiest account of her efforts in that regard. Apparently, she talked to some foreman in onions about it, but there does not appear to have been much follow-up on her part. Moreover, she never spoke to the fall rapini foreman which, under the procedures outlined by Hernandez above, was a necessary and reasonable prerequisite. Thus, there is insufficient evidence that Ledesma followed the proper procedures in applying for the transfer to fall rapini. Presumably, Ledesma was aware of these procedures, having previously (apparently in 1976 and 1977 but not 1978) made the transfer from onions to rapini.

Furthermore, Hernandez did not testify that Respondent failed to hire Ledesma for fall rapini, as General Counsel suggests (General Counsel post-hearing Brief, at p. 9). Rather, Hernandez testified that he did not recall whether Ledesma had sought work in the fall rapini.

e. Discrimination by Contacting the INS Requesting an Immigration Raid

Tne General Counsel argues that supervisor Hernandez called upon the immigration authorities to make a raid as a means of retaliation against Ledesma for her union activities.

There is no record evidence to support this allegation. The only credible evidence adduced is that there was an immigration raid at a location commonly used by several Salinas growers as a bus "pick up point" during the spring rapini season of 1979. The General Counsel did not present any evidence that Hernandez was instrumental in causing the raid. It is unlikely that Respondent would have waited for that occasion in 1979 to punish Ledesma when it had the information about her immigration status since 1976 or that it would have chosen a "pick up point" utilized by several other growers where she could easily have slipped through the hands of INS agents. It is also surprising that the INS would not have come directly to Respondent's operation to contact Ledesma if, in fact, Respondent had tipped them off as to her illegal status.

Accordingly, for lack of adequate evidence, I recommend that paragraph 6(a) of the Complaint be dismissed.

VIII. Did Respondent on or about October 17, 1979 through supervisors Cooper and Rivera unilaterally change the conditions of its employees' work by not granting a raise to all members of its crew equally? Did Respondent fail to negotiate this' change in wages with the UFW? (Paragraph 6(i) of the Complaint

A. Facts

Kelly Olds, Manager of Labor Relations, admitted that Respondent raised the wages of employees in nine categories twice in 1979, first in March (G.C. No. 14(1)) and next on August 30,

(G.C. Nos. 14(e), 14(f), and 14(g)). Celery workers later received a retroactive raise back to the August 30, 1979 date (G.C. No. 14(i)) In addition, Olds confirmed that a wage rate for a new commodity -cabbage - was established on August 30, 1979. (C.G. No. 14 (h)) A new "standby-pay" rate was established on November 21, 1979 to cover situations when a machine broke down or weather made it impossible to work.[60/] (G.C. No. 14(b))

Respondent did not notify or bargain with the employees' certified bargaining representative before instituting any of these raises or new rates. When asked why Respondent did not do so, Olds replied that he believed there was no duty to do so as long as the certification was being contested.

Olds also admitted that on October 17, 1979, Respondent increased the wage rate received by the mixed lettuce (sometimes referred to as "romaine") cutters and packers to .6160 cents per carton [61/](G.C. No. 14 (d)) and that this increase was not negotiated with the UFW. However, Olds testified that this increase was not a raise at all and that employees' pay checks did not show any improvement because the increase was only in the rate paid per carton, necessitated by the fact that there was now a greater number of romaine lettuce head packed per carton. Previous to the new rate, romaine lettuce was packed twenty-four heads to the carton; but because of the smallness of the romaine heads Respondent produced at that time and the market desirability of a

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60/None of these wage increases, retroactive raises or new wage rates was alleged as a violation in the Complaint. However, since these changes were related generally to the allegation of the October 17, 1979 unilateral change in the wage rate and since they were fully litigated at the hearing, I find that it is proper to make findings and conclusions as to whether such changes were violations of the Act. Harry Carian Sales, 6 ALRB No. 55 (191

61/Loaders received no increase.

standard weight, Respondent, for the first time in its history, decided to pack thirty head per carton and did so for three days, October 17, 18 and 22. (Resp's Nos. 8, 9 and 10) By comparing time sheets of employees under the twenty-four per carton pay rate with employees under the thirty per carton pay rate, Olds testified that there was no increase in wages. [62/] Relying on Respondent's Exhibits 7, 8,9 and 10 Olds stated:

> "...Market conditions and the condition of the product at that time dictated that we pack 30 heads per carton because the lettuce was small. If you take the time to divide 49.3 cents by 24 and then multiply that same rate by 30, you will come up with 61.6 cents for the cutters and packers. This is something that's traditionally done because the cutters and packers are cutting the same number of heads in the fields. They're quantities in the box. It's just a simple calculation that's done.... "
>
> Hearing Officer: "So your testimony is that there was absolutely no increase in wages."
>
> Witness: "There was absolutely no raise made to those people. They were paid the same rate per head as if they were paid the day before and the day before that."

The General Counsel also adduced testimony that on August 25, 1979, Respondent instituted a five percent rate increase for members of the broccoli crew under certain defined circumstances; i.e., where their pace of work was substantially reduced because of a heavy rain. As a result, the harvesting machine was unable to operate in the fields, and it was necessary to utilize a tractor to pull the machine. (G.C. No. 14(c))

62/At one point in his testimony, Olds, utilizing Respondent's Exhibits 7, 8, 9, and 10, even suggested that some members of the mixed lettuce crews earned more before the rate increase than afterwards.

Although Olds admitted that compensating employees with extra pay in this fashion would constitute a change in the wage rate, he testified he did not know if this increase was ever implemented, that General Counsel Exhibit 14(c) was prepared with the view in mind that it might occur at some point in the future, and that it was not reasonable to assume that it did occur.

On October 25, 1979, Respondent either increased or intended to increase the rate of its anise crews by five cents per carton whenever there was moderate to heavy rain, again because of the loss of pay to the individual employee resulting from the slower work pace.[63/] (G.C. No. 14(c)) Again, there is some question as to whether or not this raise was ever implemented by Respondent.

B. Analysis and Conclusion

In D'Arrigo Brothers, 4 ALRB No. 45 (1978) the Board concluded that Respondent had violated Labor Code Section 1153(e) and (a) by refusing to bargain and ordered, inter alia, a make-whole remedy. Subsequently, in J. R. Norton Co. v. Agricultural Labor Relations Board, 26 Gal.3d, (1980) the Supreme Court

63/The rate increases for the broccoli and anise crews were not alleged in the Complaint as violations of the Act. However, as these matters were related generally to the allegations of the October 17, 1979 unilateral change in the wage structure and were fully litigated at the hearing, I find it is proper to make findings and conclusions as to whether these changes constitute violations of the Act. Harry Carian Sales, 6 ALRB No. 55 (1980)

held that the Act did not intend make-whole relief to be applied in every refusal to bargain situation and that the Board must determine in each case from the totality of a respondent's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted.

Pursuant to the Norton decision, the Board reexamined its D'Arrigo Brothers remedial Order in 6 ALRB No. 27 (1980) and concluded that Respondent's contesting of the election was reasonable and that it litigated the question in good faith. As a consequence, the original make-whole remedy was vacated.

In the instant case, Respondent argues that: (1) it had no obligation to notify or negotiate with the UFW with respect to any of the raises or rate changes it effectuated during 1979 while the certification was being challenged and until there was a final court determination on its appeal, which apparently occurred in April of 1980 when the Supreme Court refused to review the case;[64/] (2) since the ALRB found that Respondent's

64/As set forth in footnote 1 of the D'Arrigo Brothers Supplemental Decision and Revised Order, 6 ALRB No. 27 (1980), the Court of Appeal for the First Appellate District, on March 20, 1980, in Case 1 Civ. No. 44814 (4 ALRB No. 45 (1978)), denied review of the Board's Decision, thereby upholding the Board's certification, 3 ALRB No. 34 (1977), but remanded that portion that dealt with the make-whole question. The Supreme Court denied review on April 20, 1980.

contesting of the election was not taken for purposes of delay and rescinded its previous make-whole award, it would be unfair to now find that Respondent violated the Act by refusing to negotiate with the UFW during that same period; (3) in any event, the per carton rate increase to the romaine cutters and packers did not constitute an increase in pay so there was no duty to notify or negotiate with the UFW about that anyway; and (4) certain of the raises and rate changes were never implemented.

There is no question that Respondent raised the wages of employees in nine categories of products during March and August of 1979,[65/] paid retroactive wage increases, established wages for a new commodity, (cabbage), and created a new "standby-pay" rate.

The UFW was never notified or given any opportunity to request negotiations regarding any of the above-mentioned changes. The legal question is whether Respondent was under any duty to so notify or bargain with the UFW over these changes while its good faith election objections were still pending.

It is established under the National Labor Relations Act that Sections 8(a)(5) and (1) are violated when an employer, without prior notice to or negotiations with the union; changes

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65/Respondent did not argue that its wage increases were automatic, and there is no evidence in the record that Respondent had ever informed its employees of a fixed policy of increasing wage rates at any given time. However, at one point in his testimony, Kelly Olds suggested that the August raise was part of a historical pattern of raises that occurred during that month each year. As no documentary evidence was offered to support this claim, and as the only evidence in the record is Olds' unsupported claim, I do not credit it. Respondent was under no duty to increase wage rates. NLRB v. Ralph Printing and Lithograph Co., 433 F.2d 1058, 1062, 75 LRRM 2267, 2270 (8th Cir. 1970).

its employees'terms and conditions of employment during the pendency of objections to an election which eventually results in certification. Mike 0'Connor Chevrolet, 209 NLRB 701, 85 LRRM 1419 (1974), rev'd on other grounds, 512 F.2d'684, 88 LRRM 3121 (8th Cir. 1975). Absent compelling economic considerations for doing so, an employer acts at its peril in making such unilateral changes prior to the union's certification. Larsen Supply Co., 251 NLRB No. 175, 105 LRRM 1177 (1980), Hillcrest Furniture Mfg. Co., 251 NLRB No. 151, 105 LRRM 1394 (1980).

A unilateral grant of a wage increase is so inimical to the collective bargaining process that it constitutes an independent violation of the National Labor Relations Act, regardless of whether any showing of subjective bad faith is made. NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962); NLRB v. Consolidated Rendering Co., 386 F.2d 699 (2d Cir. 1967). Such conduct clearly tends to by-pass, undermine and discredit the union as the exclusive bargaining representative of the employer's employees. Continental Insurance Co. v. NLRB, 495 F.2d 44 (2d Cir. 1974).

It is a violation of the Agricultural Labor Relations Act, as well. Such unilateral change is a per se violation and violates the duty to bargain because it eliminates even the possibility of meaningful union input of ideas and alternative suggestions. Kaplan's Fruit and Produce Co., 6 ALRB No. 36 (1980). Subjective bad faith need not be established to prove such a violation. O. P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979).

In Sunny sides Nurseries, 6 ALRB No. 52 (1980) a decision by the employer to hire temporary employees for a fixed term was held to be a change in hiring practices which required the employer to meet and consult with the union even though the change occurred between the date of the election and the date the bargaining representative was certified. The Board stated:

> "Respondent therefore 'acted at its peril' in failing to notify the UFW in August 1978 of its intent to institute temporary hiring for the poinsettia season. Because the UFW was subsequently certified as the exclusive representative of Respondent's agricultural employees, we conclude that Respondent's conduct violated Section 1153 (e) and (a).[66/]

The Board's certification of the UFW as the bargaining representative of Respondent's employees in 1977, 3 ALRB No. 34, has not been reversed by any Court of Appeal or by the Supreme Court. Nevertheless, under Respondent's theory, it was relieved of all duty to bargain with the UFW, including any bargaining over the unilateral raising of wages, during the pendency of its election objections.

I disagree. Although the ALRB revised its original remedial order involving Respondent's technical refusal to bargain by deleting that portion relating to the make-whole remedy (6 ALRB No. 27), that did not relieve Respondent of its

66/Prior to Sunnyside, the Board had held, inter alia, that while an employer was not under an obligation to bargain towards an agreement during the pendency of election objections, it could not unilaterally decide to change the terms or conditions of employment. Highland Ranch and San Clemente Ranch Ltd., 5 ALRB No. 54 (1979). But the Court of Appeal held that this part of the Board's decision was not enforceable unless it could be shown upon remand, that the election challenge was taken in bad faith. San Clemente Ranch Ltd., 107 CA.3d 632, 166 Cal Rptr. 375 (1980). However, on August 28, 1980, the Supreme Court vacated the Court of Appeal decision and granted the Board's Petition for Hearing, LA 31316. The matter is still pending.

duty to bargain over unilateral changes pending the appeal of the certification in the courts. The unilateral wage increases were in no way connected with Respondent's good-faith challenge of the Board's certification of the UFW. The latter issue was the subject of the refusal to bargain case (4 ALRB No. 45, 1930), and Respondent's good faith in contesting the election outcome ultimately became an issue in Respondent's subsequent case (6 ALRB No. 27, 1980). On the other hand, the good faith of Respondent in making unilateral changes is not a relevant question. As the applicable precedents hold, such changes constitute unfair labor practice regardless of whether Respondent acted in good faith. Mike O'Connor Chevrolet, supra; O. P. Murphy, supra; Sunnyside Nurseries, supra. To argue otherwise is to confuse a technical refusal to bargain in order to challenge, in good faith, the union's certification with a unilateral change in working conditions without prior notification to or negotiation with the chosen bargaining representative where the employer's good faith, or lack thereof, is simply not an issue.

In balancing the needs of. an employer to conduct its business as usual even during a period when its duties vis a vis the union are not absolutely certain with the loss of employee support of the union that is bound to result when unilateral changes occur, the equities clearly fall on the side of the union which was, after all, elected by the employees in the first place to represent them in just this kind of a situation.[67/]

67/In this case the election was held on October 11, 1975, and the UFW was certified on August 24, 1977.

The "inconvenience" of the employer's obligation is not a great burden; merely to notify the union of the proposed change and give it the opportunity to offer alternative suggestions, ideas, or counterproposals regarding said change. This does not mean, of course, that management cannot, at some point, make these changes. It only means that there is a precondition of first notifying and consulting with the union, at its request, concerning the proposed changes. In failing to notify or consult with the bargaining representative, Respondent acts at its own peril. I find that Respondent was under a duty to bargain regarding any changes in the terms or conditions of employment affecting its employees. Its failure to notify the UFW and give it an opportunity to negotiate over the proposed changes was a violation of Section 1153(e) and derivatively Section 1153(a) of the Act, and I shall so recommend to the Board.[68/]

The only remaining question is whether the increase to .6160 cents per carton received by the mixed lettuce crews was a true raise in view of the fact that the per-head rate remained the same and the per-carton rate was merely adjusted to reflect that Respondent was packing thirty head per carton instead of twenty-four. There was no evidence that such a change actually affected working conditions or that being required to pack thirty head instead of twenty-four was more arduous work and required greater effort. If any change did occur, it would have had such a de-minimis effect upon Respondent's employees that it could not be said to rise to the level of a violation of the Act.

68/Of course, this finding does not affect those proposed rate changes which the General Counsel failed to prove were ever actually implemented such as the higher rates for the broccoli and anise crews which were to be effective when rain reduced the workers' productivity. (G.C. No. 14(c))

In any event, since I cannot find on this record that Respondent's increasing the rate received by the mixed lettuce crew was a change in working conditions, I conclude that Respondent had no obligation to notify and bargain' with the certified bargaining representative over it.

THE REMEDY

Having concluded that Respondent has engaged in unfair labor practices within the meaning of Section 1153(c), 1153 (e) 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) 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 or any other labor organization.

(b) Instituting unilateral changes in its employees' wages, wage rates or any other term or condition of employment

without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning proposed changes.

(c) 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 are deemed necessary to effectuate the purposes of the Act:

(a) Immediately offer to Gabriel Valencia full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other rights or privileges.

(b) Make whole Gabriel Valencia for any loss of pay and other economic losses he has suffered as a result of his discharge, according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven per cent per annum.

(c) Preserve and, upon request, make available to the Agricultural Labor Relations Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back-pay period and the amount of back pay due under the terms of this Order.

(d) Upon request, meet and bargain with the UFW concerning the unilateral change in wages, wage rates, and the wage system it made during 1979.

(e) Sign the Notice to Employees attached hereto. Upon its translation by the Regional Director into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter. "

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time between April 1, 1979, and the time such Notice is mailed.

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

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

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the

steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: March 25, 1981 AGRICULTURAL LABOR RELATIONS BOARD

By: MARVIN J. BRENNER
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by discriminating against an employee by discharging him because of his union activity and also by changing our employees' working conditions without first notifying the United Farm Workers of America, AFL-CIO (UFW) as your representative. The Board has ordered us to post this Notice and to mail it to those who worked at the company between April 1, 1979, and the present. We will do what the Board has ordered and also tell you that the Agricultural Labor Relations Act is a law which gives you and all farm workers these rights:

1. To organize yourselves.

2. To form, join, or help unions.

3. 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.

4. To act together with other workers to try to get a contract or to help or protect one another.

5. To decide not to do any of the above things.

Because it is true that you have these rights, 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.

WE WILL OFFER Gabriel Valencia his old job back and we will pay him any money he lost, plus interest computed at seven percent per annum, as a result of his discharge.

WE WILL NOT discharge, lay off, or otherwise discriminate against any other employee with respect to his or her job because he or she belongs to or supports the UFW or any other union.

WE WILL NOT change your wages or wage rates or our wage system or other working conditions without first notifying the UFW, as your representative and giving them a chance to bargain with us about these changes.

Dated: D'ARRIGO BROTHERS

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.