San Clemente, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN CLEMENTS RANCH, LTD., Respondent, And UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-12-SD 80-CE-13-SD 80-CE-33-SD 80-CE-40-SD 80-CE-42-SD 80-CE-51-SD 80-CE-53-SD 80-CE-54-SD
	)	8 ALRB HO. 50

DECISION AND ORDER

On September 20, 1981, Administrative Law officer (ALO) Joel Gomberg issued the attached Decision in this proceeding. Thereafter, General Counsel and the United Farm Workers of America, AFL-CIO (UFW), Charging Party, each filed exceptions and a supporting brief.

Pursuant to the provisions of the California Labor Code, section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided

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[1/] All section references herein are to the California Labor Code unless otherwise stated.

to affirm his rulings, findings, and conclusions,[2/] as modified herein, and to adopt his recommended Order, with modifications.

Contrary to the ALO, we find that General Counsel established a prima facie case with regard to the discharge of Carlos Corona and we conclude that Respondent violated section 1153(c) and (a) by discharging him because of his union activity and support. Corona wore a UFW button during the corn harvest and foreman Raul Reyes acknowledged that he had seen Corona wearing a UFW button. The wearing of union pins or buttons is a legitimate form of union activity. (Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [65 S.Ct. 982]; Pay 'n Save Corp. (1980) 247 NLRB 1346 [103 LRRM 1334].) Two weeks before Corona's discharge, Reyes overheard Corona talking to some of his fellow workers about the UFW and Cesar Chavez. Corona said he thought Cesar Chavez was valiant. On hearing that statement, Reyes said, "You call any cabron[3/] valiant."

Respondent argues that it discharged Corona for cause, i.e., leaving too much corn behind in his furrows. During the morning of the day Corona was fired, August 10, 1980, Reyes gave him an oral warning about his work, and also prepared three written warning notices (at 9:00 a.m., 10:00 a.m., and 12:00 noon)

[2/] No exceptions were filed to the ALO's findings and conclusions that Respondent violated section 1153 (c) and (a) of the Act by refusing to grant a leave of absence to Enrique Corona and/or refusing to rehire him and/or by discharging Salvador Valdivia. As the record supports those findings and conclusions we hereby affirm them.

[3/] Cabron in Spanish has various connotations, all of then pejorative.

about Corona's work performance. The ALO found that Reyes did not show Corona any of the written notices or even tell him about them at any tine prior to his discharge. Reyes' failure to show Corona, and/or to tell him about, the written notices was contrary to Respondent's policies. We note that Thomas Brooks, Respondent's personnel administrator and field supervisor, did not ask Reyes whether he had shown the notices to Corona and did not ensure compliance with company personnel policies. Thus, Corona was not given an opportunity to improve his work performance if, in fact, he had been leaving too much corn in the furrows as Respondent claims.

Corona had worked for Respondent for over a year and, at the time of his discharge, had been cutting corn satisfactorily for six weeks, since the harvest began.[4/] We do not credit Reyes' testimony that Carlos Corona and another employee, Ricardo Rivera, were leaving too much corn behind in their furrows. The ALO's finding that the written notices were not shown to either Corona or. Rivera is contrary to Reyes' testimony. In addition, the ALO discredited Reyes' testimony with regard to Salvador Valdivia's discharge, based in part on Reyes' demeanor while testifying. Testimony of a witness found to be unreliable as to one issue may be disregarded as to other issues. (See Delco Air Conditioning Division, General Motors Corp. v. NLRB (1981) 649 F.2d 390 [107 LRRM 2833].) Accordingly, on the basis of the above facts, and the record as a whole, we find that Respondent's proffered

[4/] The corn harvest began on June 29, 1980.

business justification for Corona's discharge is pretextual. General Counsel established, by a preponderance of the evidence,[5/] that Corona was engaged in protected activity, that Respondent had knowledge of Corona's union activity and that there is a causal relationship between the protected activity and Corona's discharge. (Verde Produce Company (Sept. 10, 1S81) 7 ALRB NO. 27; Jackson and Perkins Rose Company (Mar. 19, 1979) 5 ALRB No. 20.) As Respondent's defense has not overcome the General Counsel's prima facie case, we conclude that Respondent violated section 1153 (c) and (a) by its discharge of Corona.

Another employee, Ricardo Rivera, was discharged the same day as, Carlos Corona for the same alleged reason, leaving too much corn behind in his furrows. On the day he was discharged, Reyes gave Rivera a verbal warning and prepared three written warning notices about Rivera's work performance, but did not show them to Rivera or tell him about them. It appears that the written warnings were prepared at the same time as Carlos Corona's. The record shows that Reyes treated Corona and Rivera in exactly the same way on the day they were discharged.

[5/] Respondent's actions during the two months preceding Carlos Corona's discharge is probative. Respondent discharged Salvador Valdivia on July 3, 1980, because of his union support or activity, refused to grant Enrique Corona a leave of absence en June 22, and refused to rehire Enrique Corona on and after July 25 because of his union support or activity. In addition, on or about July 15, 1380, Respondent informed the UFW that it was its position that it was not obligated to bargain with the UFW because of the decision of the Second District Court of Appeal, Division One, in San Clemente Ranch, Ltd, v. ALRB (1980) 107 Cal.App.3d 632 (that decision was later overturned by. the California Supreme Court (1981) at 29 Cal.3d 874). Respondent had been negotiating with the UFW prior to July 1980, but suspended negotiations in July 1980 when the corn harvest began.

The fact that Respondent treated Corona and Ricardo Rivera the same prior to discharging them, i.e., prepared three separate written warning notices for each of them, at the same time and for similar reasons, even though there is little or no evidence that Rivera had engaged in any union activity, does not establish that Corona's discharge was not for an unlawful and discriminatory reason. Disparate treatment is not the only factor which supports an inference of unlawful discrimination. (General Battery Corp. (1979) 241 NLRB 1166 [101 LRRM 1064].)

The ALO speculates that Respondent may have discharged Rivera to cover up the discriminatory discharge of Corona. The NLRB has held that an employer's discharge of an employee who is not engaged in union or other protected activity violates the Act when it is shown that the discharge is to cover up the unlawful discriminatory discharge of another employee. (See Jack August Enterprises, Inc. (1977) 232 NLRB 881 [97 LRRM 1560].) There is insufficient evidence in the instant record to establish that Respondent discharged Rivera to cover up its discriminatory discharge of Corona. There is also insufficient evidence to find that Rivera was discharged because of any known or suspected union membership or activity. Under the Act an employer may discharge an employee for any reason, or for no reason, so long as the discharge is not based on the employee's union activity or other protected concerted activity. (See National Wax Company (1980) 251 NLRB 1064 [105 LRRM 1371].)

We affirm the ALO's conclusion that the General Counsel did not establish a prima facie case that Respondent violated

section 1153(c) and (a) by discharging Ricardo Rivera, as there is little evidence that Rivera engaged in any union activity or that Respondent knew or believed that he had done so.

ORDER

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

1. Cease and desist from:

(a) Discharging, refusing to rehire, refusing to grant leaves of absence to, or otherwise discriminating against, any agricultural employee because of his or her membership in or activities on behalf of the United Farm Workers of America, AFL-CIO (UFW), or any other labor organization.

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

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

(a) Offer Salvador Valdivia, Enrique Corona, and Carlos Corona immediate reinstatement to their former positions, or substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment.

(b) Reimburse Salvador Valdivia, Enrique Corona, and Carlos Corona for all wage losses and other economic losses they have suffered as a result of Respondent's discrimination

against them, such losses to be computed in accordance with a formula established by Board precedent, plus interest computed at the rate of seven percent per annum.

(c) Preserve and, upon request, make available to the Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze and compute the amount of backpay and interest due under the provisions of this Order.

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

(e) Post copies of the attached Notice for 60 days at conspicuous locations on its premises, the period(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.

(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 June 1930 and the date of issuance of this Order.

(g) Arrange for a representative of Respondent or a Board agent to read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time, at such time(s) and place(s) as are specified by the Regional Director. Following the reading(s), the Board agent

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

(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 with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing as to what further steps it has taken in compliance with this Order.

Dated: July 21, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties were given an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to grant leaves of absence to, refusing to rehire, and discharging employees because of their support for the United Farm Workers of America, AFL-CIO (UFW). The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

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

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

Because this is true, we promise that:

WE WILL NOT discharge, deny leaves of absence to, refuse to rehire, or otherwise discriminate against any employee because he or she has joined or supported the UFW, or any other labor organization, or has exercised any other rights described above.

WE WILL reinstate Salvador Valdivia, Enrique Corona, and Carlos Corona to their former jobs, or substantially equivalent jobs, and reimburse them for all losses of pay and other economic losses they have sustained as a result of our discriminatory acts, plus seven percent interest per annum.

Dated: SAN CLEMENTE RANCH, LTD.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1350 Front Street, Room 2062, San Diego, CA 92101. The telephone number is 714/237-7119.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

San Clentente Ranch, Ltd.

8 ALRB No. 50
Case Nos. 79-CE-12-SD, et al.

ALO DECISION

Respondent violated Labor Code section 1153(c) and (a) by refusing to grant a leave of absence to Enrique Corona and, later, by refusing to rehire him because of his union activity and support; and by discharging Salvador Valdivia because of his union support and activity.

The ALO recommended dismissal of the allegations in the complaint that Respondent discriminatorily discharged employees Luiz Vasque Nunez, Miguel Melendez, Fernando Castellanos, Carlos Corona, and Ricardo Rivera. The ALO found that Luiz Nunez voluntarily quit after being properly denied a leave of absence and was denied rehire first because there were no jobs available when he reapplied, and later because of his belligerent behavior; that Respondent properly considered Miguel Melendez to have voluntarily quit his job after he missed three consecutive days of work; that the General Counsel failed to prove a prima facie case as to the discharges of employees Fernando Castellanos, Carlos Corona, and Ricardo Rivera. The ALO held that even if a prima facie case had been established as to Corona and Rivera, Respondent established that they were fired for cause, i.e., their poor work performance, rather than for protected activities, and that the General Counsel failed to meet his burden of proof that Respondent discriminatorily implemented a speed-up in the corn harvest in 1980.

BOARD DECISION

As no exceptions were taken to the ALO's findings and conclusions as to Enrique Corona, Salvador Valdivia, and Fernando Castellano, the Board affirmed those findings and conclusions; the Board also affirmed the ALO's findings and conclusions as to Luiz Nunez, Miguel Melendez, Ricardo Rivera, and the alleged speed-up in the 1980 corn harvest.

Contrary to the ALO, the Board held that the General Counsel had proved a prima facie case as to Carlos Corona and concluded that Respondent discharged him because of his union activity, finding that Respondent's proffered justification, that Corona was discharged for unsatisfactory work, was pretextual. The Board noted that even though Corona and Rivera were similarly treated the day they were both discharged, disparate treatment is not the only factor which supports an inference of unlawful discrimination. As the Board found Corona (unlike Rivera) had engaged in union activity, that Respondent had knowledge thereof, and that there was adequate causal connection, it concluded that Corona's discharge violated section 1153(c) and (a).

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

SAN CLEMENTE RANCH, LTD. Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	)	Case Nos. 79-CE-12-SD 80-CE-13-SD 80-CE-33-SD 80-CE-40-SD 80-CE-42-SD 80-CE-51-SD 80-CE-53-SD 80-CE-54-SD

APPEARANCES:

Pedro Nunez of El Centro,
for the General Counsel

Lewis P. Janowsky and Daniel Haley,
Dressier, Stoll, Quesenbery,
Laws & Barsamian, of Newport Beach,
for Respondent

DECISION

STATEMENT OF THE CASE

Joel Gomberg, Administrative Law Officer: This case was heard by me in San Clemente, California, on April 15, 21, 22, 23, 27, and 28, 1981. Eight unfair labor practice charges filed by the United Farm Workers of America, AFL-CIO (hereafter the 1 "Union" or "UFW") form the basis for the original complaint , which was issued by the Regional Director on December 3, 1980.

One additional charge was added by the Regional Director on April 17, 1981, just after the pre-hearing conference. A Second Amended Consolidated Complaint was issued, incorporating the recently consolidated case.[1/] The Complaint alleges that San Clemente Ranch, Ltd. (hereafter "Respondent" or "the Company") committed certain unfair labor practices in violation of §§1153(a) and (c) of the Agricultural Labor Relations Act (hereafter "the Act"). Each of the charges was duly served on Respondent, which filed a timely answer to the Complaint.

On the first day of the hearing, prior to the taking of any evidence, I granted General Counsel's motion to dismiss case 80-CE-33-SD for insufficient evidence. Paragraph 15(c) of the Complaint, which is based upon the dismissed charge, was also dismissed.

All parties were given a full opportunity to participate in the hearing. The UFW appeared informally at the pre-hearing conference, but chose not to intervene in the proceeding. The General Counsel and Respondent filed post-hearing briefs pursuant to Section 20278 of the Board's Regulations.

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

FINDINGS OF FACT

I. Jurisdiction.

The essential jurisdictional facts are undisputed. Respondent has admitted that it is an agricultural employer within the meaning of §1140.4 (c) of the Act, and that the UFW is a labor

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1/I shall refer to this document as "the Complaint."

organization within the meaning of §1140.4 (f) of the Act.

The Alleged Unfair Labor Practices.

The Complaint alleges that Respondent has committed eight unfair labor practices. Seven of the issues involve allegations that the Company either discharged or refused to rehire agricultural employees because of their Union support or because they engaged in protected concerted activities. The remaining charge alleges that Respondent instituted a speed-up in one of its corn harvesting crews in retaliation for the Union or other concerted activities engaged in by its members. Respondent denies that it violated the Act.

A. Background.

Respondent grows a variety of vegetables, including corn, tomatoes, and celery, at locations in San Clemente and Oceanside. The Company is a limited partnership, whose general partner is Deardorff-Jackson, a California corporation headquartered in Oxnard. Ranch operations are run by a General Manager, Tom Tanaka. Tanaka has delegated most personnel matters to Thomas Brooks, the Company's personnel administrator. Brooks worked for Deardorff-Jackson before going onto the San Clemente payroll in 1979. His involvement with personnel matters at San Clemente began in mid-1978.

Deardorff-Jackson purchased the land on which Respondent operates from Highland Ranch, Ltd., in November, 1977. In Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54, the Board found that Highland had committed a number of unfair labor practices in 1977, when a representation election was

won by the UFW.[2/] A number of the former supervisors of Highland, who were involved in the 1977 unfair labor practices, became supervisors for San Clemente after the change in ownership. They include Tanaka, Raul Reyes, Isaac Rodriguez, Telesforo Hernandez, and Antonio Bedolla. Foremen, such as Reyes, must consult with Brooks or Rodriguez before discharging employees,

Brooks testified that it was the Company's practice to issue at least two oral and two written warnings to an employee before discharging him for bad work. The third written notice would result in discharge. The purpose of the warning system is to give employees an opportunity to improve their work. The Union activities of the alleged discriminatees were limited to the wearing of UFW buttons. Fermin Galvan, an acknowledged Union activist who was discriminatorily discharged by Highland in 1977, and later reinstated, testified that he distributed UFW buttons to many employees. Brooks stated that he had seen employees wearing UFW buttons in all areas of the Company's operations.

B. Luis Vasquez Nunez.

Nunez was employed by the Company as a general field laborer. In November, 1978, he requested a leave of absence to attend to some unspecified matters in Mexico. He first spoke to his foreman, Antonio Bedolla, about the leave. Bedolla testified that he discussed Nunez's request with Tom Brooks. Brooks denied the request. Bedolla, whose testimony was unusually vague, was

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2/The Board also found that San Clemente was the successor to Highland's collective bargaining obligations. An appeal from that decision is pending before the California Supreme Court.

unable to state whether Brooks had given any reason for refusing to grant the leave of absence. Bedolla gave Nunez a copy of a Company leave notice, which both he and Nunez had signed. The notice indicates that Nunez was leaving work to go to Mexico because of an emergency. The form does not indicate when Nunez was to return. The leave notice has a number of boxes to indicate the status of the leave request. The one given to Nunez is not checked "granted" or "denied." It does have a check in the box marked "other." No witness explained why this box was checked. Nunez spoke directly to Brooks about his request before leaving for Mexico. According to Nunez, Brooks first offered him a one-week leave. Nunez replied that a week was insufficient. Brooks wanted to know when Nunez would return. Nunez told Brooks that he would return as soon as he had straightened out some matters, but that he could not give a definite return date. Apparently, Nunez never explained, and Brooks never inquired about, the specific nature of his emergency. Brooks testified that he told Nunez he could have a leave of 60 days and that he pleaded with Nunez to provide him with a return date. According to Brooks, leaves are never granted without a definite return date. Brooks claims that he explained to Nunez that if he left without his leave request being granted he would lose his seniority and would be treated like any other applicant if he returned to the Company seeking work. While the Company leave policy provides that leaves in excess of 60 days may be granted if an extension is agreed upon in advance, Brooks stated that he never granted any leave for a period longer than 60 days. Nunez testified that he left the meeting believing that his leave request had

been granted. Although Brooks had requested a return date, Nunez believed that he would get his job back whenever he returned. Brooks emphatically denied ever granting the leave request.

Nunez returned from Mexico in late February, 1979, nearly three months after his departure. He went to see Brooks to ask for work, and was accompanied by Fermin Galvan, a Company employee who was well known as a Union supporter and spokesman. Brooks told Nunez that he would be considered for work along with other new applicants, but that he was not hiring general field laborers at the present time. According to Brooks, Nunez expressed disbelief about this explanation. In his testimony, Nunez admitted that he believed that Brooks had no intention of giving him work. On February 28, Brooks wrote a letter stating that Nunez had voluntarily quit his job in November, 1978, and that his application for work would be considered in relation to other employees who had been laid off. Brooks testified that he gave the letter to Nunez and explained that employees on layoff would be recalled before his application would be considered.

In support of its contention that it was not hiring general field laborers in early 1979, Respondent introduced into evidence the employment applications of two persons, dated March 5, and 6, 1979. The applicants received offers of employment on June 21, 1979. Brooks testified that the Company made job offers to applicants based on their apolication dates.

Nunez asked Brooks for work several more times. The conversations were much the same in tone and content. In April or May, Brooks spoke to Nunez on the telephone. Nunez may have asked about a bonus payment as well as his job status. According

to Brooks, Nunez became belligerent and nasty when Brooks explained that work was still not available. Nunez slammed down the phone. Nunez testified that he only asked about his bonus when he spoke to Brooks on the phone. He stated that the last time he asked for work was at the ranch. He admitted that he became angry with Brooks, because it was clear to him that Brooks did not have it in his heart to give him work. I find that Nunez did speak to Brooks about his application for work during their telephone conversation. It seems unlikely that Nunez would have failed to mention this subject whenever he spoke to Brooks.

Brooks testified that he decided not to consider Nunez for a job because of his belligerent behavior. He stated that he did not want an abusive, disbelieving employee. Nunez never asked about work after May, 1979, and the Company never offered him a job.[3/]

Nunez did not testify about any Union activities he may have engaged in while an employee of the Company. The only evidence concerning his Union support came from Brooks, who testified that he believed that Nunez was wearing a UFW button when he requested the leave of absence.

C. Miguel Melendez.

On January 8, 1980, Melendez asked his foreman, Paul Reyes, for permission to take the rest of the day off in order to go to Los Angeles to consult with an immigration attorney helping him to get visas for some of his children. Reyes granted the

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3/Nunez filed the unfair labor practice charge, in this matter on March 22, 1979. There is no allegation that the Company refused to hire him in retaliation for the filing of the charge and no evidence was offered concerning any effect the charge may have had on the Company's decision not to offer work to Nunez.

request. Melendez's crew did not work the following day, because of rain.

Taking care of the immigration matters took longer than Melendez expected. He testified that he asked his daughter, Maria Melendez, to telephone the Company on January 10, and explain that he would not be able to return to work until he had finished getting all the necessary papers for the immigration case. Melendez testified that his daughter told him that she had spoken to Brooks twice, once about his absence from work, and the other time to ask for her father's earnings records. Maria's testimony differed substantially from her father's. She testified that she called the Company on January 9, to ask for W-2 forms. She spoke in English to a man who said that he would try to get the forms for her. She did not mention her father's absence from work, because he had not asked her to. The following day she called the Company and asked to speak to the foreman. The secretary said that the foreman was busy, but that she would leave Maria's message that her father would not return to work until all the immigration papers had been filed. Brooks testified that he received no telephone messages concerning Melendez, but that his secretary did leave messages for him when he was out of the office, as he frequently was.

Melendez's crew worked on January 10, 13, and 14. Reyes made out a worker notice for Melendez on the 14th, noting three consecutive days of unexcused absences. Company policy treats three such absences as a voluntary quit, although the policy is not always strictly followed.

On January 14, Melendez came to the Company office

at about 4:30 p.m., to pick up his earnings records. Brooks angrily asked him why he had not come to work and had not called. Melendez explained his absence and told Brooks that he did call. Brooks asked if he did not have a dime to call. Melendez repeated that he had called. Brooks then told Melendez he no longer had a job. Melendez had worked for the Company since its inception.

The Company's records disclose that Reyes filed a worker notice for two other employees, Fermin Curiel and Ignacio Zepeda, who had also missed work on January 10, 13, and 14. They were also discharged. Neither party sought to introduce the Company's telephone logs to support or rebut Brooks's testimony that he received no telephone messages from Melendez.

Melendez did not testify about his Union activities while an employee of the Company. Galvan testified that he had given a UFW button to Melendez, which Melendez always wore to work. Telesforo Kernandez, a Company foreman, also testified that he had seen Melendez wearing a UFW button.

D. Fernando Castellanos.

The Company began growing celery for the first time in 1980. A number of the employees who became celery workers were recruited by the crew foreman, Jorge Zamudio, from among the Company's packing shed employees. Zamudio told the employees that they would be working on a piece rate basis in the celery and that any employee who was unable to do the celery work would be able to return to the shed, where employees were paid, by the hour. Castellanos, one of the shed workers, warned some of the employees that the offer of celery work was a trick to get them

out of the shed. There is no evidence that any supervisor was aware that Castellanos had made this statement.

Castellanos worked in the 16-member celery crew as a packer. He packed celery in the field on a cart. The crew had two packing carts, with three packers on each. The daily earnings of the crew were divided equally among the employees.

On April 1, 1980, Zamudio ordered Castellanos to pick up some packing papers that had scattered over the field, because the container in which they were kept had not been properly closed the previous day. Castellanos refused the order, believing that he was not responsible for the scattered papers, and an argument ensued between him and Zamudio. Eventually, two other employees picked up the papers. One of the other two employees who worked on the cart with Castellanos was absent from work. Castellanos testified that he asked Zamudio to bring in a replacement, because it was impossible for the remaining two employees to do the work by themselves. Zamudio testified that he could not remember Castellanos asking for a replacement. Castellanos said that he worked for about an hour, but refused to continue when Zamudio failed to secure a replacement. Zamudio filled out a Company "worker notice" indicating that Castellanos had refused to accept a work assignment. He told Castellanos to get into his truck to go to the office. Castellanos told Zamudio, in the presence of the crew, that he was not afraid of being fired.

Zamudio took Castellanos to the office to speak to Brooks. He testified that he had not yet fired Castellanos and thought that the matter might be resolved. Most of the discussion

between Brooks and Zamudio occurred after Zamudio left the office. Castellanos explained that he did not want to work without a replacement. Brooks told him that he would earn more money without a replacement, because the crew's earnings would be divided among 15, rather than 16, employees. Castellanos said that he would not earn more, but would have to do the work of two people. Brooks testified that he told Castellanos that replacements were not being brought because it was the consensus of the crew not to make temporary replacements. Zamudio and Brooks both testified that the workers had asked that replacements not be brought in when a worker was absent, because inexperienced workers slowed down the crew and the crew was obligated to share its earnings with the replacements. Castellanos denied that there had ever been such a decision by the crew and claimed that replacements had always been brought in. Zamudio and Brooks stated that replacements had sometimes been provided, but not since the crew had decided not to have them. The celery crew payroll sheets for the week preceding April 1 disclose that only 14 employees worked on March 23, and only 15 worked on March 24, The absent employee on the 24th was Castellanos. Brooks testified that any replacement from another crew would appear on the celery crew payroll sheet because it was paid on a piece rate basis.

When Brooks refused his request to have a replacement brought in, Castellanos asked to be transferred back to the shed. Brooks denied the request on the grounds that Castellanos was not unable to do the celery work. He was simply unwilling to do the work, and was not entitled to return to the shed. Brooks testified that Castellanos left the office without waiting for

his check or a discharge notice.[4/] Castellanos asked to be returned to his job several days later, but Brooks told him that he had been replaced.

Castellanos did not testify about any Union activities that he may have engaged in while employed by the Company. Tom Tanaka, the Company's General Manager, testified that he had probably seen Castellanos wearing a UFW button while working in the shed. Zamudio stated that no member of the celery crew wore Union buttons. Brooks denied seeing Castellanos wearing a button.

E. Enrique Corona.

In June, 1980, Corona received word that his mother was sick. He testified that he told Brooks that it might be necessary for him to go to Mexico to be with her. Brooks stated that Corona first came to him to ask for a vacation. He explained that he could not allow employees to take vacations during the peak work season. Only an emergency would be a basis for granting a leave. Corona denied ever asking for a vacation. A few days later Corona was told that he would have to come to Mexico. He purchased airplane tickets with a return date of July 25, 1980, and went to ask permission from Brooks for an emergency leave. Fermin Galvan accompanied him. According to Brooks, he denied the leave because Corona refused to give him a return

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4/In his brief, the General Counsel attempts to impeach the testimony of Brooks and Zamudio because of their disagreement concerning whether the notice given to Castellanos was a discharge notice or a worker notice. The Company's "worker notice" form is used for a variety of purposes. In this case, the "discharge" box was not marked on the form given to Castellanos. If, it had been marked, it would have been a "discharge" notice. The testimony of the Company witnesses was generally consistent: Zamudio had intended to fire Castellanos, but left the final decision up to Brooks.

date. He admitted that Corona showed him his airplane tickets, but stated that Corona could not guarantee when he would return. Corona and Galvan testified that Corona said that he would return on July 25, but that Brooks continued to deny the leave. Corona asked if he would get a job when he came back. Brooks then told Corona to bring a medical certificate with him when he returned. It was Corona's belief that Brooks was granting the leave when he asked for medical proof. Galvan corroborated Corona's testimony, but left the meeting believing that Brooks had denied the leave. Brooks testified that he denied the leave solely because Corona would not guarantee his return on a definite date and stated that he did not ask Corona to bring a medical certificate from his mother's doctor, because he never doubted Corona's reasons for wanting the leave.

Corona returned from Mexico on July 25, with a certificate from the doctor. He took the certificate to Brooks, who read it and told Corona that: "For you, there is never going to be work." Brooks denied seeing or reading the doctor's statement. He did not recall telling Corona that there would never be work for him. He claimed that he believed that he was not hiring when Corona returned and that Corona was never rehired because he did not ask to be. Brooks conceded that the Company's peak season was in the months of July, August, and September. The Company did not offer any application forms as evidence on this issue.
Corona, Brooks, Tanaka, and Telesforo. Hernandez all
testified that Corona wore UFW buttons at work.
While on its face the controversy with respect to
Corona's leave appears to be quite similar to the one over Nurez's

request, I credit Corona's testimony over Brooks's. I must assume that Brooks, as he testified, denied Corona's leave for reasons unrelated to the genuineness of Corona's emergency, even though Brooks expressed skepticism about Corona's emergency coming' quickly after he supposedly had asked for a vacation. I simply cannot believe that Corona showed Brooks his return airplane ticket and then refused to say that he would return on the date indicated. Brooks may have been testing Corona when he said that the leave would be denied. Once it became clear to Brooks that Corona was serious about leaving, he asked Corona to bring a medical certificate. Corona was adamant in his testimony that Brooks read the medical certificate in the presence of his secretary. The Company did not call the secretary to rebut this testimony. Finally, Brooks was utterly unconvincing in his attempt to explain why Corona was not rehired on his return from Mexico. He came back at a time when the Company was certainly hiring employees, whether or not there was a vacancy on the day Corona appeared at the office. There is no indication that Corona was not a good worker. Even accepting Brooks's testimony at face value, Corona had done nothing more than voluntarily quit his job to visit his sick mother. I found Corona to be a strong, clear witness whose version of his attempt to obtain a leave of absence was more consistent and credible than Brooks's.

F. Salvador Valdivia.

Valdivia began working in Raul Reyes's corn cutting crew on June 29, 1980, the first day of the corn harvest. The record does not disclose how long Valdivia had worked for the Company prior to the harvest.

On the first day of the harvest, the crew picked corn by hand. Several employees, including Antonio Segredo, an, acknowledged Union spokesman, asked Reyes to provide the crew' with knives, because the corn was too green to pick well by hand. Reyes agreed that the corn was green, but stated that this was a reason not to use knives. In any event, knives were provided to the crew sometime the following day. Valdivia testified that his: right wrist began to hurt early in the afternoon, as a result of picking the corn by hand. Valdivia did not mention the pain in his wrist to Reyes. Reyes testified that he gave Valdivia two warnings that day, one verbal and one written, because he was picking slowly and causing the tractor to slow down. Valdivia denied receiving any warnings or even speaking to Reyes on the first day of picking.

On the second day of the harvest, Valdivia's wrist remained sore. He testified that he wore a handkerchief on it. Valdivia claimed that he asked Reyes for a medical insurance claim form. He wanted the form to enable him to seek treatment for his wrist. According to Valdivia, Reyes replied that he did not have any forms and did not wait for him to explain that his wrist was hurt. Reyes denied that Valdivia asked him for a medical form. He testified that he did not notice the handkerchief on Valdivia's wrist and was unaware of the injury. Segredo testified that Valdivia received an oral warning from Reyes on the second; day of the harvest for slowing down the tractor. Neither Reyes nor Valdivia testified that there had been an oral warning on this day. Segredo also testified that he told Reyes that j Valdivia's wrist was hurt. Reyes denied that Segredo spoke to

him.

On the third day of the harvest, which apparently was July 2, Valdivia received a verbal warning from Reyes. Valdivia asked Reyes to look at his arm to see why he was having trouble. Reyes replied that Valdivia had to work up to par. Valdivia then complained that Reyes was making the crew work too fast. Reyes denied that Valdivia ever mentioned the pain in his wrist before he was fired. He testified that he gave Valdivia a written warning on July 2, but Valdivia refused to sign it. Valdivia denied receiving any written warnings from Reyes.

On July 3, Reyes testified that he gave Valdivia three written warnings, which Valdivia refused to sign, at intervals of several hours. Each warning concerned Valdivia working too slowly and falling behind the trailer into which the cut corn was thrown. Valdivia conceded that his injured wrist caused him to fall behind the other employees, but denied receiving any written warnings from Reyes. At the end of the work day, Reyes informed Valdivia that he was fired. The discharge notice states that the cause was Valdivia's incompetence.

Before discharging Valdivia, Reyes had discussed the matter with his supervisor, Isaac Rodriguez, and with Tanaka. Tanaka testified that Reyes told him Valdivia was not cutting as he had before.

Rodriguez handed Valdivia the discharge notice and 251 his final check. Valdivia claimed that Rodriguez gave him a number of papers stapled together, which included all of the written warnings and a medical form, as well as the discharge notice and check. Rodriguez testified that he thanked Valdivia

for his services, handed him the papers, and walked away. He stated that he had no conversation with Valdivia or other members ' of the crew and left before Reyes did. Reyes's testimony conflicts sharply with Rodriguez's. Reyes stated that he gave the discharge notice to Valdivia and asked him to sign it. Valdivia replied that he would not sign anything. He testified that Valdivia told Rodriguez that he had an injured wrist and that he had asked Reyes for medical forms. Reyes stated that he did not inspect Valdivia's wrist during this conversation because he had already been fired and it was time for him (Reyes) to go home. Reyes said that he left quickly and did not hear any further conversation between Rodriguez and Valdivia or other members of the crew.

Valdivia's version of the events surrounding his discharge differs from the accounts of his supervisors. He testified that after Rodriguez gave him the discharge and other papers, Galvan pointed out his wrist to Rodriguez. Reyes then walked away, laughing sarcastically. Valdivia said that he let Galvan and Segredo speak for him.

Segredo testified that Rodriguez gave him some medical forms, which he had requested, at the same time that Valdivia received his. Segredo told Rodriguez that Valdivia had been hurt and should not be discharged. Rodriguez then asked Reyes if he knew about Valdivia's injury. Reyes replied that Valdivia had been fired for falling behind. Segredo acknowledged that Valdivia had not kept up with the rest of the crew and had had more problems each day. He said that the tractor pulling the trailer was moving too fast for new workers like Valdivia to keep the pace.

Valdivia went to the emergency room of a nearby hospital several hours after his discharge. He was directed to take aspirin and rest. On July 12, Valdivia was seen by his family physician, who diagnosed his condition as acute tendonitis. The doctor stated that Valdivia would be able to return to work by July 21.

It would be nearly impossible to resolve every contradiction in the testimony of the witnesses concerning Valdivia's work in the corn crew. I will limit my credibility resolutions to three major issues: whether Valdivia' s work was unsatisfactory, whether his wrist was injured, and whether Reyes was aware of the injury. As to the first issue, there is no real dispute. Valdivia admitted that he was unable to keep up with the rest of the crew because of his injury. Respondent claims that the warning issued to Valdivia by Reyes on the first day of the harvest demonstrates that his inability to keep up preceded his injury. Because Valdivia did not receive another warning until several days later, I do not find that the first warning, assuming that it was issued, was significant. Valdivia was new to the corn harvest and might be expected to have more difficulty at first than experienced workers. With respect to the second issue, Respondent does not really dispute that Valdivia had an injured wrist. The Company does question whether the injury was work related, but I credit Valdivia's testimony that his wrist did not begin to bother him until he began picking the corn by hand.

Respondent insists that Reyes was unaware of

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Valdivia's injury until after he had decided to fire him.[5/] I credit the testimony of the General Counsel's witnesses over that of Respondent's, primarily because of the conflict between Rodriguez and Reyes, and as a result of observing Reyes's demeanor while testifying. While Rodriguez denied having any conversation concerning Valdivia's injury, Reyes admitted that Valdivia and Galvan spoke to Rodriguez about it. Reyes disclaimed any interest in the revelation of the injury because Valdivia had already been , fired and it was his quitting time. Throughout his testimony, Reyes did little to conceal his contemptuous attitude toward the proceeding. He appeared to be alternately bored and suspicious. At times, he began to answer questions in Spanish before the interpreter had finished his translation of the question. Many witnesses who understand some English have a tendency to do this. I reminded Reyes that he ought to wait for the question to be translated in full before answering. Reyes replied: "Okay, but I don't understand English." Within five minutes of this exchange, Reyes again began to answer questions before the translation had been completed. In addition to these general considerations with respect to Reyes's credibility, I simply cannot believe that a foreman who frequently inspected the work of his crew would not have noticed a handkerchief on Valdivia's wrist. Even if Reyes did not notice the handkerchief, he did notice that

5/Respondent argues that the fact that Reyes took Ricardo Rivera to the office when he cut his finger demonstrates that Reyes was unaware of Valdivia's injury. I am not persuaded by this argument, because Rivera's injury, however minor, involved the loss of blood and, more significantly, because Valdivia had already filed an unfair labor practice charge by the time of Rivera's injury. Reyes may have been warned by management not to ignore injuries in the future.

Valdivia's work was unsatisfactory. He told Tanaka that Valdivia was not working as well as he had before. Surely, Reyes would have tried to discover a reason for this sudden decline in Valdivia's performance. And, if Reyes actually did warn Valdivia a half dozen times about his work, it is even harder to believe that Valdivia would not have explained why his work was bad. In sum, while there were some contradictions between the testimony of Valdivia and Segredo, I found Reyes and Rodriguez to be extremely untrustworthy witnesses.

Valdivia testified that he wore UFW buttons to work every day. He claimed that he was wearing three buttons on the Day he was fired. Reyes was not questioned concerning his knowledge of Valdivia's Union support. Rodriguez denied seeing any Union buttons on Valdivia on the day of his discharge.

G. Carlos Corona And Ricardo Rivera.

Corona and Rivera worked in a corn cutting crew supervised by Reyes during the 1980 harvest. Reyes supervised two crews at the time. Valdivia, Galvan, and Segredo worked in one six-member crew, while Corona and Rivera worked in the other. Corona had worked for the Company for about a year prior to his discharge in August, 1980. The record does not disclose when Rivera began to work for Respondent.

Reyes testified, and Company records indicate, that Corona was issued a written warning on August 6, for leaving corn in his furrow. The warning notice states that Corona told Reyes that he would continue to leave corn unless the tractor were I stopped. Corona denied receiving any warning from Reyes on 28 August 6. On August 7, Reyes issued a warning notice to Rivera

for leaving too much corn behind. Rivera denied receiving the warning.

During the afternoon of August 7, Rivera cut his finger while working. Reyes took him to the office where Brooks gave Rivera a bandaid. Rivera testified that he asked Brooks to transfer him to a tomato picking crew until his cut healed. Reyes responded that if one employee were allowed to transfer all of them would want to leave. Reyes stated that he could not remember Rivera asking for a transfer. Rivera received permission from Reyes not to work on August 8. August 9 was the crew's day off.

On August 10, according to Rivera and Corona, Reyes; warned them orally that they were leaving too much corn behind. Reyes testified that he issued both men three written warnings between 9:00 and 12:00 for leaving too much corn. The warnings were' issued at the same times to both men and were nearly identical in their wording. Corona and Rivera denied receiving any written warnings. Rivera testified that he asked the employees to sign the notices, but that they always refused.

Corona and Rivera testified that they did leave some; corn behind, but no more than other employees. Reyes said that he; checked the furrows of all the employees and only Rivera and Corona were leaving an unacceptable amount of corn. The six members of the crew worked in three pairs. Two men were stationed on each side of the trailer, while Corona and Rivera worked behind it. They contended that their work was more difficult because the tractor and trailer knocked down the corn stalks. Reyes agreed that some of the corn stalks remained flattened, but

said that most of the stalks rebounded after the trailer passed. According to Reyes, some workers, such as Galvan and Segredo, preferred to be behind the trailer. This testimony was not rebutted by Galvan or Segredo.

When the crew finished cutting corn, shortly after 2:00 p.m., the employees took a break to drink water from the rear of a nearby truck. Corona and Rivera testified that they finished working about five minutes after the rest of the crew, because they were working behind the trailer. While they were drinking water, the rest of the crew had climbed aboard Reyes's truck. He drove off to a tomato field, where the crew was going to pick next, without waiting for Rivera and Corona. They testified that the other crew members banged on the side of the truck and yelled at Reyes to wait. Reyes denied knowing that he had left the two men behind until he arrived at the tomato field. Corona and Rivera walked to the tomato field. They estimated that it took them 20 minutes to get there. Reyes said that he to went looking for the men as soon as he realized he had forgotten them, but that he could not find them. He said that they had already arrived at the tomato field by the time he returned. It is likely, given the testimony of Corona and Rivera that they finished work in the corn at 2:10 and arrived at the tomato field shortly before the 2:30 break, that the walk was somewhat less than 20 minutes. But, I do not credit Reyes's testimony concerning the incident. At first, he claimed that he had taken all the 25 workers in his truck. Then, he claimed to have remembered the incident, which he characterized as a "detail." However, according to Reyes, he forgot to take the two men in his truck from one

tomato field to another tomato field. Corona and Rivera testified credibly that they only worked in one tomato field. Their testimony is buttressed by the fact that the crew typically took a break to drink water after finishing in the corn. Further, because the work day ended at about 3:30, it seems unlikely that the crew would have picked in two tomato fields in a little over an hour.

When the work day concluded, Reyes took the crew back to the office. He told Corona and Rivera that they were 10 being fired for leaving too much corn behind. Brooks gave them their checks and discharge notices. Corona testified that Brooks said: "Why don't you go to another ranch?" Reyes walked away laughing.

Corona testified that he wore a UFW button, given to him by Segredo, while working in Reyes's crew. Reyes never spoke to him about the button. But Corona testified that he was discussing Cesar Chavez with two co-workers, two weeks before he was fired, and described Chavez as valiant. Reyes came up to the group and said: "You call any cabron valiant." Reyes denied making this statement. He did state that he noticed that Corona wore a UFW button.

Rivera's testimony regarding his Union support is brief and ambiguous. He testified that when he arrived on foot at the tomato field on August 10, he talked to Galvan because he had asked him a week before for a UFW button. It is not clear whether Rivera began wearing the button an hour or a week before his discharge. While Rivera admitted that Corona wore a UFW button, he denied seeing Rivera with one. Reyes's denial is

given added credibility because he testified before Rivera.

The Alleged Speed-Up In The Corn Harvest.

Segredo, an experienced corn harvester, was the General Counsel's only witness on this issue. He testified that he was involved in negotiations with Respondent, on behalf of the UFW, concerning a proposal to pay the corn harvesters by piece rate instead of by the hour. These negotiations began before the harvest and were suspended in July, 1980. Segredo began to keep track of the number of trailers picked by his crew each day in order to determine whether the Company's proposal was fair. He continued keeping records after the negotiations broke off. He kept no production records in 1979 or any previous year.

Segredo testified that the tractor moved more quickly in 1980 than it had in earlier years. He said that it started fast and went a little faster each day. Employees without experience could not keep up with the tractor. Even experienced workers like Segredo had to work as hard as they possibly could to avoid falling behind. Segredo's records disclosed that the crew filled between 13 and 16 trailers per day, with the exception of July 31, when 23 trailers were filled. He estimated that the crew picked between five and five and one-half trailers Per day during a comparable period in 1979. Segredo conceded that the trailers were not of uniform size. While he kept records based on the size of the trailer, he did not produce them at the hearing.

According to Segredo, he was informed by Reyes about July 15 that the Company's position that it was not obligated to bargain with the UFW had been upheld by the Court or

Appeal. Immediately after this announcement, the tractor began to move even faster. The tractor driver, Ponciano Alvarado, who was a generally credible witness, stated that he was not instructed to speed up the tractor as the season progressed. He stated that he kept the tractor at the slowest possible speed at which it would operate without the motor going off. He conceded that the workers had difficulty keeping up with the tractor in the afternoons, as they became tired. He said that at times he operated the tractor at a speed slower than Reyes had directed him to run it. Alvarado stated that he was able to observe the tractor and trailer used by the other corn crew and that they moved at roughly the same speed.

No records comparing corn production in 1979 and 1980 were offered by either party. Segredo testified that Brooks had conceded that the Company had more corn acreage in 1980 than in 1979. Brooks did not rebut this testimony.

The parties stipulated that the corn crews did not receive a wage increase in 1980 and that the workers began to be paid on a piece rate basis during the last week of the harvest, after Segredo's crew had been transferred to other work.

ANALYSIS AND CONCLUSIONS

A. General Legal Principles.

The Complaint alleges that Respondent has discriminated against seven employees, because they engaged in Union activities, in violation of §§1153 (a) and (c) of the Act. In order to make out a prima facie case of a violation of §1153 (c) , the Generals Counsel must ordinarily establish that the affected employee engaged in Union or other protected activities, that the employer

had knowledge of those activities, and that there is some causal link between the protected activities and the employer's action, such as discharge, failure to hire or rehire, or a speed-up in work. Jackson & Perkins Rose Co. (1979) 5 ALRB No. 20.[6/] After the General Counsel has established a prima facie case, the burden shifts to the Respondent for proof of its motivation.

The number and variety of legal tests to determine a violation of Section 8(a)(3) of the National Labor Relations Act {§1153(c) of the Act), in cases where the employer's motivation is an issue, have proliferated in recent years, resulting in "intolerable confusion," according to the National Labor Relations Board. In Wright Line (1980) 251 NLRB No. 150, 105 LRRM 1169, the NLRB made an attempt to clarify the situation by setting out a test for violations of Section 8(a)(3) which, although it uses new phraseology, is consistent with previous standards. After reviewing the history of the development of various tests, which I will omit here, the NLRB adopted the reasoning of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle (1977) 429 U.S. 274, in arriving at its new formulation:

> ... [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a moti vating factor in the employer's decision. Once this is established, the burden will shift to

[6/] In its brief, the General Counsel mistakenly cites the test employed by the Board in Jackson & Perkins for the de termination of whether a prima facie case has been established as the test for a violation of §1153(c).

> the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [105 LRRM at 1174-5.]

The California Supreme Court, in Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721, and the Board, in Nishi Greenhouse (1981) 7 ALRB No. 18, have held that Wriaht Line is an applicable precedent under the NLRA, pursuant to §1148 of the Act, and have directed that it be followed in cases arising under the Act.

B. Luis Vasquez Nunez.

The Complaint alleges that, in denying Nunez re-in employment when he returned from an "emergency leave of absence," the Company violated §1153 (c) of the Act. The charge filed by Nunez in Case No. 79-CE-12-SD alleges that Respondent discriminatorily refused to grant him a leave of absence. Because the facts surrounding Nunez's request for a leave of absence were fully litigated, I will treat the issue of whether the leave was discriminatorily denied as having been raised by the Complaint.

The General Counsel's prima facie case consists of evidence that Nunez wore a UFW button in the presence of Brooks and that Brooks's knowledge of Nunez's Union support was a motivating factor in his decision not to hire Nunez. Because Brooks admittedly refused to hire Nunez after work became available in June, 1979, I conclude that the General Counsel has made out a prima facie case with respect to that refusal. But, I do not accept the General Counsel's argument that the mere fact that Nunez had at one time been a member of Reyes's crew is somehow proof of Respondent's discriminatory motive. There is no evidence that Respondent transferred known Union supporters to Reyes's crew. What

evidence there is suggests that Galvan and Segredo recruited crew members of the crew for the Union. Many of the arguments presented by the General Counsel concerning the Union activism of the alleged discriminatees are based upon remarks made by him in his opening statement, which were never supported by any record evidence.

It is clear that Brooks told Nunez that his request for a leave of absence was denied because Nunez would not provide him with a return date. The fact that Bedolla gave Nunez a leave notice does not establish that the leave was granted, inasmuch as the notice does not indicate that it was granted and does not have a return date. The notice actually confirms Brooks's testimony that he would consider Nunez for employment on his return. Because the record does not indicate that the Company ever granted leaves of absence for periods greater than 60 days or in the absence of a return date, I conclude that Nunez's request for a leave would have been denied even if he had never worn a UFW button to work.

With respect to the allegations of a refusal to rehire Nunez, the General Counsel cites Golden Valley Farming (1980) 6 ALRB No. 8, for the proposition that he need not establish that Respondent had any work available at the time of Nunez's application. In Golden Valley, the Board simply noted that the General Counsel need not always show that there was work available at the time of an application. In Kawano, Inc. (1978) 4 ALRB No. 104, enfd Kawano, Inc. v. A.L.R.B. (1980) 106 Cal.App.3d 937, the Board held that, while ordinarily the General Counsel must establish that work was available at the time of an application, such

a showing will not be required if the employer has prevented or discouraged the employee from applying for work. Here, Nunez did file an application and the Company did have a policy of hiring applicants based on the application date. Nor was Nunez told that || he would not be hired in the future; on the contrary, he was informed that he would be called when the Company began to hire. I conclude that this is not the kind of case in which the availability of work need not be specifically proved.

The testimony of Brooks, coupled with Company records demonstrating that there was no hiring of employees in Nunez's classification until June, 1979, demonstrates that no work was available when Nunez first applied. This evidence is basically uncontested. While some employees on layoff may have been recalled during this period, Nunez's status was that of a new applicant. By leaving his job without receiving a leave of absence, he was considered by the Company to have quit voluntarily.

The Company concedes that it did not offer Nunez work even after jobs became available. Brooks testified that he was exasperated by Nunez's repeated expressions of disbelief concerning the Company's promises to call him and that Nunez had become belligerent and nasty. Nunez basically conceded that he had become angry with Brooks and did not believe his explanations of why he had not been given work. Nunez's demeanor while testifying lends some support to Brooks's characterization of him. Nunez was an impatient witness who frequently did not take the time to listen to the questions asked him before replying. As a result, his answers were often unresponsive. While it is possible that Brooks was partially motivated by Nunez's Union support or the

filing of the charge in his decision not to offer work to Nunez, I conclude that he reacted principally to Nunez's belligerent behavior and that he would have denied employment to Nunez whether or not he had worn a UFW button at work. I shall order that Paragraph 15 (a) of the Complaint be dismissed.

C. Miguel Melendez.

The General Counsel established that Melendez, who had worked for Respondent since it began its operations, had always worn a UFW button on the job. One supervisor testified that he had seen Melendez wearing a button. This rather weak evidence of Union activity and Company knowledge is coupled with a very strict application of Respondent's policy with respect to unauthorized absences. For purposes of discussion, I will assume that the General Counsel has made out a prima facie case of a violation of §1153(c).

It is undisputed that Melendez missed three consecutive days of work without receiving explicit permission from the Company. Reyes only gave Melendez permission to leave work early one afternoon to take care of his immigration problem. While Melendez's testimony with respect to notifying the Company that he was taking time off to continue to deal with the immigration matter conflicted with the testimony of his daughter, I found her to be a believable witness. I credit her testimony that she left a message with a Company secretary explaining her father's continued absence. However, Brooks's testimony that he never received such a message was also credible. It was clearly not conceived of as a defense to the unfair labor practice charge, because Brooks angrily confronted Melendez when he came to the

Company office on January 14, 1980, and asked him why he had not bothered to call.

The basic issue is whether Brooks would have discharged Melendez for his three days of unauthorized absence had he not worn a UFW button. Respondent introduced into evidence worker notices for 22 employees who had been discharged for unauthorized absences. Most were considered voluntary terminations after the third consecutive absence. A few were absent for as many as six days before being discharged, but the notices signed by Reyes always indicated a discharge after the third missed day. Two other employees were discharged for missing work on the same three days that Melendez was absent. The record is silent as to their work records or Union activities. There is no evidence that the Company enforced its attendance rules in a discriminatory manner against Union supporters. Given the weakness of the evidence concerning Melendez's Union activities and Employer knowledge of those activities, I conclude that, even if the General Counsel has made out a prima facie case, the Company has established that Melendez violated its rules concerning unauthorized absences, and would have fired him even if he had not engaged in Union activities. I agree with the General Counsel that the Company treated

Melendez harshly and, perhaps, unfairly, but I cannot find that it was motivated by his Union support. The factual context here differs markedly from that of Highland and San Clemente Ranch, supra, which is frequently cited by the General Counsel. In the 261 earlier case, there was a substantial amount of evidence establishing anti-union animus on the part of Highland; here there is only one isolated statement by Reyes suggesting animus. The discharges

in the earlier case took place against the backdrop of a vigorous anti-union campaign by Highland; here, there is virtually no evidence of organized Union activity or of Employer responses to organizing. I shall order that Paragraph 15(d) of the Complaint be dismissed.

D. Fernando Castellanos.

The General Counsel argues that Respondent discharged Castellanos because of his Union support. I find that the General Counsel has not made out a prima facie case in support of this allegation. There is no evidence that Castellanos wore a UFW button or engaged in any other Union activities while working in the celery crew. While Tanaka did testify that Castellanos probably wore a UFW button when he worked in the shed, I find that this vague reference is insufficient to establish a causal connection with his subsequent discharge. The General Counsel has cited Highland and San Clemente Ranch, supra, for the proposition that it is unnecessary to establish that an employee was a Union supporter or that the employer had knowledge of his Union support in order to prove a violation of §1153(c). The Board clearly held in Highland that only when there is evidence establishing that an employer has discriminated against an individual in retaliation for the Union activities of the employees as a group is the General Counsel relieved of its obligation to prove employer knowledge. There is no such evidence on this record. In fact, the only evidence of Union activities by a group involves the negotiations between the UFW and the Company. There is no indication that there was any connection between those negotiations, which were mentioned only briefly during the hearing, and Castellanos' s

discharge.

The General Counsel also argues, at least implicitly, that Castellanos was discharged because of his participation in protected concerted- activities for mutual aid and protection, in violation of §1153(a) of the Act. The NLRB has held in Alleluia Cushion Co. (1975) 221 NLRB 999, that an employee acting alone may be deemed to have engaged in concerted activities under certain circumstances, even in the absence of support by other employees. The NLRB presumes that other employees consent to representation by the protesting worker, in the absence of contrary evidence.

In Foster Poultry Farms (1980) 6 ALRB No. 15, the Board, citing Alleluia, stated that "[a]n individual's actions are protected, and concerted in nature, if they relate to conditions of employment that are matters of mutual concern to all affected employees." 6 ALRB No. 15, at p. 5.

Here, Castellanos was discharged, in part, for refusing to work on the celery packing cart without a full complement of employees. No other employee spoke on his behalf or demonstrated support for his position. There is no clear evidence that bringing in a replacement for an absent worker would have benefited the rest of the crew. In fact, because the total earnings of the crew were divided equally among its members, it is possible that the crew members would earn more with fewer employees. In any event, the Company rebutted Alleluia's presumption of implied consent by offering evidence which indicated that a consensus of the crew members favored not bringing in replacements for employees who were absent for only a day. I conclude that Castellanos was not engaging in concerted activity when he was discharged. I shall

order that Paragraph 15(b) of the Complaint be dismissed.

E. Enrique Corona.

Corona wore a UFW button at work. Several supervisors testified that they had seen him wearing Union buttons. Because Respondent's actions in connection with Corona's request for a leave and his subsequent application for work were inconsistent with its stated policies, I find that Corona's Union support was a motivating factor in Respondent's refusal to grant his leave request or rehire him.

Corona sought a leave of absence for good cause. The Company contends that the leave request was denied solely because Corona failed to give a firm return date to Brooks. Although I have credited Brooks's testimony on other matters, in this instance I have found that Corona did supply him with a return date. Corona certainly had nothing to lose by promising to return in a month. If he did not return, he would not be guaranteed employment. But if he did not promise to return, he would still be out of a job. And the fact is that Corona did return when he promised he would. To rebut an inference of discriminatory motive, Respondent introduced into evidence seven leaves which had previously been granted to Corona. All but one of the leaves were for a day or two to permit Corona to take his wife to the doctor or to attend a funeral. One leave granted Corona permission to take a six-week vacation from December, 1978, to January, 1979. I do not find that these leaves establish that Respondent did not discriminate against Corona. His vacation request came during the winter months when many employees were laid off. It worked no hardship on the Company. The emergency leave which Corona

sought in 1980 came at the height of the season. Because I do not credit Respondent's business justification for the denial of Corona's leave request, I conclude that it was pretextual. In denying Corona an emergency leave, Respondent violated §§1153(a) and (c) of the Act.

Even if the Company did not unlawfully deny Corona's leave request, I would still find that its refusal to rehire him upon his return constitutes a violation of the Act. Corona was discouraged from applying for work by Brooks. Whether or not there was a job vacancy on the day he returned, it is clear that Respondent was hiring in the months of July and August, during its peak season. Respondent offered no credible reason for not hiring Corona when he returned. Even were I to accept the Company's position with respect to the denial of Corona's leave, there would still have been no reason for it not to consider Corona's application for work on his return. He had only left his job because of a legitimate emergency. I conclude that Respondent's refusal to rehire Corona in July, 1980, is an additional violation of §§1153 (a) and (c) of the Act.

F. Salvador Valdivia.

The only evidence of Valdivia's Union support was his own testimony that he wore a UFW button at work. Reyes was not questioned about his knowledge of Valdivia's Union support. I find that Reyes knew that Valdivia wore a UFW button. Reyes supervised only two corn crews with a total of 12 employees. He was with the crews frequently and would have had ample opportunities to observe whether Valdivia was wearing a button. The extreme contradictions in the testimony of Reyes and Rodriguez

support an inference that Valdivia's Union support was a motivating factor in his discharge. The General Counsel has made out a Prima facie case of a violation of §1153(c).

The Company argues that it fired Valdivia because he worked too slowly. The General Counsel concedes that Valdivia's work was substandard, but maintains that his inability to perform well was the result of an injury to his wrist of which Reyes was aware. Respondent denies knowledge of the injury at the time of Valdivia's discharge, but argues that Valdivia's poor work did not result from the injury. If Respondent were unaware of the injury, it would have no basis for determining whether it was the cause of Valdivia's work problems. The fact that Reyes may have issued a warning to Valdivia on the first day of the harvest, prior to the injury, does not establish that, in the absence of the injury, Valdivia would have been discharged. It is clear from Reyes's testimony that both he and Rodriguez were made aware of Valdivia's injury shortly after he was given his discharge notice, even though Rodriguez contradicted Reyes. I have already found that Reyes knew of the injury several days earlier.

The Company does not contend that it had a policy of discharging injured workers. The question is whether Reyes was simply a petty tyrant who was even-handed in his bad treatment of workers, or whether he singled out Union supporters for punishment. This is not an easy question to answer in light of the facts surrounding the discharges of Carlos Corona and Rivera. Rodriguez's incredible testimony helps in the resolution: of this issue, along with the Administrative Law Officer's finding in Highland and San Clemente Ranch, supra, that Rodriguez had a

"demonstrated hostility to the UFW and its adherents." 5 ALRB No. 54, ALO Decision at p. 22.[7/] Rodriguez's failure to investigate Valdivia's firing after he learned that Valdivia was suffering from an injury to his wrist supports an inference that he had a discriminatory motive. I must assume that Reyes and Rodriguez did not ordinarily fire workers simply because they were injured. I conclude that the Respondent has not established that Valdivia would not have been fired if he had not supported the Union, and that his discharge violated §§1153 (a) and (c) of the Act.

G. Carlos Corona And Ricardo Rivera.

I have discussed the cases of these two employees together because they were treated in a virtually indistinguishable manner by Reyes. But there was a significant difference in their Union activity. Corona testified that he had worn a UFW button since the beginning of the corn harvest, a little over a month before his discharge. Reyes acknowledged that he had seen Corona wearing the button. Corona also testified that Reyes had made a derogatory comment about Cesar Chavez about two weeks before he was fired. Rivera's Union activity was slight or non-existent. He testified that, about an hour before he was discharged, he spoke to Galvan because he had asked Galvan for a UFW button about a week before. Galvan gave him a button. Although the testimony is ambiguous, it appears that Rivera did not get the button until after Reyes had decided to fire him. Reyes testified that he had never seen Rivera wear a UFW button.

Reyes made out warning notices for Corona and Rivera on

[7/] it is interesting to note that Reyes and Rodriguez contradicted each other in the earlier proceeding as well.

August 10, which the employees claimed they were never shown. It appears that Reyes was laying the groundwork for firing them. They admitted that they left some corn behind, but no more than other workers left. However, they were really in no position to observe how much uncut corn was left by other crew members. On the other hand, it is hard to understand why two employees would simultaneously begin to do bad work more than a month into the harvest, when neither had received a prior warning.

Although the circumstances surrounding the discharges of Corona and Rivera bear some similarity to those in Valdivia's firing, there are important differences. First, unlike Valdivia who admitted that his work was not up to his usual standard, Corona and Rivera denied that they were unable to pick properly. While all the worker witnesses expressed hostility toward Reyes, there is no indication that he fired employees who worked up to his standards. Valdivia, Rivera, and Corona were the only workers fired by Reyes during the 1980 corn harvest. As the General Counsel has repeatedly emphasized, Reyes's crews contained a number of strong Union supporters, including Galvan and Segredo. None was discharged and Segredo testified that he had never received a worker notice from Reyes in the many years they had worked together. Second, there is no evidence that Reyes had knowledge of Rivera's Union support. Knowledge of Valdivia's Union support can be inferred from the record, because he had worn a UFW button in the crew for a substantial period of time. Rivera apparently never manifested any Union support until after Reyes had left him and Corona behind in the corn field an hour before their discharges. While it is possible that Reyes's target

for discrimination was Corona and that he cleverly masked his true motive by also discharging Rivera, such an argument is highly speculative and is not supported by the evidence. I must conclude that, while Reyes's treatment of Corona and Rivera was harsh and unfair, the General Counsel has not carried its burden of establishing a prima facie case of a violation of §1153 (c), in that there is no evidence that Reyes knew of Rivera's Union support and no causal connection between Corona's Union support and his discharge. Even if a prima facie case had been established, I would reach the same result. Respondent has established that Corona and Rivera were fired because of their work performance and would have been fired even if they had not worn UFW buttons at work.[8/]

H. The Alleged Speed-Up In The Corn Harvest.

The General Counsel's theory with respect to this allegation is difficult to discern. Apparently, in retaliation for the Union activities of Segredo and other members of his crew, including Segredo's role in collective bargaining sessions,

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8/I do not mean to suggest, in concluding that Corona and Rivera were fired because of their work performance, that they were fired for "cause," in the sense that their firings were justified under Respondent's policies. I find that Reyes did not show the written warnings to Rivera and Corona. All witnesses agreed that employees invariably refused to sign such notices when they were presented. It is more likely that Reyes did not bother to go through the motions of presenting the warnings in the first place. Whether or not Reyes actually showed the written warnings to Corona and Rivera, he gave them no real opportunity to improve their work. They could not have been aware until the day of their discharge that their jobs were in jeopardy. But, while I find that Reyes violated Company policies, I am unable to find that these violations were motivated by the Union activities of Corona and Rivera. Mot all arbitrary and unfair treatment of workers by their foremen can be attributed to anti-Union motivation. Historically, such treatment has often preceded, and itself been a precipitating cause of, unionization.

Respondent ordered the tractor driver to increase his speed, forcing the crew to work faster and produce more without any wage increase. Although Segredo was a sincere witness who testified in I good faith, the General Counsel's evidence failed to establish a prima facie case. First, the record is silent as to the Union support or activities of the other four members of Segredo and Galvan's crew. Valdivia, a Union supporter, was discharged on July 3, before the tractor, in Segredo's view, began to speed up markedly. Second, although the General Counsel appears to argue that Segredo's crew was forced to work at a quicker pace than Reyes's other crew, Corona testified that Reyes had them working too fast as well. The General Counsel's argument does not explain why the Company would be treating Segredo's crew more harshly than Corona's, inasmuch as both crews had Union supporters in their ranks.

Moreover, Segredo's 1980 production records do not support his testimony that the tractor kept moving faster each day after July 15. Alvarado testified credibly that he kept the tractor at essentially the same speed throughout the harvest. Segredo's testimony is also insufficient to establish that the crew worked at a faster pace in 1980 than it did in 1979. Segredo kept records of the number of trailers picked per day by the crew in 1980 and compared these figures with an estimate of the number of trailers picked per day in 1979. The 1979 figures are clearly not as reliable as those from 1980 because they are taken from memory. Further, Segredo admitted that the trailers used by the Company were not all the same size, making comparisons even more dubious. Factors other than the speed of the tractor could

account for some differences in production. They include the size of the corn and the yield per stalk. If Segredo's figures are taken at face value, the crew picked two and one-half to three times as much corn per day, on the average, than it did the year before. It is hard to believe that the Company could have tripled the speed of the tractor without causing itself economic harm in the form of unpicked or badly cut corn. In sum, Segredo's testimony failed to establish either the fact of a speed-up by the tractor or its extent. While it is possible that a more careful and complete presentation of Company production data would have established that there was a speed-up, the record before me does not. I shall order that Paragraph 15(g) of the Complaint be dismissed.

THE REMEDY

Having found that Respondent discharged Salvador Valdivia and denied a leave of absence and re-employment to Enrique Corona, because they supported the Union, in violation of §§1153(a) and (c) of the Act, I shall recommend that it cease and desist from like violations and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend that Respondent be ordered to offer Salvador Valdivia and Enrique Corona reinstatement to their former jobs, without loss of seniority, and to make them whole for any loss of pay or other economic losses they have suffered as a result of Respondent's unfair labor practices.

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

ORDER

Respondent, San Clemente Ranch, Ltd., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, refusing to grant leaves of absence, refusing to rehire or otherwise discriminating against agricultural employees because of their Union activities or Union support.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed by §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 Salvador Valdivia and Enrique Corona full reinstatement to their former positions or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Reimburse the above-named employees for all wage losses and other economic losses they have suffered as a result of Respondent's discrimination against them. Such losses shall be computed according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43. Interest, computed at the rate of 7% per annum, shall be added to the net back pay to be paid to each of the above-named persons.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel

records and reports, and all other records necessary to analyze the amount of back pay due under the provisions of this Order.

(d) Sign the Notice to Employees attached hereto. After its translation by a Board agent into Spanish and any other appropriate language(s), Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

(f) Arrange for a representative of Respondent or a Board agent to read the attached Notice in Spanish and any other appropriate language(s) to the assembled employees of Respondent on Company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The 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.

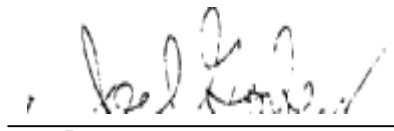
(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically

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

IT IS FURTHER ORDERED that allegations contained in the Complaint not specifically found herein as violations of the Act shall be, and hereby are, dismissed.

Dated: September 20, 1981

AGRICULTURAL LABOR RELATIONS BOARD

By 

Joel Gomberg
(Administrative Law Officer)

NOTICE TO EMPLOYEES

After a trial in which each side had an opportunity to present its facts, the Agricultural Labor Relations Board has found that we violated the law by discharging two employees because they engaged in activity protected under the Act.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law of the State of California which gives farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To choose, by secret-ballot election, a union to represent them in bargaining with their employer.

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

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

Because this is true, we promise that:

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

Especially:

WE WILL NOT discharge, deny leaves of absences to, refuse to rehire, or otherwise discriminate against any employee because he or she exercised any of these rights.

The Agricultural Labor Relations Board has found that we discriminated against Salvador Valdivia and Enrique Corona by discharging them because they engaged in activity protected under the Act.

WE WILL reinstate the above-named employees to their former jobs, or substantially equivalent jobs, and reimburse them for any loss of pay and other money losses they suffered as a result of their discharge, plus 7% interest per annum.

Dated: SAN CLEMENTE RANCH, LTD.

By _____

THIS IS AN OFFICIAL DOCUMENT OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA.

DO NOT REMOVE OR MUTILATE