Gonzales, California

STATF OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J & L FARMS Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-434-SAL 80-CE-42-SAL 80-CE-66-SAL 8 ALRB No. 46

DECISION AND ORDER

On July 30, 1981, Administrative Law Officer (ALO) Arie Schoorl issued the attached Decision in this proceeding. Thereafter, Respondent filed timely exceptions with a supporting brief and the Charging Party filed a brief in reply to Respondent's exceptions.

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 ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/] and conclusions of the ALO and to adopt his recommended Order as modified herein.

Respondent excepts to the ALO's failure to use the

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[1/] In the first line on page 18 of the ALO's Decision, he inadvertently stated "Spring of 1977"; the correct date is Spring of 1979.

Wright Line[2/] analysis in this case. Respondent contends that had the ALO applied Wright Line, he would have reached a contrary conclusion. We disagree. In applying the Wright Line analysis, we reach the same conclusion as the ALO and we find that Respondent violated Labor Coda section 1153(a) by discharging Julio Alcaia and Lorenzo berber for their participation in protected concerted activity.

The Wright Line analysis is essentially the same as the "but for" test that we have used in our previous decisions concerning dual motives for alleged discriminatory conduct. (Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. IS. See also, Martori Bros. v. ALRB (1981) 29 Cal.3d 721.) Under Wright Line, once the General Counsel has made a prima facie showing that unlawful discrimination was a motivating factor in an employer's decision to take an adverse employment action, the burden shifts to the employer to show that it would have reached the same decision absent the protected activity. (Merrill Farms (Jan. 22, 1982) 8 ALRB No. 4; Nishi Greenhouse, supra.)

To establish a prima facie case, the General Counsel has to prove by a preponderance of the evidence that the employer knew, or at least believed, that the employees had engaged in protected concerted activities and that they were discharged because of those activities. (Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13.)

In the instant matter, we find that the General Counsel established a prima facie case of discriminatory discharge in which

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[2/] Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].

a motivating factor in Respondent's decision was the protected activity of Alcala and Berber.[3/] Respondent had knowledge of Alcala's and Berber's[4/] participation in or attendance at several meetings with co-owner Butch Lindley to discuss issues of seniority and the institution of new work rules by their forewoman, Maria Olivas. Those meetings took place during the first two weeks of the pruning season. Early in the third week, Alcala and Berber were summarily discharged shortly after they entered the row of a co-worker to assist him. Forewoman Olivas ordered them to leave the row and to go on to their own rows. Alcala and Berber did leave their co-worker's row within thirty to ninety seconds after Olivas' order. Olivas immediately reported the incident to co-owner Lindley. After work that day, Lindley called Alcala and Berber separately into his office and discharged each of them without any investigation of the incident. Lindley told Alcala that one of the reasons for the discharge was because Alcala had been creating too

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[3/] Respondent argues that the employees' meetings with co-owner Lindley did not constitute protected concerted activity but rather were limited to issues of individual concerns. We find no merit in Respondent's contention since any issue directly involving the employment, wages, hours and working conditions of employees qualifies as a subject matter for protected concerted activity. (Jack Bros, and McBurney, Inc. (Feb. 25, 1980) 6 ALRB No. 12.) We affirm the ALO's finding of protected concerted activity. However, we do not adopt the ALO's sole reliance on the factors set forth in Shelly and Anderson Furniture Mfg. Co. v. NLRB (9th Cir. 1974) 497 F.2d 1200 [86 LRRM 2619]. Rather, we shall continue to use a case-by-case approach in analyzing facts to determine the existence of protected concerted activity. (See, e.g., Bill Adam Farms (Dec. 21, 1981) 7 ALRB No. 46.)

[4/] Although Berber was not as active as Alcala in speaking out about grievances and attending meetings, co-owner Sutch Lindley testified that Berber had attended at least one meeting in Lindley's office to discuss employee grievances.

many problems for the company.

Respondent asserts that the delay of Alcala and Berber in obeying their forewoman constituted insubordination as defined in its written rules of employment. The evidence, however, shows that previous terminations were based on serious infractions such as intoxication and fighting on the job. Generally, warning slips were given for minor infractions such as tardiness or absence without permission. Four warnings in a calendar year could lead to termination. After reporting the incident to Lindley, forewoman Olivas believed the incident merely warranted a warning. Lindley did not tell Olivas of his decision to terminate Alcala and Berber until after work that day. We therefore find that the conduct of Alcala and Berber did not warrant discharge under Respondent's established personnel policies. The only remaining explanation for the discharges is the conclusion reached by the ALO that Lindley terminated Alcala and Berber in retaliation for their participation in protected concerted activity.[5/]

Respondent excepts to the ALO's recommendation not to

[5/] Member McCarthy concurs in his colleagues' finding that employees Alcala and Berber acted in concert with other employees during their discussions with Respondent concerning employee benefit proposals and other conditions of employment but dissents from their further finding that they were terminated for that reason. He would find that the alleged discriminatees were discharged for violating conditions of employment and that they had been adequately forewarned that such infractions would be cause for dismissal. The fact that employees have engaged in protected concerted activity does not insulate them from discharge for insubordination or other just cause. (Waterbury Committee Antenna, Inc. v. NLRB (2d Cir. 197S) 587 F.2d 90 [99 LRRM 3216].) It is his view that the majority has been misled by the ALO's misplaced evaluation of the nature of the discipline. (Hansen Farms (May 24, 1977) 3 ALRB No. 43; NLRB v. Montgomery Ward (8th Cir. 1946) 157 F.2d 486 [19 LRRM 2008].)

grant attorney fees or costs for its defense of allegations which were dismissed by the ALO. The ALO based his recommendation on the guidelines for frivolous litigation as set forth, in Heck's, Inc. (1971) 191 NLRB 886 [77 LRRM 1513] and our decision in Tenneco West (May 27, 1931) 7 ALRB No. 12. We have recently held that this Board has no authority to grant attorney fees or costs to a Respondent who is exonerated of violations alleged in a complaint. (J. G. Boswell, Inc. (May 10, 1982) 8 ALRB No. 31; Neuman Seed Co. (Oct. 27, 1981) 7 ALRB No. 35.) We therefore adopt the ALO's recommendation not to award fees or costs to Respondent.

ORDER

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

1. Cease and desist from:

(a) Discharging or otherwise discriminating against: any agricultural employee for participating in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the 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 Julio Alcala and Lorenzo Berber immediate and full reinstatement to their former or substantially

equivalent positions, without prejudice to their seniority or other rights or privileges.

(b) Make whole Julio Alcala and Lorenzo Berber for all losses of pay and other economic losses they have suffered as a result; of the discrimination against them, such amounts to be computed, in accordance with established Board precedents, plus interest thereon computed at the rate of seven percent per annum.

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

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

(e) 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 December 1, 1979, until the date on which the said Notice is mailed.

(f) 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.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached, Notice, in ail 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 to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to 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 at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging Julio Alcala and Lorenzo Berber because they protested about working conditions during a two week period between December 3 and December 17, 1979. The Agricultural Labor Relations Board has told us to pest and publish this Notice. We will go 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 NOT discharge, lay off, or otherwise discriminate against any employees who participate in meetings with company representatives to protest working conditions.

WE WILL reinstate Julio Alcala and Lorenzo Berber to their former jobs, or to comparable employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they lost because of their discharge from J & L Farms.

Dated: J & L FARMS

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 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

J & L Farms
(UFW)

8 ALRB No. 46
Case Nos . 79-CE-434-SAL
80-CE-42-SAL
80-CE-66-SAL

ALO DECISION

The ALO found that Julio Alcala and Lorenzo Berber engaged in protected concerted activity by attending meetings with the co-owner of the company to discuss work-related grievances. The ALO conclude that Respondent violated section 1153(c) by discharging Alcala and Berber for an alleged infraction of work rules within a raw days after their participation in those meetings with the co-owner. Although Berber was not as active in the concerted activity as Alcala, the ALO found that since Berber was involved in the same incident which led to Alcala' s discharge, the Respondent also terminated Berber in order to appear consistent. To remedy the 1153(a) violation, the ALO recommended the reinstatement of Alcala and Berber with backpay and seniority, a cease and desist order, and the reading, posting, distribution and mailing of an appropriate remedial notice.

The ALO recommended dismissal of the allegation that Respondent violated 1153(c) by discharging Alcala and Berber for their union activities. The ALO found that their union activities were too remote in time to support a finding of discrimination based on those activities

The ALO also recommended dismissal of the allegation that Respondent refused to rehire Javier Barragan because of his union activities, finding that Respondent did not rehire Barragan because he failed to report to work on the agreed upon starting date.

Finally, the ALO recommended dismissal of the allegation that Respondent conspired with labor contractor Felipe Arce to lend money to employees in exchange for their no union votes in the election. The ALO discredited Arce's testimony and found no evidence to support the allegation. The ALO, however, denied Respondent's request for attorney fees and costs in its defense of the allegations concerning Arce's loans. The ALO relied on the definition of frivolous litigation as set forth in Heck's Inc. (1971) 191 NLRB 886 [77 LRHM 1513] and Tenneco West(May 27, 1981) 7 ALRB No. 12, to support his recommendation against awarding attorney fees or costs to Respondent.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO. With regard to the discharges of Alcala and Berber, the Board applied the Wright Line or dual motive analysis to the facts and reached the same result as the ALO in concluding that Respondent violated section 1153 (a).

The Board ordered Respondent to reinstate Alcala and Berber to their former positions with backpay and full seniority rights, as well as to cease and desist from such discriminatory conduct. The Board also ordered the posting, mailing, reading and distribution of a notice as recommended by the ALO.

The Board relied on its decisions in J. G. Boswell (May 10, 1982) 8 ALRB No. 31 and Neuman Seed (Oct. 27, 1981} 7 ALRB No. 35, to deny attorney fees or costs to Respondent. In those cases, the Board determined that it has no authority to award attorney fees or costs to a Respondent who is exonerated of violations alleged in a complaint.

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

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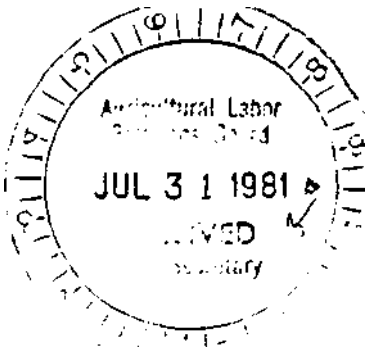
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	)	
J & L FARMS,	)	
Respondent,	)	
and	)	Case Nos. 79-CE-434-SAL 30-CE-42-SAL 80-CE-66-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

Eduardo Blanco, Esq.
for the General Counsel

Arnold B. Myers, Esq.
for Respondents

Stephen Matchell
for the Charging Party

DECISION OF THE ADMINISTRATIVE LAW OFFICER

ARIE SCHOORL, Administrative Law Officer: This case was heard by me on March 3, 4, 5, 6, 10, 11, 16, 17, 18, 19, 20, 23 and 24, 1981 in Salinas and King City, California. Two complaints issued herein. The first complaint, which issued on July 31, 1980, based on charges filed by the United Farm Workers of America, AFL-CIO (hereinafter called UFW), and duly served on Respondent J & L Farms on May 6 and 21, 1980 respectively, alleged that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the ALRA or the Act). The second complaint, which issued on December 16, 1980, based en a charge

filed by the UFW and duly served on Respondent on December 21, 1979, alleged the Respondent committed an additional unfair labor practice. An order consolidating cases 79-CE-434-SAL, 80-CE-42-SAL and 30-CE-66-3AL was issued on February 23, 1981.

The General Counsel, the Charging Party and Respondent were represented at the hearing. The General Counsel and the Respondent timely filed briefs after the close of the hearing. Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs submitted by the parties, I make the following findings of fact:

I. Jurisdiction

Respondent admitted in its answer, and I find, that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act. I find that the UFW, the Charging Party herein, is a labor organization within the meaning of Section 1140.4 (f) of the Act.

II. The Alleged Unfair Labor Practices

The General Counsel alleges that on or about December 17, 1980 Respondent through its agents, fired employees Julio Alcala and Lorenzo Berber because of their participation in concerted activity and their support for the UFW, and that, prior to the representation election in April 1979, Respondent through its agent Felipe Arce, a labor contractor, lent money to its employees in return for their promises to vote against the UFW. The General Counsel further alleges that on or about January of 1980, Respondent, through one of its managing partners Butch Lindley, refused to hire Javier Barragan Sanchez because of his support for the UFW.

III. Background Information

Respondent is a partnership owned and managed by Phillip Johnson and W. L. "Butch" Lindley, and raises principally wine grapes and some row crops in the Salinas Valley. In 1978, Respondent expanded its operation tenfold and contracted with Felice Arcs, a licensed labor contractor, to supply them with vineyard workers. Although Respondent employed some workers directly, Arce continued to supply Respondent with the bulk of its workers until September 1980.

The UFW began its campaign to organize Respondent's employees during the last few days of December 1978 and continued until the representation election held on April 10, 1979. The UFW lost the election, i.e. UFW - 67 votes, No Union - 70 votes, Challenged Ballots - 2 votes. The UFW filed timely objections. No hearing on objections was held and in May 1980 the Board issued an order declaring moot the issues raised in the objections and certified the results of the election.

IV. Alleged Discriminatory Discharge of Julio Alcala and Lorenzo Berber

A. Facts

Julio Alcala and Lorenzo Berber had worked directly for Respondent for three years and were experienced in every phase of Respondent's vineyard work, i.e. pruning, tying, budding, suckering, and harvesting.

In December 1978, the UFW filed notice of intent to take access to Respondent's premises and UFW representatives Filiberto Chavez and Narciso Carvales began to visit Respondent's fields to converse with field employees about the advantages of union representation and persuade them to sign union authorization cards.

The union campaign lasted, three and one-half months, up to April 10, 1979. Alcala and Berber were members of Antonio Vizcarra's crew. Fellow crew-member Delfino Gutierrez was the most active UFW supporter and the crew members elected him president of the employees' ranch committee. His brother Socorro and Lorenzo Berber were also active and passed out buttons and leaflets to their fellow crew-members. Almost every member of the crew, including Julio Alcala and Lorenzo Berber, wore UFW buttons on their caps and shirts every day up to the date of the election. A few of them continued to wear them after the election.

Foreman Antonio Vizcarra on occasions would answer queries about the UFW from the members of his crew. He informed them that it was their decision to make and that he thought the UFW representation would be advantageous since the union would be able to secure better wages and working conditions for them. Vizcarra was extremely lenient with his crew and would permit them to gamble, run races and drink wine and beer in the fields. However this did not adversely affect their production; partner Lindley testified that Vizcarra's crew was always the best in respect to the quantity and quality of its work.

On the day before the election, crew members, Julio Alcala, Lorenzo Berber and Javier Barragan testified they noticed a radical change in Vizcarra's comments about the UFW. They noticed that after he returned from a pickup ride with owner-manager Johnson that he told them that the UFW would not serve their interests and that if the Union won the election gambling

and drinking alcoholic beverages would no longer be permitted while they were working in Respondent's fields.

After the election Alcala and Berber continued to work in Vizcarra's crew. In May, Maria Olivas joined the crew as a foreperson trainee and also to learn the techniques of budding since she was inexperienced in that respect. In September, the season ended[1/] and the crew was laid off.

On December 3, Alcala and Berber and eight other employees were rehired to begin the pruning work in a crew supervised by Maria Olivas. She explained to them on the first day that each worker would be expected to prune a certain number of vines per hour and that no worker was permitted to help another worker by pruning vines in the latter's row. She failed to explain to the workers the reason for this rule. As each worker commenced work with Maria Olivas she had him or her sign a written form which contained the rules of employment in Spanish.[2/]

A few days later, Julio Alcala along with Delfino and Socorro Gutierrez, met with partner Butch Lindley about Respondent's bonus system and a proposed medical plan. Alcala questioned Lindley about when the bonus would be paid and the

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[1/] The season ran from early December to early September.

[2/] One of the written rules was than an employee would be subject to dismissal if he or she failed to obey a foremen's order. However the rules about son many vines per hour and helping fellow workers were not part of the written rules but were rather oral instructions.

medical insurance plan would go into effect.

At the beginning of the second week, Alcala and the Gutierrez brothers, went to Lindley's office and complained to him that he had passed over all the experienced' regular workers, like themselves, to bring in as a foreperson, a certain Margarita Hernandez, who had never worked for Respondent previously.[3/] Lindley explained to them that Hernandez had had previous experience as a foreperson elsewhere and stressed the fact to them that he was the one to make such selections.

Later on in the second week, Maria Olivas ordered Alcala, the Gutierrez brothers and the other four experienced male workers[4/] to change the sequence in which they pruned the rows of grapevines. Some new employees who had slight experience in pruning grapevines had started to work that week. As they were considerably slower than the original members of the crew, they fell behind the others as the crew moved across a field, each worker pruning a single row. Olivas told the above-mentioned seven experienced employees that instead of continuing along their rows they would each have to return to the morning starting point and begin a new row and thus work behind the inexperienced pruners. The aforementioned workers understood that the purpose of this "maneuver" was in effect to "push" the slower workers into a faster pace. They discussed the issue among themselves and requested Olivas to permit them to discuss the problem with

[3/] Alcala testified that he was the first one to speak at this meeting and then Delfino Gutierrez followed and concluded the discussion.

[4/] The other four experienced workers were Manuel Villagomez, Lorenzo Berber, Armando Zamudia and Ramon de la Rosa.

Lindley after work hours. She consented and after work four of the seven employees went the Lindley's office and told him about the current problem and also about Olivas' general lack of flexibility in her manner of supervising the crew. They added that: they were experienced workers and really did not need close supervision. Lindley took each worker into his office and talked to them on an individual basis. The first one he talked to was Alcala[5/] and he explained to him that even though they were competent employees they still needed a foreperson to direct their work and they should follow any reasonable requests from Maria. He added that if they had any problems with Maria's orders to come see him. Lindley in his testimony admitted they they did not discuss the rule that no worker should help another worker in his row.

On the following Monday just before the noon break Ramon de la Rosa, one of the seven experienced employees, requested Alcala, Berber and Armando Zamudia to help him finish his row. He had only five vines remaining in his row and appealed to their friendship in asking his assistance. All three responded to his plea and began to prune vines in his row. Shortly thereafter Olivas arrived and ordered all three to return to work in their own rows. Berber replied that he was almost finished with the vine he was working on and both he and Alcala finished

[5/] I credit Alcala's testimony with respect to the meetings with Lindley and the leading part Alcala took in the discussions. Alcala testified in a straightforward manner and had a good memory for details. Furthermore, Lindley's testimony confirmed the fact that the three meetings described by Alcala actually took place but he was less definite than Alcala about who spoke out at the meetings as he did not remember who started a conversation at one meeting and he thought that all five employees spoke for themselves at another one.

the vines they were working on in de la Rosa's row.[6/] Zamudia immediately stopped pruning in de la Rosa's row and went to Olivas pickup truck a few yards away to drink some water.

Approximately one minute after receiving Olivas' order Alcala and Berber left de la Rosa's row and went to the same pickup truck to oil their pruning shears.[7/] After a minute there, they returned to their respective rows and resumed pruning.

After the crew took their lunch break, Olivas went to the office and informed Lindley and Philip Johnson, the other partner, about the alleged disobedience of her order by Alcala and Berber. They told her to write down a summary of what had occurred and she complied. The two partners discussed in Olivas' presence the appropriate discipline for the work-rule infraction. Olivas left to return to the fields and the

[6/] Olivas testified that Alcala replied to her order to stop pruning in de la Rosa's row by telling her not to make such a big thing out of it. However I do not credit Olivas' testimony on this point since Alcala denied saying it and other witnesses, both General Counsel's and Respondent's who were in earshot of the episode testified that they did not hear Alcala answer anything to Olivas when she gave him the order.

[7/] I find that Alcala and Berber delayed between 30 seconds and 1 1/2 minutes in obeying Olivas' order. Both Alcala and Berber testified it was a matter of seconds before they left the row. Elisa Lopez stated in her testimony that the maximum time was 45 seconds. Armando Zamudia, Respondent's witness, testified that after he left de la Rosa's row he spent two minutes at Olivas' pickup and before he left Alcala arrived to sharpen his shears. Also it is clear from the record that Alcala and Berber could prune at least 40 vines an hour which means only 1 1/2 minutes per vine so that would be the maximum time needed by them to finish a vine. Olivas' testimony that they remained in de la Rosa's row for five minutes is false in light of the forementioned evidence. This falsity is bolstered by the fact that Olivas added a sentence about the alleged five-minute delay after she had completed the statement in response to the partners' request and in a different color ink (which would indicate it was added some time after she signed the statement).

two partners continued their discussion, considered suspension of the two workers, and other alternative punishments, and finally decided that dismissal was the most appropriate measure to be taken since Alcala and Berber had committed a serious violation of the work rules. Lindley instructed supervisor Alderette to instruct Alcala and Berber to come to his office after work ended that day.

When Maria Olivas arrived back in the fields, she conversed with her immediate superior, supervisor Steve Alderette, and he advised her to write up warning notices for the two employees and deliver them to Alcala and Berber. She proceeded to do that and upon delivering them to the two workers, they informed her that they would not sign the notices since they had not been guilty of disobedience and in addition asked her why she had not given a warning notice to Zamudia since he had also helped de la Rosa.

Olivas told them it was their right to refuse to sign the warning slips. They told her that they would only accept warning notices from the owners and would go talk to them after work. Soon afterwards Olivas relayed the message to them that Lindley wanted to see them after work.

After work ended, Alcala and Berber went to the office to meet with Lindley. Lindley first called Alcala into his office along with Alderette. Lindley spoke in English to Alcala while Alderette served as the interpreter.[9/] He told Alcala that he and Johnson had decided to discharge both him and Berber for

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[8/] Olivas testified that she was not authorized to issue warning notices on her own but had to secure approval from one of her superiors.

[9/] Lindley was fluent in Spanish and always spoke to Alcala, Berber and all Spanish speaking workers in Spanish.

insubordination since both had failed to heed Olivas' order to cease assisting de la Rosa and continued to work in his row in defiance of the work rule which provided for obedience to foreman's instructions. Alcala protested and pointed out to Lindley chat they had not disobeyed Olivas, that it was the custom to help each other and that although they did not leave the row immediately they did so soon after Olivas' request. Lindiey added that he had had too many problems with him. Alcala informed Lindley that he would contact the state (ALRB) to lodge a complaint against him. Lindley then told Alcala to have his wife report in for work the next day. Alcala left the office and told Berber who was entering that they had been fired.

Lindley, with Alderette still acting as interpreter, informed Berber that he and Johnson had decided to discharge him and Alcala for not following Olivas[1] orders. Berber gave the same explanation as Alcala, but Lindley said that the decision had been made and that he and Alcala had to leave the premises since they had been dismissed.

In March 1980, Alcala and Berber returned to-Respondent's premises and conversed with Lindley about their rehire. Lindley told them that he would reconsider their discharge and then inform them of the final decision. Lindley talked to Johnson and some witnesses to the incident and he and Johnson decided that their initial determination was correct. Respondent then sent letters to Alcala and Berber informing them about its final resolution and how it was reached.

B. Analysis and Conclusion

General Counsel contends that the actual motive for Respondent's discharge of Alcala and Berber was their union activities in the first part of 1979 and their protected concerted activities during the two week period creceding[10/] said discharge. According to ALRA precedent, General Counsel must prove by a preponderance of the evidence that there is a casual connection between the discriminatory action and the union and/or concerted activities. The legal principles applicable to discriminatory action based on union activity and protected activity are identical.[11/]

In the instant case it is clear that Alcala and Berber engaged in both union activities and other protected concerted activities and that Respondent had knowledge of such activities.

Berber was very active in union activities during the UFW campaign in Spring 1979 while Alcala's participation was minimal. Berber was a member of the UFWs ranch committee; he openly distributed UFW literature and solicited signatures for authorization cards. Alcala engaged in none of these activities as he was merely one of the many UFW adherents and wore a UFW button to work. Delfino Gutierrez was the

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[10/] Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979)

[11/] Lawrence Scarrone, 7 ALRB No. 13 (1981)

most active of Respondent's employees; he was president of the ranch committee and openly distributed literature and solicited and secured signatures on authorization cards.

Alcala, Berber and Delfino Gutierrez continued to work at Respondent's from after the election until the season-end September layoff. Respondent took no discriminatory action against either Alcala or Berber during the five-month period. Furthermore, Respondent never took discriminatory action against Delfino Gutierrez, the most ardent union advocate, either during this five-month period or the nine-month period Gutierrez continued to work in the 1979-80 season. Because of the aforementioned extended periods of time with no reprisals on Respondent's part against anyone of these three employees, there exists a strong inference that Alcala's and Berber's Spring 1979 union activities played no part in Respondent's decision to discharge them in December 1979 and I so find.

The situation in respect to the employees' concerted activities in December 1979 is the reverse of the situation in respect to the Spring union activities. In December Alcala's participation in the concerted activities was maximal while Berber's was minimal.

Respondent argues that Alcala's conversations with his coworkers and his and their subsequent complaints to Lindley about working conditions do not constitute protected concerted activities. A U.S. Court of Appeals has stated the four conditions necessary to qualify a concerted activity for protection under the NLRB as:[12/] (1) there must be a work-related complaint or grievance;

[12/] Shelly & Anderson Furniture Mfg. Co. v. NLRB 497 F,2d 1200 (9th Cir. 1974)

(2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper.

Alcala and the Gutierrez brothers conferred together and with other workers on several occasions about work-related complaints having to do with some or all of the workers i.e. delay in the implementation of the bonus and medical insurance plans, the selection of an outsider, Hernandez, for foreperson rather than promotion from within the ranks, the inflexibility of Maria Olivas in her supervision of them and the four other experienced employees in their crew. The foregoing subjects were definitely not problems of individual workers.

Alcala acted in concert with the other aforementioned six workers of his crew to obtain a specific result. Either three of them (Alcala and the Gutierrez brothers) or four (Alcala, the Gutierrez brothers and Manuel Villagomez) went to Lindley and expressed their concerns about these common problems and on each occasion requested corrective action: prompt implementation of the bonus and health insurance plans; selection of an experienced employee as a foreperson rather than bringing in an outsider; less supervision of their work by Olivas.

The methods used by Alcala and the rest were certainly neither illegal or improper.

Accordingly, I find that Alcala engaged in protected concerted activities, and that Respondent had knowledge of this participation since he was the most active spokesman for the group. He was the first to speak to Lindley about the bonus and insurance

plans and also about the hiring of Hernandez as a foreperson and he was the first one whom Lindley talked to in his office regarding Olivas and less supervision.

The timing of the discharges definitely suggests a discriminatory motive on the part of Respondent. Alcala engaged in extensive concerted activity within a two-week period and on the following Monday he was discharged. Lindley even made reference to this newly inaugurated militancy on the part of Alcala when he was discharging him by saying, "I've had too many problems with you."

Now to the reasons proffered by Respondent for the discharge...Alcala's and Berber's alleged disobedience of Olivas' order. In evaluating this reason the salient factor is the relative insignificance of the infraction. Alcala and Berber did not disobey Olivas' order, they merely delayed for no more than two minutes in obeying her order and Olivas was aware of this when she reported this trivial matter to Lindley and Johnson. The order itself was of doubtful reasonableness since Lindley himself testified that the purpose of the rule against assisting fellow workers was to enable Respondent to evaluate new employees and their ability to prune and such an experienced worker as de la Rosa certainly does not fit into this category. Compare this infraction with Respondent's usual grounds for discharge, as testified to by Lindley: fighting, drunkeness on the job, four warning notices.[13/] A two-minute delay in complying with a supervisor's order in respect to such a minor matter hardly falls into the same category as the aforementioned

[13/] According to Respondent's rules, an employee is subject to discharge after receiving four warning notices.

bases for discharge.[14/]

Providing additional credence to the relative unimportance of Alcala's and Berber's rule violation is Olivas' course of action. I doubt it ever occurred to her that the routine report to her superiors would trigger the whole disciplinary procedure and end with the discharge of Alcala and Berber. After reporting the infractions to Lindley and Johnson and writing at their request, a summary of the event, she returned to the fields, consulted with her immediate supervisor Steve Alderette, and issued warning notices to Alcala and Berber. It appears from this action on her part that she considered the matter to such a degree of importance as to only merit a warning notice not a discharge.

There are additional factors that detract from the validity of Respondent's reason for the discharges. They have to do with Olivas' report to them and their reaction to it. After Olivas provided them with her version of the incident, they made no investigation to verify whether it was true. Alcala and Berber were two excellent employees, each with three years of service with Respondent. There is no evidence that they had ever had any disciplinary problems or had received any warning notices during their long tenure with Respondent. Moreover, Lindley had the practice of encouraging workers to come to him and voice their concerns about any work matters. His modus operandi appears to be that of a manager who keeps all avenues of communication open. However on this particular day he completely departed from his customary method of acting and, before making his decision,

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[14/] in NLRB cases a factor supportive of an illegal motive on the part of an employer has been the severity of the punishment which runs contrary to a past policy for minor conduct. See Nucor Corp. 230 NLRB No. 17.

did not interview either of the employees involved or any of the witnesses whose names Olivas had provided: Armando Zamudia, Elisa Lopez, and Maria de los Angeles.[15/]

On the contrary, he and his partner Philip Johnson decided summarily that the only appropriate disciplinary action was the outright dismissal of Alcala and Berber.

The irrevocablity of that decision was later borne out by the manner in which Lindley informed Alcala and Berber of their dismissal. When the two employees came into Lindley's office, his obvious purpose was not to listen but to inform. He never gave either Alcala or Berber an opportunity to explain the details of the incident from their point of view. It was strictly a one-way communication with Lindley talking first to Alcala and then to Berber. This was reflected in Alcala's expression of resignation to both his and Berber's fate when he expressed the futility of attempting to explain their version to Lindley when he commented to Berber, who was entering Lindley's office, that they had both been fired.[16/]

The circumstantial evidence surrounding the discharge in this case clearly shows that Lindley was desirous of -ridding the company of Alcala not because of any alleged disobedience of an order but because Alcala had recently become very militant and

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[15/] Olivas had written the names of these three witnesses at the bottom of the sheet of paper that contained her summary of the event.

[16/] Although an employer's refusal or failure to provide an opportunity to an employee to give his side of the matter is not definitive, according to NLRB precedent, when considered with the totality of other evidence, it can be further proof that the reason given for a discriminatory action is pretextual. See C.T.S. Keene, 247 NLRB No. 141.

vociferous in respect to seeking changes in working conditions at J & L Farms. Within a two week period Alcala had protested about Respondent's fringe benefits, promotional policies and method of supervision by a foreperson. Shortly after these protected activities took place, Respondent made a hasty decision to discharge Alcala, a valuable employee, for a minor infraction without adequate investigation. The sequence of events inescapably points to one conclusion: that it was Alcala's participation in protected concerted activities that was the basis for his discharge.[15/]

Although Berber had not been engaged in the recent concerted activities to the same extent as Alcala, I believe that Respondent discharged Berber because he was involved in the identical infraction as Alcala and therefore in order to be consistent, Respondent meted out the same punishment to him as it had to Alcala.

In accordance with the foregoing, I find that Respondent's proffered reason for discharging Alcala and Berber was pretextual and that the actual reason for the discharges was Alcala's participation in protected concerted activities. By such conduct Respondent discriminated against Alcala and Berber with respect to their tenure of employment and thereby violated Section 1153(a) of the Act.

V. Alleged Discriminatory Refusal to Rehire Javier Barragan

A. Facts

Javier Barragan had worked for Respondent since 1977.

[17/] As stated in Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB 362 F.2d 466, 470 (C.A. 9, 1966) "If he (the trier of fact) finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one the employer desires to conceal—an unlawful motive... at least, where in this case, the surrounding facts tend to reinforce that inference."

During the UFW campaign in the Spring of 1977 he was a member of the UFW's ranch committee, distributed UFW buttons, authorization cards, and leaflets to fellow crew-members and wore UFW buttons on his cap and shirt. He conversed with Antonio ViZcarra, his crew foreman, about the UFW and informed him that if the UFW won the election the crew members would request the UFW to retain Vizcarra, as their foreman. A day before the election, Barragan once again talked to Vizcarra about the union upon the latter's return to the crew after having been with partner Johnson. Vizcarra advised Barragan against supporting the UFW and warned him that if the UFW won the election there would be no more drinking or gambling permitted in the crew. Barragan queried him about why he had changed his mind so abruptly, told him that he was not a man of his word, and added that the UFW, a union he respected, would win the election.

About ten days after the election, Barragan accompanied his brother Gonzalo to Respondent's office to inquire about employment for Gonzalo. They conversed about the matter with supervisor Steve Alderette who asked Gonzalo whether he was on the company's side or the union's side. Gonzalo replied that he was on the company's side. Alderette retorted that Javier should learn from his brother, that the latter was with the company and that Javier should also be with the company. Gonzalo was hired by Respondent that same day.

A few weeks before the season ended, Lindley lent $300 to Barragan so he could purchase an automobile from Vizcarra. Barragan signed a promissory note for the amount and it was agreed that the repayment would be made out of the wages which he would earn during

the next season at Respondent's operation, i.e. from December 1979 to August 1980. Barragan paid the $300 plus $60 of his own to Vizcarra and owed him $140 additional since the total price of the automobile was $500.

Barragan continued to work at Respondent's until September, at which time Lindley informed the workers that the season had ended and that they were laid off and would be subsequently notified by mail when the next season would begin.

Respondent's conditions-of-employment list contained a rule that if a worker did not report for work within three days after the receipt of such a letter the company would consider him or her a voluntary quit. Barragan admitted signing the list but denied ever having received a copy of the list from Respondent.

Respondent subsequently sent letters of recall to its employees, including Barragan who received it on November 30. On December 2, 1979 Barragan telephoned Respondent and informed Lindley that his car had broken down and that he would not be able to come to work until December 4th or 5th. Lindley consented and added that he would see Barragan on the 4th or 5th. Barragan did not report in to work on either of these days nor did he communicate with Respondent.

On December 9 or 10 Barragan was testing his automobile along Mission Road near Respondent's field in Soledad when he saw Lindley come along in his pickup truck, hailed him to a stop and explained to him that he was still having difficulties in the repair of his automobile but once it was in running order he would report to work.

Lindley replied that Barragan knew the rule that if an employee failed to return on time, he would lose his job and since they had not heard from him they assumed that he had quit

and now there was no work available for him.

On December 13 or 14 Barragan went with a. friend, Miguel, in Barragan's brother's car, to Respondent's office and they both asked Lindley for employment. Lindley once again fold him there was no work for him and chat he had voluntarily quit.

Lindley admitted in his testimony that Respondent was hiring workers at that time but Respondent did not rehire Barragan because he had not abided by the rule of coming back within three days of the notice or making arrangements to report in at a later date. Lindley explained that some workers had not reported in on December 3rd either but had called in and asked for an extension of time such as to the 6th or another specific date and Respondent had permitted them to report to work on the date they had designated.

The next day Respondent hired Miguel. On December 20 or 21 Barragan returned to Respondent's to ask for work and Lindley again rejected his request. Around the first of the year, Barragan once again requested work and was again turned down by Lindley.[18/]

B. Analysis and Conclusion

The Board has stated in Jackson and Perkins Rose Co., 5 ALRB No. 20 (1979) that the burden of the General Counsel is required to meet in proving a violation of Section 1153(c) is as follows:

> "To establish a prima facie case of discriminatory discharge in violation of Section 1153(c) and (a) of the Act, the General Counsel is obliged to prove

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[18/] Barragan never repaid the $300 that Lindley had lent him in September to purchase the automobile from Vizcarra.

> 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 is some casual relationship between the union activity and the discharge."

According to NLRB precedent General Counsel can meet: the burden to establish a prima facie case by proving (a) knowledge on the part of the employer of the discharged employee's union activities or sympathies and (b) the timing, or the relationship between discharge and other critical events. Proof of these two elements gives rise to a strong inference of a casual connection between the union activities and the discharge. See Halloran House, 249 NLRB No. 113.

In the instant case Barragan had openly participated in union activities on the job site from December 1979 to the date of the election in April 1979. He was one of the three most active union supporters in his crew as he was a member of the UFW ranch committee and distributed authorization cards, union literature and buttons to his fellow crew members. On several occasions he conversed with foreman Vizcarra about the UFW and expressed his unstinted support of the union. Moreover, Steve Alderette, Respondent's supervisor, in his conversation about Barragan's brother Gonzalo indicated he knew Barragan was on the side of the UFW. Therefore it is clear that Respondent had knowledge of his union involvement.

However General Counsel has failed to show that the timing in this case points to a discriminatory motive on the part of the employer. A substantial amount of time passed between the union activities of Respondent's employees, Barragan, Berber and Delfino Gutierrez and any alleged discriminatory action against

them. Both Barragan and Berber worked from December 1978, when they first began to be active in union affairs, until the regular September layoff without any discriminatory action against either of them by Respondent. Similarly, Respondent engaged in no discriminatory treatment of Delfino Gutierrez, the most active union supporter among Respondent's employees (he was president of the UFW ranch committee and the one who secured signatures on union authorization cards) during his entire tenure at Respondent's up to his voluntary departure from his job in August 1980. Berber, of course, was discriminated against but I found that it was because of Alcala's concerted activities rather than Berber's own union activities. So Berber's fate cannot be utilized here for comparison.

Furthermore, there was a significant incident which occurred between the union activity in the first part of 1979 and the alleged discriminatory refusal to rehire in December 1979, It was the loan of $300 by Lindley to Barragan for the purchase of the automobile from Vizcarra. The understanding was that Barragan would repay Lindley out of his wages earned at Respondent's in the future. If Respondent had harbored any ill feelings against Barragan for his union activities during the first part of the year, it would not have been so ready to lend a sizeable sum of money, $300, to him, which sum in all probability it could recover only if it rehired Barragan for the next year's season. This conduct by Respondent in September raises a strong inference that in December when Respondent failed to rehire Barragan it did not possess any animus toward Barragan because of his union activities earlier in the year.

However, even if it can be assumed, arguendo, that General Counsel has proven a prima facie case, and shifted the burden to Respondent, Respondent has met the burden and has clearly shown that it had a legitimate reason for refusing to rehire Barragan.

There is uncontroverted evidence that Respondent had a rule that any employees who failed to report to work within three days after a recall notice would be considered a voluntary quit. Barragan denied that he knew anything about this rule. However he did admit that it was his signature on Respondent's working-conditions list, which included the rule in question. He denied ever having received a copy of the list. Lindley stated, that if an employee contacted him within the three-day period and requested an extension of time to report to work because of a valid reason, he would grant such extension.

In the instant case, Barragan contacted Lindley within the three days and requested an extension of time to report to work, e. g. December 4th or 5th. Lindley granted the request. However Barragan failed to report to work on either of these two days. Since according to Respondents own rules, Barragan was required to report to work on December 4th or 5th and failed to do so, Respondent was adhering to its general practice i.e. a legitimate business reason, when it considered him a voluntary quit from that date on. Barragan's later attempts to seek employment at Respondent's and the rejections of such attempts by Respondent cannot be considered in any way other than requests for reemployment since he had no longer any right to recall under Respondent's rules. There was no evidence to indicate that Barragan was treated any

differently than any other employee who has quit employment at Respondent's and soughtreemployment.

I find that General Counsel has failed to prove by a preponderance of the evidence that Respondent refused to rehire Javier Barragan because of his union activities and consequently I recommend that this allegation be dismissed.

VI. Alleged Loans to Employees to Influence ALRS Election Vote

A. Facts

Felipe Arce, a labor contractor, supplied Respondent with the bulk of its vineyard workers approximately 100 employees at a time from February 1978 through the end of the 1979 season (September). In December 1979, Respondent did not contract with Arce for any workers and started the season with only workers it directly hired.

In April 1980, Arce went to the ALRB and the UFW and informed them that during the UFW campaign in the first four months of 1979 he, at the request of W. L. "Butch" Lindley, lent sums of money ranging from $7 to $3,000 dollars to Respondent's employees with the understanding that they would not have to repay the loans if they voted against the UFW in the ALRB election in April. According to Arce, he continued to make loans in these amounts to Respondent's employees after the election because Lindley expressed his fear that if the loans ceased, the employees might initiate action to overturn the results of the election in which the UFW lost. Arce claimed that Lindley never repaid him the loans, which according to Arce

amounted to approximately $100,000,[19/] and then surreptiously, so Arce would not realize it, recruited Arce's employees to work directly for Respondent in the 1979-80 season. Then when the season began in December 1979 Respondent informed Arce that his services were no longer needed.

Respondent denies these allegations and claims that no agent or representative of Respondent ever mentioned anything to Arce about loans to employees to influence their vote, let alone authorize such loans. Respondent asserts that Arce made periodic loans in small amounts to employees for a few days and generally received his loans back by deducting the loan sums from the weekly paychecks of the employees.

In 1978, Respondent, which had been raising a limited amount of row crops, acquired 2300 acres of vineyards to administer With the additional work, Respondent required an immediate increase in experienced vineyard workers so it contracted Felipe Arce, a local labor contractor, to supply those needs.

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[19/] Arce did not mention this amount in his oral testimony but General Counsel introduced nine notebooks, which, Arce contended, contained accurate records of the loans. The total sum of the loans as recorded by Arce in the notebooks, comes to approximately $100,000.

During 1978, Arce supplied about 250 vineyard workers for Respondent, approximately 100 at a time. At the same time, Respondent employed a small number of vineyard workers directly. Respondent was satisfied with Felipe Arce's service's during the entire 1978 season and had no cause for complaint.

However, in 1979 Respondent began to experience a series of difficulties with Arce and the performance of his duties as a farm labor contractor. In late December 1978, the UFW filed a notice of intent to take access with the ALRB which in turn informed Respondent it had to provide the agency with a list of the names and current addresses of its employees. Since, under the Act, the employees of a labor contractor are considered employees of the grower, Respondent requested this information from Arce for the latter's employees who were then working at Respondent's. Arce was unable to supply this data so ALRB personnel, assisted by Respondent's supervisors, reviewed Arce's records and found that he not only did not have this information but also had no social security numbers and had been filling the 100 vineyard positions at Respondent's with the rotation of 250 employees throughout the 1978 season.[20/] Arce expressed to Philip Johnson his resentment of the ALRB agents going through his records and the latter told him to "cool it".

In January 1979, UFW organizers began to periodically visit Respondent's employees in the fields and soon afterwards

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[20/] Respondent did not favor this system becase the constant rotation made it difficult to always have experienced employees working in its vineyards.

Respondent was served with unfair labor practice charges alleging that Arce and his foremen had illegally interfered with, coerced, and restrained Respondent's employees in the exercise of their rights to join a union or participate in union activities. Respondent settled these charges with the ALRB and as part of the settlement agreement paid 34,000 dollars[21/] in back-pay to the alleged discriminatees, reinstated them and agreed to permit expanded access to the UFW.

Respondent queried Arce about these charges bur the latter categorically denied their validity. Respondent did not possess evidence that Arce was guilty of the charges but suspected there must be some truth to them. Furthermore the partners realized that Arce was an emotional individual with strong feelings[22/] against the UFW. Consequently, Respondent considered it advisable to minimize his contact with the workers, so in January Respondent placed its own supervisors in charge of Arce's contract workers and thus eliminated the main reason Arce had to visit the fields.

Also in January, Respondent learned that since the first of the year Arce had failed to pay to the appropriate federal and state agencies the money he had deducted from his employees' wages for social security, unemployment insurance and workmen's compensation. The partners conversed with Arce about this and they all agreed that until Arce straightened this problem out with the agencies Respondent would retain the amounts which

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[21/] Arce promised Respondent to pay one-half of any settlement agreement it would have to pay but never fulfilled his promise.

[22/] The pro-UFW employees in the crews had begun to shout insults to Arce every time he would approach them in the fields.

corresponded to the deductions and Arce's commissions in a separate bank-trust-fund account. The agreement was carried out from March 9, 1979 to April 23, 1979. On the latter date Respondent paid the amounts, which had accumulated in the trust fund accounts, directly to the agencies and the commissions to Arce and the account was closed.

The day before the election, Arce's residence was destroyed by fire and he suspected the UFW had something to do with it.

On April 10, the ALRB election was held which the UFW lost. After the election, Lindley and Johnson conferred and decided that Respondent would no longer engage Arce but did not immediately inform him of their definite decision. The partners informed him that they had not made any firm decision yet in regard to his future with the company. During the months of April, May, June, July and August, Arce visited Johnson's office on a regular basis and talked to the latter about his prospects with Respondent. On those occasions Johnson told him that he and Lindley would sooner or later make their final decision. In August, Respondent notified Arce that they would not be needing his services for the 1980 season[23]/ and advised the Arce employees that those who wanted to work for Respondent in the 1979-80 season

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[22]/ krce testified that Respondent failed to inform him of their decision until December 1979, the beginning of the 1979-80 season. However the testimony of Lindley and Johnson, that they told him at the end of the season in September, was corroborated by General Counsel's witness Elisa Lopez who testified that Lindley told the employees about filing job applications directly with Respondent in full earshot of Arce, who was standing nearby.

should file a job application directly with Respondent because Respondent's arrangement with Arce had terminated. Arce accepted the decision of the partners and informed Respondent that he understood it was just a business decision on their part.

Felipe Arce took no action with respect to Respondent: until March 1980 when he went to Jim Gonzalez, an attorney in private practice, and told him that Respondent directed him to make loans to his employees who were working for Respondent in return for a no-union vote, and that Respondent had not kept its promise to reimburse him for such loans. Arce asked Gonzalez whether he could bring a civil suit or an ALRB action against Respondent. Gonzalez advised him that he could bring a civil suit but would have to pay him attorney fees. Arce testified that he could not afford the fees so he went to the ALR3 in April 1980 to seek redress. Lupe Martinez, Regional Director, testified that Arce came to him, related to him his version of the loan-bribe program and Martinez told him that the ALRB could not provide a person in his situation with a remedy. However, Martinez came to the conclusion that the facts as related by Arce could form a basis of an unfair labor practice charge so he contacted the UFW, which contacted Arce and later, based on Arce's statements to them, filed a charge with the ALRB in May 1980.

In his testimony Felipe Arce claimed that the following events took place at Respondent's in 1979.

In January 1979, after the UFW organizers began to visit Respondent's employees in the fields, Arce began to receive notes on his automobile windshield threatening him with death.

He confided to Lindley that he was afraid and would prefer to leave. Lindley told him not to be afraid and to do everything he could to prevent the UFW from organizing the employees. Later, employees began to ask for loans from Arce and he reported this fact to Lindley. The latter told him to make the loans to the employees and to tell them that they need not make repayment if they voted against the UFW. Lindley assured Arce that he would be reimbursed and have work forever with Respondent. Arce made it known to all non-UFW employees that loans were available to them and no repayment would be expected if they voted against the Union.

Arce said he began to make loans to his employees in sums ranging from $7.00 to $3,000. He brought nine notebooks to the hearing (introduced into evidence) and he indicated that he wrote the amount of each loan on a page and then had the "borrower" sign under the notation of the amount. At times, he would make an additional loan to an employee and would write it in the notebook under the original amount but would not require the employee to sign again. Numerous pages with loan amounts and employee signatures had been crossed out with a large "X". Arce explained that it did not signify that the loan had been paid but that the page had been used up and he could not write on it again. Arce testified that no employee ever repaid any of the loans. He explained that the source of the money that he lent was his commissions and the deductions that he failed to pay to the state and federal agencies. Arce informed Lindley about the fact that he was not submitting these payments for social security etc., and Lindley assured him it was no

problem. Nevertheless Lindley failed to keep either of his two promises to Arce, i.e. to reimburse him for the loans or to hire him forever.

Arce thought that when the 1979-30 season began in December 1979 that he would return once again as a labor contractor and continue to supply Respondent with all of is vineyard workers with the exception of a small group of vineyard employees customarily employed directly by Respondent. At that time, Lindley was supposed to begin to reimburse him for the loans he had made to the employees at Lindley's request In December, Respondent informed him that it would no longer require his services and no mention was made about loan reimbursements. He then realized that Lindley had betrayed him and had abandoned him to his own devices after the many sacrifices he had rendered Respondent. He was exceedingly bitter about the whole affair and attributed his present dire financial straits to treachery on the part of Respondent.

Arce's version of the facts above-described was corroborated in part by three of Respondent's employees.

Rafael Durate, Jose Luis Rucio, and Manuel Urquides all testified that Arce made loans to them in 1979 and told them that if they voted against the UFW, they would not have to pay back the loans. They stated that they voted against the UFW because then they would not have to pay back the loans

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[24/] Duarte is the brother of Calixtro Duarte, one of Arce' s foreman and Jose Luis Rucio is his half-brother.

to Arce. In addition, Duarte and Rucio testified they overheard conversations in which Lindley told Arce he should make the loans to influence the workers against the UFW and that he, Arce, would be reimbursed.

Duarte testified that in March 1979 he overheard Lindley, Caiixtro Duarte and Arce talking about the ALRE election and that Lindley told Arce to proceed to make the loans to the employees so that they would vote against the UFW and later Lindley would compensate Arce.

Rucio testified that he overheard Lindley and Arce conversing and Arce informed Lindley that the employees wanted more loans, more money and Lindley replied "go ahead and give them the money."

Arce's nine notebooks constitute crucial evidence to determine the veracity of Arce's, Duarte's, Rucio's and Urquides' testimony. A careful examination of the notebooks reveals that numerous sums have been altered to higher amounts and also higher amounts have been written in later over a signature that was signed for a loan of a smaller amount. A clear pattern emerges in reviewing the notebooks. A loan for a smaller amount, e.g. $10, $25, $50 or $100 has a signature below and has been crossed out. Almost every loan for a larger amount, e.g. $250, $500, $1,000 or $3020 has either been added over a signature for a smaller-amount loan or has been increased by adding ciphers to an original smaller amount, e.g. $7 has become $700 by adding two "0"s (this is evident because a different colored ink was used or a cipher is so shaped as to fit into a narrow space or the amount is written "one hundred" while the ciphers are "1,000" for the same loan) or if there is just

a large amount with a signature, then the signature is an obvious forgery since it differs markedly from the same person's signature for a smaller amount.

It is patently obvious from the foregoing analysis that Arce made loans for smaller amounts to his employees but he apparently received repayment by deducting the loan account from the employee's pay on the following payday.[24/] Evidently the large "X" marked across all the writing having do with each loan indicated that the loan had been repaid and accordingly Arce's explanation that the "X" was an indication to him that the page had been used up is false. It appears that Arce later falsified the notebooks by adding ciphers to original loan amounts, by writing in loans for larger amounts over signatures that correspond to actual loans for smaller amounts, and by recording loans for large amounts and then forging emplovees' signatures below.[26/]

[25/] This practice of Arce's, while at Respondent's, of making loans for small amounts and receiving repayment soon afterwards was substantiated by the credible testimony of six of Respondent's employees. Each one testified that while in Respondent's employ in 1979 he or she received loans in small amounts from Arce and repaid him by allowing him to deduct such amounts from their paychecks on the following pay day.

[26/] Further evidence of such falsification is the credible testimony of the same six J & L Farm employees who testified regarding the small payments and method of repayment. They stated that Arce had added ciphers in the notebooks to smaller amounts that they had borrowed and repaid, to make it appear he had made loans in large amounts to them which in reality he had never made. They also pointed out how he had entered sums for large amounts over their signatures for loans which were never made and also attested to outright forgeries of their signatures in the notebooks. Moreover the six employees testified that Arce never mentioned anything about voting for or against the UFW or anything about the election when he made the loans or at any other time.

The inescapable inference is that Arce never made any loans for any large amounts and that he was almost always repaid by employees for the loans he actually made. If he went to such great lengths to falsify his notebooks in respect to "unpaid loans" in the amount of approximately $100,000 to employees then it is highly probable that he prevaricated about the alleged scheme on the part of Respondent to have him make loans to employees to influence their vote in the ALRB election.

There is additional evidence that Arce has not told the truth in his testimony, and consequently I find his entire testimony not credible.

According to his testimony and his notebooks, he made loans to his employees totaling many thousands of dollars in March and April of 1979, that is during the six weeks leading

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up to the election on April 10, 1979, the most crucial period of time to make the loans for the purpose of influencing the results of an election. Arce claimed that the source of the loan funds was his own commissions and the deductions from the employees checks that he refrained from paying to the appropriate government agencies. However, from March 9 to April 23 he did not have access to these sources since Respondent was withholding the deduction money and his commissions and paying them into a bank trust-fund.[27/] Therefore there is no plausible explanation as to where Arce secured the funds to make loans during that period. The inference to be drawn is that he did not make the large-amount loans during this period, but only the small loans for which he received repayment in a matter of a few days by deducting the amount of the loans from the weekly pay of the recipients.

There is additional evidence that Arce, contrary to his testimony that he never made loans but merely distributed bribes, was in the habit of lending small amounts of money to his employees and then later deducting such amounts from their weekly pay checks. He testified that he kept notebooks' in 1978 when he was working for Respondent and then also in 1980, the year after he left Respondent's services, but he did not have them available for the hearing. According to his unsupported testimony, those records contained other information, especially signed

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[27/] Lindley and Johnson credibly testified to this fact and Arce himself admitted it on cross-examination by Respondent. Also, Respondent introduced documentary evidence to the same effect so that the evidence is uncontroverted.

receipts for money he paid out to employees, but no data regarding loans since he assertedly did not lend money to his employees. The reason given for the unavailability of those records was that the 1978 notebooks were destroyed in the fire' and he had somehow lost the 1980 notebooks. His explanation strains credulity since it appears to be too great a coincidence to believe that only the notebooks that survived the fire contained the data regarding the loans and the ones destroyed in the fire were the ones he assertedly used during a period in which he made no loans. Furthermore, he had no plausible explanation of why the 1980 records were not available other than that he had lost them. The inference is that he himself destroyed or declined to produce the 1978 and 1980 notebooks in response to General Counsel's subpoena duces tecum.

There is a strong inference that these notebooks contained information that would indicate that Arce was in the habit of making periodic loans to his employees and then repaying himself by deducting the amount of the loans from their pay checks a few days later. A perusal of these notebooks at the hearing would in all probability have shown that, the loans with the crosses were just a continuation of his custom of making loans to employees and keeping track of them by the system of signatures in the notebook and the crossing out to show payment and not part of the purported scheme to distribute bribes in large amounts to employees to influence their ALRB election vote. I infer that in order to make his presentation of the facts convincing it was in Arce's interest not to have his 1978 and 1980 notebooks available for inspection.

Another incongruous aspect of the loan scheme as described by Arce is the fact that his notebooks reveal records of loans in exceedingly large amounts through the months of May, June, July, August, September and October, a period of time extending to long after the election was over. His explanation that it was a tactic to keep the employees happy so they would not initiate steps to overturn the election is weak at best. There is even another incompatible facet of this whole project and that is the loans to non-voters such as foremen and workers who were not in Respondent's employ during the eligibility period.

General Counsel argues that the testimony of Urquides, Duarte and Rucio corroborates Arce's testimony that at Lindley's request Arce had made loans to employees to persuade them to vote against the UFW.

It is true that all three testified as to Arce's giving them money in return for their promise of a no-union vote and in addition, Duarte and Rucio testified they overheard Lindley tell Arce to make the loans for such a purpose and that he would reimburse him. However their testimony, is suspect for several reasons.

Duarte and Rucio both mentioned the existence of an obligation to repay the loans to Arce. Duarte testified that Arce had told him "You have to pay back" and "when I go back to work for the company, then you can pay me." Rucio testified that he told Arce, "I'll pay you later when we are working again," and that he borrowed $1,000 in October 1979 and was making payments on the balance and that he had not paid back all the loans he received.

This testimony contradicts Arce's assertions that every "loan" was made with the understanding that no repayment was necessary and that none of the "loans" had been paid back. Furthermore their testimony was self-contradictory[1], because they testified at times that the loans were to persuade an anti-union vote with no repayment expected and at times that some loans were paid back, in whole or in part.

General Counsel has failed to prove by a preponderance of the evidence that any loans were ever made to influence Respondent's employees in respect to their voting in the April 1979 election. In fact I find that no loans were ever made for any such purpose. Accordingly, I recommend that the allegation in this respect be dismissed.[28/]

VII. Should the Board Award Attorney Fees and Costs to Respondent?

Respondent in its answer, at the hearing, and also in its post-hearing brief has requested an award of attorney fees in respect to allegations based on Case No. 80-CE-42-SAL which deal with the alleged bribery of employees by Felipe Arce.

There is NLRA authority that holds that the NLRB has the authority to award attorney fees and costs in those cases where a party has engaged in frivolous litigation. Tildee Products Inc. and I.E.E. 194 NLRB 1234, 79 LRRM 1175 (1972).

The Board in Tenneco West, Inc., 7 ALRB No. 12 rejected the Administrative Law Officer's recommendation to

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[28/] One of Respondent's defenses against the allegation with respect to the loan-bribe scheme was that the section 1160.2 six-month period had run by the time the charge was filed in May of 1980. Since I have decided that General Counsel has failed to prove this allegation I do not have to pass on the applicability of section 1160.2 in this respect.

award attorney fees and costs to Respondent. The ALO based his recommendation on his finding that the Respondent had been forced to prepare a defense to a case that constituted frivolous prosecution. The Board found that the General Counsel's issuance of the complaint was based on his reasonable belief that the allegations therein were true, and that the conduct of the litigation by the General Counsel was not frivolous. The Board did not touch on the issue of whether it has authority to award attorney fees and litigation costs to a Respondent exonerated of unfair labor practices, a question that was left unresolved by the Board in S. L. Douglas, 3 ALRB No. 59.

In Heck's Inc., 191 NLRB 886, the NLRB provided a definition of what constitutes "frivolous" litigation.

> "As we understand the purport of the court's decisions in Quality Rubber and Levi Strauss, supra, as explicated and applied in its decisions in Ex-Cell-0, supra, it is not the court's view that because a defense is found to be without merit, it must necessarily be found to be "frivolous." As we understand the court's use of "frivolous" in this context, it refers to contentions which are clearly meritless on their face; the court did not, as we view its decisions intend to label as "frivolous" a defense, the merit of which in the last analysis rests, as here and in Quality Rubber and Levi Strauss, upon a Trial Examiner's resolutions of credibility."

Based on the definition of "frivolous" in Heck's Inc., supra, I find that the conduct of the litigation herein by the General Counsel in respect to the loan-bribery scheme allegation was not frivolous. The allegations of such a scheme was not meritless on their face. Felipe Arce's testimony concerning the bribery to obtain anti-UFW votes was supported by the testimony of the three witnesses, Duarte, Rucio and urquides. In respec- to their testimony, I had to make a resolution of credibility and I discredited them because of the internal inconsistencies

in their testimony. The additional evidence offered in support of Arce's testimony, the nine notebooks were relatively easy to discredit because of the obvious falsifications of amounts and signatures. However the falsifications were only obvious after a careful examination of the notebooks. A cursory analysis would not nave sufficed. Perhaps General Counsel's conduct in this sense can be characterized as negligent in depending inordinately on the notebooks for proof of the bribery allegations and not realizing they were convincing proof that the alleged bribery scheme was purely a product of Arce's imagination.[29/]

If the notebooks and Arce's testimony had been the sole evidence in the case then General Counsel's overall conduct of the litigation could have been reasonably labeled as frivolous. However, the testimony of the three additional witnesses gave sufficient credence to the alleged scheme so that General Counsel's conduct in prosecuting the case cannot be termed frivolous and his issuance of the complaint was based on his reasonable belief that the allegations were true. Accordingly, I recommend that no attorney fees or costs be awarded to Respondent.

[29/] On the other hand General Counsel, once he decided to proceed with the case regarding Arce and the alleged loan-bribe scheme, had no other alternative but to present the notebooks as evidence since not to do so would be a suppression of relevant evidence.

ORDER

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

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee for participating in protected concerted activities.

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

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

(a) Offer Julio Alcala and Lorenzo Berber full and immediate reinstatement to their former positions or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole Julio Alcala and Lorenzo Berber for any loss of pay and other economic losses they have suffered as a result of their discharge by Respondent, according to the formula stated in J & L Farms (August 12, 1980) 6 ALRB No. 43, plus interest thereon at the rate of seven percent per annum.

(c) Preserve and, upon request, make available to this 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 backpay and

reinstatement rights due under the terms of this Order.

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

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

(f) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive 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.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property, at 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.

(h) Notify the Regional Director in writing, within

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

DATED: July 30, 1981

ARIE SCHCORL
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEE

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging two of our employees because during a two week period between December 3, and December 17, 1979, one of them, Julio Alcala protested about working conditions. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farmworkers these rights:

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

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that, it was unlawful for us to discharge Julio Alcala and Lorenzo Berber on December 17, because Julio Alcala participated in a concerted protest about working conditions. WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate Julio Alcala and Lorenzo Berber to their former jobs or to comparable employment, without loss of seniority or other privileges, and we will reimburse them for any. pay or other money they lost because of their discharge from J & L Farms.

DATED: J & L FARMS

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farmworkers 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) 443-3145.

DO NOT REMOVE OR MUTILATE