

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROTHERS COMPANY	)	Case Nos.	79-CE-181-SAL
OF CALIFORNIA,	)		79-CE-182-SAL
	)		79-CE-253-SAL
Respondent,	)		79-CE-313-SAL
	)		80-CE-40-SAL
and,	)		80-CE-59-SAL
	)		80-CE-62-SAL
UNITED FARM WORKERS OF	)		80-CE-75-SAL
AMERICA, AFL-CIO,	)		80-CE-132-SAL
	)		80-CE-132-1-SAL
Charging Party.)		

8 ALRB No. 66

DECISION AND ORDER

On January 16, 1981, Administrative Law Officer (ALO) Joel Gomberg issued the attached Decision in this proceeding. Thereafter, General Counsel and Respondent each timely filed exceptions and a supporting brief.

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

The Board has considered the record^{1/} and the attached Decision in light of the exceptions and briefs and has decided to affirm the ALO's rulings, findings, and conclusions, and to adopt his recommended Order as modified herein.

ORDER

By authority of Labor Code section 1160.3 the

^{1/}In the ALO's Decision, passim, he correctly refers to Case No. 80-CE-40-SAL, which had erroneously been carried in the caption of the pleadings as Case No. 80-CE-48-SAL. We have corrected the caption accordingly.

Agricultural Labor Relations Board hereby orders that Respondent, D'Arrigo Brothers of California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, refusing to hire or rehire, isolating from other employees, or otherwise discriminating against any agricultural employee for engaging in union activity or other protected concerted activity.

(b) Instituting any unilateral change(s) in its agricultural employees' wage rates or any other term or condition of their employment without first notifying and affording the United Farm Workers of America, AFL-CIO, (UFW) a reasonable opportunity to bargain with Respondent concerning such proposed change(s).

(c) 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) Immediately offer to Eugenio Hernandez, Jr. and Gabriel Zamudio full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Eugenio Hernandez Jr. and Gabriel Zamudio for all losses of pay and other economic losses they have suffered as a result of Respondent's layoff of Hernandez at

the end of the 1980 Huron season because of his union activity, and Respondent's failure or refusal to rehire Zamudio and accord him his seniority status in the mustard crew in March 1980 because of his protected concerted activity, such backpay amenities to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(c) Make whole Maria Concepcion Rico for all losses of pay and other economic losses she has suffered as a result of Respondent's unilateral change in her working conditions in August 1979 because of her union activity, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(d) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral increase Respondent made in the said employees' wage rates on or about July 16, 1980.

(e) If the UFW so requests, rescind the aforesaid unilateral increase Respondent made in its agricultural employees' wage rates.

(f) Make whole its agricultural employees for all economic losses they have suffered as a result of the aforesaid unilateral increase Respondent made in their wages, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(g) 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 period and the amount of backpay and other makewhole relief due its employees under the terms of this Order.

(h) 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.

(i) 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 between August 1, 1979, and the date such copies of the Notice are mailed.

(j) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, 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.

(k) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural 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 to compensate them for time lost at this reading and the question-and-answer period.

(1) 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: September 23, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, D'Arrigo Brothers Company of California, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we violated the Agricultural Labor Relations Act (Act) by raising wages of our employees without giving the United Farm Workers of America, AFL-CIO, (UFW) your bargaining representative, prior notice of such wage increases and an opportunity to bargain with us about the wage increases; also that we discriminated against certain agricultural employees because of their union activity and other activities protected by the Act. The Board has ordered us to post this Notice and to mail it to those who worked for us in the Salinas District between August 1, 1979, and the present. We will do what the Board has ordered us to do.

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

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

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

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

WE WILL NOT make any changes in our agricultural employees' wages, or working conditions without first notifying and bargaining with the UFW about any such proposed changes.

WE WILL NOT discharge, lay off, refuse to rehire, or otherwise discriminate against any agricultural employee with respect to his or her job because he or she belongs to or supports the UFW or any other union, or because he or she has helped any other employee in connection with their employment.

WE WILL OFFER Eugenio Hernandez, Jr. and Gabriel Zamudio their old jobs back and we will pay them any money they lost, plus interest, as a result of our discrimination against them.

WE WILL bargain with the UFW about a contract at its request because it is the representative chosen by our employees.

WE WILL pay each of the employees employed by us at any time after July 16, 1980, any money which they lost because we have failed or refused to bargain in good faith with the UFW.

Dated:

D'ARRIGO BROTHERS COMPANY OF
CALIFORNIA

By:

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

D'Arrigo Brothers Company
of California

8 ALRB NO. 66
Case Nos. 79-CE-181-SAL
79-CE-182-SAL
79-CE-253-SAL
79-CE-313-SAL
80-CE-40-SAL
80-CE-59-SAL
80-CE-62-SAL
80-CE-75-SAL
80-CE-88-SAL
80-CE-132-SAL
80-CE-132-1-SAL

ALO DECISION

The ALO concluded that Respondent violated section 1153 (c) and (a) of the Act by laying off Eugenio Hernandez, Jr., failing to rehire Gabriel Zamudio, and transferring Maria Concepcion Rico to a different crew, in each case because of the employee's union activities. In addition, he concluded that Respondent failed to bargain in good faith with the United Farm Workers of America, AFL-CIO, (UFW) the exclusive certified bargaining representative of its employees, by unilaterally increasing its employees' wages on July 16, 1980, and thereby violated section 1153 (e) and (a) of the Act.

BOARD DECISION

The Board upheld the ALO's rulings, findings, and conclusions and adopted his recommended remedial Order with minor modifications.

REMEDY

Respondent was ordered to offer Eugenio Hernandez, Jr. and Gabriel Zamudio full reinstatement and to make whole Kernandez, Zamudio, and Concepcion Rico for all losses of pay and other economic losses they have suffered as a result of Respondent's unlawful discrimination against them. Respondent was ordered to reimburse its employees for all economic losses sustained by them as a result of Respondent's failure and refusal to bargain in good faith with the UFW from July 16, 1980, the date on which it instituted the unilateral change.

* * *

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

* * *

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of)
D'ARRIGO BROTHERS COMPANY OF) Case Nos. 79-CE-181-SAL
CALIFORNIA) 79-CE-182-SAL
Respondent) 79-CE-253-SAL
and) 79-CE-313-SAL
UNITED FARM WORKERS OF AMERICA,) 80-CE-48-SAL
AFL-CIO) 80-CE-58-SAL
Charging Party) 80-CE-62-SAL
) 80-CE-88-SAL
) 80-CE-132-SAL
) 80-CE-132-1-SAL

APPEARANCES :

Arocoles Aguilar and Lupe Martinez,
Salinas, California, for the General
Counsel

Jasper E. Hempel
Dressier, Stoll, Quesenbery, Laws & Barsamian
Sacramento, California, for the
Respondent

Ellen J. Eggers, Keene,
for the Charging Party

DECISION OF
ADMINISTRATIVE LAW OFFICER

1 in the hearing. The UFW intervened, as a matter of right, pursu-
2 ant to Section 20266 of the Board's Regulations. All parties
3 waived oral argument, but filed post-hearing briefs pursuant to
4 Section 20278 of the Regulations.

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

8 FINDINGS OF FACT

9 I. Jurisdiction.

10 Respondent admitted in its answer that it is an agricul-
11 tural employer within the meaning of §1140.4(c) of the Act, and
12 that the UFW is a labor organization within the meaning of §1140.4
13 (f) of the Act, and I so find,

14 II. The Alleged Unfair Labor Practices.

15 The two Complaints allege that Respondent committed a
16 number of basically unrelated unfair labor practices. Five of the
17 charges were resolved during the hearing. I granted the General
18 Counsel's motion to dismiss Charges 79-CE-181-SAL, 79-CE-182-SAL,
19 and 80-CE-40-SAL because of the unavailability of witnesses. I
20 also granted the General Counsel's motion to dismiss Charge 80-CE-
21 75-SAL because of insufficient evidence, (R.T. IV:27). At the con-
22 elusion of the General Counsel's case, I granted Respondent's
23 motion to dismiss Charge 80-CE-88-SAL, because the General Counsel
24 had failed to produce evidence sufficient to establish a prima
25 facie case of violations of the Act (R.T. VII:83-85).2/

26 2/The sixth volume of the reporter's-- [continued]

1 The remaining charges allege that:

2 (1) Maria Concepcion Rico, an employee in Respondent's
3 hoeing and thinning crew, was discriminatorily laid off in 1979 be-
4 cause of her Union activities and was on one occasion separated
5 from the rest of the crew for the same reason, in violation of
6 §1153 (a) and (c) of the Act.

7 (2) Gabriel Zamudio, an employee in Respondent's mustard
8 crew, was not rehired in 1980 because of his Union and other pro-
9 tected concerted activities, in violation of §1153(a) and (c) of
10 the Act,

11 (3) Eugenio Hernandez, Jr., an employee in Respondent's
12 lettuce crew, was discriminatorily laid off in 1980 because of his
13 Union activities, in violation of §1153(a) and (c) of the Act.

14 (4) Jesus Duarte Hernandez, who worked as an irrigator
15 for the Company, was not rehired in 1980 because of his Union acti-
16 vities, in violation of §1153(a) and (c) of the Act.

17 (5) Respondent's decision to grant a wage increase to
18 its Salinas District employees in July, 1980, over the objection of
19 the UFW, the certified collective bargaining agent for the em-
20 ployees, constituted a refusal to bargain in good faith, in viola-
21 tion of §1153(a) and (e) of the Act.

22 Respondent generally denies that it violated the Act.
23 It also raised a number of affirmative defenses to the allegations.

24
25 _____
26 2/[continued]--transcript is incorrectly denominated as
 Volume VII. I will follow the reporter's notation. There is,
 therefore, no Volume VI.

1 A, Maria Concepcion Rico

2 Maria began to work for Respondent in 1978, spending
3 most of her time in the thinning and hoeing crew. She worked
4 until the end of the season. Again, in 1979, she worked the bulk
5 of the season in the thinning and hoeing crew. For most of the
6 year she was supervised by Foreman Ralph Everts.

7 During the summer of 1979, Maria was elected by the
8 crew to be its Union representative. It is undisputed that, in
9 this capacity, she distributed leaflets to the crew, attended
10 Union meetings, and generally was the crew's most active and vocal
11 UFW supporter.

12 Maria testified that she often talked as she worked,
13 but not about the Union. Ralph testified that there was no rule
14 against talking while working, as long as the talk did not slow
15 down or otherwise interfere with the work. On one or two occa-
16 sions in August, 1979, Ralph separated Maria from the rest of "the
17 crew as a result of her talking while working. According to
18 Maria, Ralph separated her because he believed she was talking
19 about the Union, A co-worker, Francisca Oliveras, testified cre-
20 dibly that she heard Ralph tell Maria that he "was going to send
21 her to another field because he didn't want her to talk to us about
22 the Chavez union" (R.T. 11:14).

23 Ralph conceded that he was upset about certain state-
24 ments concerning unionization that Maria was reportedly making to
25 the crew. He testified that he admonished Maria to stop making un-
26 true statements about seniority and certain other matters. Ralph

1 did not actually hear Maria make any such statements; he simply
2 acted on reports from other employees. Ralph said that he sepa-
3 rated Maria from the rest of the crew because she was talking so
4 much that she was slowing down the work of a number of employees
5 including herself. According to Ralph, the subject matter of her
6 conversation was not a factor in the decision to separate Maria.
7 Ralph felt that Maria was influencing the crew by putting doubts
8 into employees' minds about where they stood with the Company.

9 On one occasion, Ralph characterized Maria's behavior
10 as two-faced, because, in Ralph's opinion, Maria was trying to get
11 other employees to stage a walk-out, but she would not go out herself.
12 Clearly, Maria's Union activities were a source of friction,
13 between her and her foreman. Nonetheless, other than the one or two
14 separations from other crew members, Ralph took no disciplinary ac-
15 tion against Maria.

16 On August 24, 1979, Maria was laid off by Ralph. One
17 worker with less seniority than Maria, Miguel Santayo, continued to
18 work. Maria and a number of other laid off employees were re-
19 called shortly thereafter. Maria continued to work until
20 September 13, 1979, when she and many other employees were once
21 again laid off. Again, Miguel Santayo continued to work. Ralph
22 testified credibly that Miguel was his assistant and in training
23 to become a foreman. He earned a higher salary than and was in a
24 different job classification from regular crew members,

25 Maria did not seek to be rehired by the Company at
26 the beginning of the 1980 season. She testified that she had

1 become very nervous as a result of her conflict with Ralph. She had
2 also heard from a friend that the Company did not want her to return
3 to work.

4 B. Eugenio Hernandez, Jr.

5 Eugenio first worked for the Company in 1978, as a
6 lettuce cutter. He was hired by foreman Martin Ayala. He worked
7 the entire season in Salinas and then worked during the late fall in
8 Huron, Eugenio returned to Salinas for the 1979 lettuce season. He
9 became a supporter of the UFW and spoke to Union organizers in the
10 presence of his foreman almost every day. On occasion, he passed
11 out UFW flyers in the presence of his foreman.

12 In July, 1979, Eugenio helped to lead the crew out of
13 the fields in a work stoppage designed to pressure the Company into
14 bargaining with the UFW. According to Eugenio, Martin warned him
15 not to leave the field and said that once the Company signed with
16 the UFW he (Eugenio) would be fired.

17 After the work stoppage, Martin, who had previously
18 been on very good terms with Eugenio, began to treat him much more
19 coolly.

20 At the end of the season in Salinas, Martin told
21 Eugenio he would have to work in the Imperial Valley or lose his
22 seniority, Eugenio worked in the Imperial Valley for a short time,
23 but was laid off frequently. He finally quit when Martin told him
24 he had seniority in Salinas, but not in the Imperial Valley,

25 In April, 1980, Eugenio began to work for Respondent in Huron.
26 He first worked for another foreman and then transferred

1 to Martin's crew. At the end of the season in Huron, the crew came
2 to Salinas. Eugenio worked one day and was laid off. He was told
3 by Martin that he had lost his seniority, Eugenio returned to ask
4 for work each day for a week and was given the same answer. In
5 September, 1980, Martin told Eugenio that he wanted nothing to do
6 with him and that there would be no work. On October 7, 1980, one
7 day before he testified at this hearing, Eugenio was told by his
8 brother, who continues to work for the Company, that Martin had
9 asked Eugenio to return to work.

10 Martin Ayala was the only witness called by the Com-
11 pany on this issue. His direct examination was limited to a denial
12 that he had ever seen Eugenio engage in Union activities. At first
13 he denied that there had been any work stoppage in his crew in 1979
14 (R.T, VII:2). Later, when called as a rebuttal witness by the
15 General Counsel, Martin answered a large proportion of the ques-
16 tions about the walk-out by saying "I don't know" or "I don't re-
17 member" (R.T, VII:10). Concerning Eugenio's layoff, Martin testi-
18 fied that it was a "mistake," because "We weren't sure about his
19 seniority" (R.T. VII:12). When asked to clarify the nature of the
20 mistake, Martin said: "I don't remember" (R.T. VII:14).^{3/}

21 I found Eugenio to be a generally credible witness.
22 Martin, on the other hand, was unusually nervous, evasive, and
23 vague in his answers. He repeatedly changed his answers, I
24

25 ^{3/}Contrary to an assertion in Respondent's brief, Martin
26 was not cut off during his testimony about Eugenio's layoff.

1 therefore credit Eugenio's version of the events of 1979.

2 C. Gabriel Zainudio

3 Gabriel Zainudio first worked for the Company in 1976.

4 He worked as an irrigator and as a cutter in the mustard and anise
5 crews. In 1979, Gabriel worked in both the spring and the fall
6 mustard seasons. His foreman was Fernando Sanchez. Although
7 Gabriel was a UFW supporter, there is no evidence that he engaged
8 in any Union activities at work.

9 On September, 1979, Gabriel was one of the leaders in
10 a work stoppage called to protest various working conditions. The
11 crew first refused to talk to several lower level supervisors, in-
12 eluding Fernando, Paul Hernandez, and Joel Cooper, The employees
13 then left the field and traveled in a car caravan to the Company
14 office to talk to the Company labor relations director, Kelly Olds.

15 Fernando was asked who started the work stoppage. He
16 testified:

17 A. Well, there was a bunch of workers
18 there, they always - I won't say trouble-
19 makers, you know, but they were always
20 trying to do something, you know, and I
21 do recall their names and everything.

22 Q. Who are they?

23 A. One of them was Elvia Fragoso, Mr.

24 [R.T. V;73:12-17.j
25

26 A few weeks after the protest, Gabriel decided to
transfer to the anise crew because he felt that he was being
harassed and pressured by Fernando. Gabriel testified that he

1 sought and received permission for the transfer from Fernando.
2 Gabriel's testimony on this point was corroborated by Teresa
3 Vasquez, another member of the crew. She testified that she heard
4 Fernando give his permission for the transfer while he was making up
5 boxes for the mustard. Fernando denied that Gabriel asked for per-
6 mission to leave his crew. He testified that he would have denied
7 any such request because he needed all the workers he could get.
8 Three days later Fernando terminated Gabriel's employment in his
9 crew. Fernando was aware that Gabriel had switched crews because
10 the mustard and anise crews were working very close to each other
11 and Fernando was able to see Gabriel,

12 John Snell, the anise crew foreman, asked Gabriel if
13 he had Fernando's permission for the transfer, Gabriel said that
14 he did not. Gabriel explained in his testimony that he was afraid,
15 that Fernando would claim that he had not sought permission and
16 then deny him his seniority in the mustard crew. He hoped that
17 John would talk to Fernando to ensure that the transfer was acknow-
18 ledged, John said that he did not talk to Fernando about the trans-
19 fer because he assumed that Gabriel had not been working in the mus-
20 tard crew long enough to establish seniority.

21 In March, 1980, Gabriel tried to the mus-
22 tard crew. He was told by a Company supervisor that he had lost
23 his seniority. He appeared for work a short time later, on the
24 first day of the season, and was given the same response by
25 Fernando. Gabriel said that about six new workers were hired that
26 day, after the seniority workers were given jobs. During his

1 testimony, Fernando said that he would have hired Gabriel as a new
2 worker had he been hiring non-seniority employees that day. How-
3 ever, according to Fernando, he did not hire any non-seniority
4 workers until later in the season. General Counsel Exhibit 7-C, a
5 compilation of Company hiring records, demonstrates that seven em-
6 ployees without seniority numbers were hired by Fernando during the
7 week ending March 8, 1980. Another nine employees without seniority
8 numbers were hired during the following week.

9 Gabriel appealed Fernando's refusal to rehire him
10 through several levels of Company supervisors. He testified that Paul
11 Hernandez, Fernando's supervisor, told him a week later that he would not
12 be hired, "even as a new worker, because you cause a lot of problems"
13 (R.T. 11:62). Paul denied making such a statement and further denied
14 that Gabriel had asked about being hired as a new (i.e., non-seniority)
15 worker. According to Paul, he simply told Gabriel that he had lost his
16 seniority because he had transferred without permission. Paul relied
17 solely on what Fernando told him in reaching this conclusion. Paul also
18 testified that non-seniority workers were not hired until several weeks
19 after the season started. Because the Company records support Gabriel on
20 this issue, I credit his account over Paul's.

21 Ultimately, Kelly Olds ruled that Gabriel had not
22 followed proper procedure, in that he had failed to get Fernando's
23 permission to transfer. As a result, Gabriel had properly been denied
24 status as a seniority worker. Olds' decision was reached simply by
25 ascertaining that there was no written permission for the
26

1 transfer and by asking Fernando if he had given Gabriel oral per-
2 mission.

3 D. Jesus Duarte Hernandez

4 Jesus Duarte Hernandez worked as an irrigator in
5 1979. Cruz Reyes hired Jesus and was his foreman during the first
6 half of the season. Later, Cruz's brother, Joel Reyes, became the
7 crew foreman.

8 During the summer of 1979, Jesus was elected by the
9 other irrigators in the crew as their Union representative.
10 Sabino Lopez, the UFW organizer who conducted the election, testi-
11 fied that the crew foreman (unnamed) was nearby at the time. As
12 Union representative. Jesus passed out pamphlets and flyers to the
13 other irrigators. Typically, he kept the Union materials in a box
14 on his tractor and handed them to the other workers when he saw
15 them in the field. Because the irrigators worked independent of
16 direct supervision by the foremen, Company supervisors did not see
17 Jesus passing out Union materials in the field. However, when he
18 passed out flyers in the shop where the workers assembled in the
19 morning before work began, supervisors were in the area. The re-
20 cord is not clear as to which supervisors were present or as to
21 how many times Jesus distributed flyers in the shop, Joel Reyes,
22 Cruz Reyes, and their immediate supervisor, Jesus Vasquez, all de-
23 nied having seen Jesus distribute Union materials, wear Union
24 buttons, or participate in any Union activities other than talking
25 to Union organizers, something which all the irrigators did. All
26 three supervisors stated that they were unaware that Jesus was the

1 crew's Union representative.

2 On one occasion before he left as crew foreman, Cruz
3 Reyes saw Union organizers in the shop area and reminded them of
4 their responsibilities under an access agreement between the UFW
5 and the Company, Jesus Vasquez once told two Union organizers to
6 leave the area. According to Vasquez, the access agreement per-
7 mitted no more than two organizers per crew, and there were four
8 organizers in the area at the time. According to Sabino Lopez, a
9 UFW organizer, this incident took place before Jesus was elected
10 Union representative. He testified that the supervisor asked him
11 to leave on orders of the Company.

12 At the end of the season in 1979, Joel laid Jesus
13 off and told him to return in late February or early March of 1980.
14 When Jesus asked Joel for work on March 4, 1980, Joel told him
15 that none was available yet, but to keep checking. According to
16 Jesus, Joel took down his phone number and said that he would call
17 Jesus as soon as he began hiring again, Joel denied that he ever
18 had Jesus' phone number and stated that he never recalled any
19 worker by phone. The parties stipulated that Felimon Guevava, an
20 irrigator with slightly less seniority than Jesus, worked on
21 March 5, 6, and 8, 1980, but may have begun working earlier (R.T.
22 VII:122-24). Jesus Vasquez testified that Felimon was hired at the
23 end of February, because Jesus Duarte had not yet returned.

24 Jesus returned to ask Joel for work again about two
25 weeks later, Joel told him to keep checking since no work was yet
26 available. The parties stipulated that a second worker with less

1 seniority than Jesus, Jorge Z. Molina, was hired during the
2 week ending March 22, 1980. Since Jorge worked five days
3 during that week, it is probable that he was hired on March 17
4 or 18 (R.T, VII: 122-24),

5 About a week later, Jesus came back to check with
6 Joel a third time, Joel told him work was still slow and that
7 perhaps Jesus should look for another job, although Jesus still
8 had seniority and would be recalled whenever work became
9 available. Jesus felt that Joel was embarrassed and not being
10 honest with him. Joel claims that Jesus offered him money in
11 return for a job.

12 That same day Jesus Duarte spoke with supervisor
13 Jesus Vasquez and told him that Joel did not want to hire him,
14 Vasquez took Duarte's phone number and said that he would call when
15 work became available. Vasquez told Duarte that he had seniority and
16 would be the next irrigator to be hired. Vasquez testified that
17 Duarte also offered him money in return for a job. On or about March
18 30, 1980, Vasquez called Duarte's number, but there was no answer.
19 Then he lost the phone number, Joel and Vasquez said that they waited
20 for Jesus to come back so they could give him work. Jesus testified
21 that he gave up because he was never called by Joel or Vasquez. The
22 Company hired several irrigators with less seniority than Jesus during
23 the month of April, 1980,

24 E. The Wage Increase Of July 16, 1980

25 In lieu of presenting oral testimony on this issue,
26 the parties introduced, by stipulation, a number of documentary

1 exhibits detailing the negotiations between the Company and the UFW
2 There is virtually no dispute about the facts relating to this
3 issue.

4 On August 24, 1977, the UFW was certified by the
5 Board as the exclusive representative of Respondent's agricultural
6 employees at its Brawley location and in the Salinas Valley, with
7 some minor exceptions. Respondent refused to bargain with the UFW
8 in order to test the validity of the certification in the courts.

9 [See 4 ALRB No. 45 (1978),] The Court of Appeal denied review of
10 Respondent's petition on March 20, 1980, and the Supreme Court del-
11 nied Respondent a hearing on April 21, 1980. The Court of Appeal
12 remanded the case to the Board in light of the Supreme Court's de-
13 cision in J.R. Norton Co. v. A.L.R.B., 26 Cal,3d 1(1979), on the
14 applicability of the make-whole remedy in "technical" refusal to
15 bargain cases. The Board determined that Respondent's litigation
16 posture was reasonable and deleted the make-whole provisions of its
17 order, while extending the UFW's certification for an additional year.
18 [See 6 ALRB No. 27 (1980).]

19 After the litigation was resolved, the UFW requested
20 Respondent to bargain. The first bargaining session was held on May 28,
21 1980. At this first meeting, the UFW provided Respondent
22 with a rather lengthy request for information. The UFW concedes
23 that the Company response has substantially complied with this re-
24 quest.

25 A second negotiation session was held on June 12,
26 1980. At this meeting, the Company provided the UFW with much of

1 the information it had requested on May 28. The UFW submitted its
2 contract proposal on the non-economic items, although its proposed
3 article on seniority may have been incomplete.

4 The third bargaining session occurred on June 26,
5 1980. At this meeting the UFW submitted its economic proposals,
6 including proposed contract terms on wages and fringe benefits, al-
7 though its wage proposal may have been incomplete for the anise
8 crew. The Company submitted a proposal for a wage increase for
9 its Salinas district employees, to be effective on July 16, 1980
10 (G,C. Exh. 3-D), The UFW negotiating team decided, after caucusing
11 to discuss the proposal, to reject any wage increase outside the
12 context of an agreement on a comprehensive contract. The UFW ex-
13 plained that such an increase would undermine progress toward such
14 a comprehensive agreement, while the Company stated that it wanted
15 to raise wages, as it typically did in July, to remain competitive
16 with other growers in the area. The wage increase would have
17 brought the Company's wages in line with those of other companies
18 in the Salinas valley area operating under contracts with the UFW.
19 The UFW suggested stepping up the tempo of negotiations in order to
20 arrive at an agreement on all issues by July 16.

21 The fourth bargaining session took place on July 7,
22 1980, At this meeting the Company submitted its response to the
23 UFW's proposal on non-economic issues. The Company did not accept
24 any of the UFW's proposed articles. No agreement was reached on
25 any article at this session. The Company did not submit a response}
26 to the UFW's proposal on economic issues. While it repeated its

1 desire to implement the wage increase on July 16, Respondent was
2 unable to meet with the UFW again before that date because its
3 attorney and bargaining representative had scheduled vacations
4 during the week of July 14,

5 At some point in the negotiations, the Company re-
6 quested certain information concerning the UFW's proposal for em-
7 ployer contributions to the medical plan and other benefit funds.
8 As of July 16, the Company had not received this information.

9 The Company was a party to a collective bargaining
10 agreement with the Western Conference of Teamsters from 1973
11 through 1977. The contract called for wage increases to be made
12 each year on July 16. In 1978, the Company once again provided
13 its employees with a wage increase on July 16, In 1979, the Com-
14 pany granted raises in March and August in order to keep pace with
15 its competitors.

16 On July 16, 1980, the Company increased wages in
17 accord with its proposal of June 26, 1980, without reaching agreement
18 with the UFW.

19 DISCUSSION, ANALYSIS, AND CONCLUSIONS

20 I. The Section 1153(c) Issues.

21 A. Maria Conceocion Rico

22 The Complaint alleges that Maria's separation from
23 the other members of the crew came about as a result of her Union
24 activity and that she was discharged on August 24, 1979, again be-
25 cause of her Union activity. In its brief, the General Counsel
26 argues that Maria's failure to return to work in 1980, was caused

1 by harassment from Ralph Everts and other Company officials , and
2 constitutes a constructive discharge.

3 As to the separation, it is clear that Ralph was
4 aware not only that Maria was a Union activist but that she was the
5 Union representative for the crew and its most vocal supporter.
6 It is equally clear that Ralph did not like and was upset by what
7 he thought Maria was saying about unionization to other members of
8 the crew. The evidence is more than sufficient to establish a
9 prima facie case of violations of §§1153(a) and (c). In defense,
10 the Company argues that Maria was separated because her talking during
11 work time slowed down the crew. The Company contends that
12 it was unconcerned about the content of Maria's speech, but was
13 concerned about its effect on the crew's work. Kelly Olds, the
14 Company's labor relations manager, testified that when he spoke to
15 Maria, who was working in the field at the time, about the separa-
16 tion, she gesticulated frequently with her hands, slowing down her work.

17 I find the Company's defense unpersuasive in light
18 of the timing and context of the separation. It was ordered by
19 Ralph when he admitted that he was upset about what he perceived to
20 be untruths told by Maria to other employees. Part of his reason
21 for the separation was his feeling that Maria was influencing
22 other employees against the Company position on unionization.
23 Clearly, Ralph's decision to separate Maria from the rest of the
24 crew was made in response to what he thought was the content of
25 her speech. Although Ralph testified that he had separated crew
26

1 members in the past when their talking had slowed down the work,
2 Maria had never before been separated. If her talking were always
3 accompanied by hand gestures, it would be reasonable to assume
4 that she either would have been separated in the past or that the
5 gestures were not the real reason for the separation. I find that
6 Maria was separated from the rest of the crew because of her pro-
7 tected Union activity, in violation of §§1153(a) and (c) of the
8 Act.

9 Maria was laid off on August 24, 1979, along with a
10 number of other employees in the same crew. She was recalled a
11 short time later and again laid off. The only evidence tending to
12 establish any discrimination in these layoffs is that one employee
13 with less seniority continued to work. In its defense, the Corn-
14 pany introduced evidence to demonstrate that the employee in ques-
15 tion was the foreman's helper and trainee. The General Counsel
16 offered no evidence to rebut this credible testimony, I therefore
17 find that there was no anti-Union discrimination involved in the
18 layoffs. This allegation shall be dismissed.

19 Alternatively, the General Counsel argues that
20 Maria's treatment by the Company was so hostile that it amounted
21 to a constructive discharge. I find no merit to this argument.
22 Maria was separated from the rest of the crew on, at most, two
23 occasions. They were for a short period of time and did not in-
24 volve a transfer to more arduous or unpleasant work. While her
25 verbal exchanges with Ralph about the Union were certainly un-
26 pleasant for Maria, they did not prevent her from finishing out

1 the 1979 season. The Board has held that a constructive discharge
2 occurs when "an employer renders an employee's working conditions
3 so intolerable that the employee is forced to quit," Sierra Citrus
4 Association, 5 ALRB No, 12 (1979), but that "not every discrimina-
5 tory assignment to more onerous work followed by the employee's re-
6 signation constitutes a constructive discharge." George
7 Arakelian Farms, Inc., 5 ALRB No. 10 (1979). Here, Maria's treat-
8 ment did not approach such intolerable levels. Further, it took
9 place more than six months before Maria's failure to return to
10 work in 1980. I find that the General Counsel has not established
11 that the Company constructively discharged Maria.

12 B. Eugenio Hernandez, Jr.

13 The Complaint charges that Eugenio was laid off by
14 his foreman, Martin Ayala, because of his Union activities, Cre-
15 dible evidence presented by the General Counsel establishes that
16 Eugenio engaged in protected concerted activity on behalf of the
17 UFW in helping to organize and lead his crew in a work stoppage to
18 protest the Company's refusal to negotiate with the UFW. The evi-
19 dence further demonstrates that Eugenio's foreman, Martin Ayala,
20 made anti-Union statements at the time of the work stoppage and
21 treated Eugenio more harshly after it took place. The Company's
22 only defenses to the charge are a denial that it had knowledge of
23 Eugenio's Union activities and that his layoff came about as the
24 result of an unspecified mistake. I reject the first defense be-
25 cause I find that Martin's testimony was lacking in credibility.
26 As to the attempt to characterize the layoff as a mistake, it is

1 unsupported by any substantial evidence as to the nature of the
2 mistake or how it came about. Eugenio returned to the field seek-
3 ing work for several days after the layoff. If there had been
4 some mistake concerning his seniority, the Company had ample time
5 to check out the facts and make a correction.

6 The Company's attempt to justify the layoff by
7 asserting that there was no business justification is particularly
8 unpersuasive taken together with Eugenio's active participation in
9 the work stoppage and Martin's denial that he had any knowledge of
10 it, even though the layoff took place months after the walk-out.
11 The more logical inference is that there was no mistake involved
12 in the layoff, but that it resulted from Eugenio's protected Union
13 activity. I conclude that the layoff violated §§1153(a) and (c)
14 of the Act.

15 C. Gabriel Zamudio

16 The General Counsel contends that the Company unlaw-
17 fully refused to rehire Gabriel as a mustard cutter in 1980, be-
18 cause of his protected concerted activities. It is undisputed
19 that Gabriel was one of the leaders of a work stoppage called in
20 September, 1979, to protest certain working conditions. There is
21 no doubt that the walk-out was concerted activity for mutual aid
22 and protection protected by §1152 of the Act. And it is clear
23 that Gabriel's foreman, Fernando Sanchez, considered Gabriel to be
24 a malcontent, and treated him harshly after the work stoppage,

25 A primary dispute among the parties is whether
26 Gabriel sought and received Fernando's permission to transfer from

1 the mustard to the anise crew. According to Respondent's wit-
2 nesses, such permission is a prerequisite to retaining seniority in
3 the first crop. While Kelly Olds, the Company's labor relations
4 supervisor, attempted to portray the Company's seniority system
5 and procedures as being formalized and standardized, it is clear
6 from the testimony of various foremen that responsibility for the
7 actual implementation of the seniority system rested with them and
8 that their practices varied considerably. Some required the per-
9 mission to transfer to be in writing, while others allowed oral re-
10 quests to be honored. Fernando¹'s supervisor, Paul Hernandez, tes-
11 tified that an oral request was sufficient.

12 The evidence on this issue is conflicting. Gabriel
13 testified that Fernando gave him permission to transfer; his ver-
14 sion was corroborated by Teresa Vasquez, a credible witness,
15 Fernando denied that Gabriel asked for permission to transfer and
16 testified that he would have denied such a request because of his
17 manpower needs. Gabriel told John Snell, the anise crew foreman,
18 that he had not asked Fernando for permission, Gabriel stated
19 that he told John he had not asked Fernando if he could transfer
20 because he was afraid that Fernando would deny that he had given
21 permission. He wanted to be sure that John would talk to Fernando
22 to double check his status. John, who was the Company's most cre-
23 dible witness, denied that Gabriel had asked him to talk to
24 Fernando about Gabriel's seniority status. What is undisputed is
25 that Fernando knew that Gabriel had changed crews and made no
26 attempt to warn him that his seniority as a mustard employee was in

1 jeopardy. Fernando merely waited the three days required by Com-
2 pany policy and filed a termination notice for Gabriel for absence
3 from work. While this is a difficult issue to resolve, I find that
4 Gabriel did inform Fernando that he was changing crews, but that
5 Fernando's "OK" was ambiguous. Fernando's testimony revealed that
6 he is a man who tends to interpret rules technically. Since
7 Gabriel notified Fernando he was changing crews without explicitly
8 asking permission to transfer or specifically asking about his
9 seniority, Fernando did not explicitly grant permission. I credit
10 John Snell's testimony that he did not promise to make sure the
11 transfer had been effective.

12 There is less doubt about the legality of Fernando's
13 refusal to hire Gabriel in 1980. Even assuming that the Company
14 had denied Gabriel seniority in the mustard crew for nondiscrimi-
15 natory reasons, the Company could not lawfully refuse to hire him
16 as a non-seniority employee for discriminatory reasons. Respon-
17 dent's records (G.C. Exh. 7-C) clearly support Gabriel's testimony
18 that workers without seniority were hired when he sought employ-
19 ment on the first day of the season. During the weeks ending
20 March 8, 1980, and March 15, 1980, 16 employees without seniority
21 were hired to work in the mustard crew, contrary to Fernando's
22 testimony that he did not hire new workers until several weeks
23 after the start of the season in early March. Paul Hernandez told
24 Gabriel that he would not be hired as a new worker because he
25 caused too many problems. Paul was well aware of the 1979 walk-
26 out. Since the Company has presented no business justification

1 for refusing to hire Gabriel as a non-seniority worker, I find
2 that it has violated §1153(a) of the Act. I further find that in
3 denying Gabriel his seniority status in the mustard crew it vio-
4 lated §1153(a) of the Act. Regardless of the technicalities of
5 the Company's seniority policy, it is clear that Fernando and John
6 were both aware that Gabriel had changed crews and neither made any
7 attempt to explain to him the consequences of the change on his
8 seniority. All of the testimony concerning seniority, from em-
9 ployees and from supervisors, establishes that the Company mad
10 virtually no attempt to let employees understand how the system
11 worked and how to protect their seniority rights. I specifically
12 find that Fernando's failure to make these matters clear to
13 Gabriel when Gabriel informed him that he was leaving the crew was
14 motivated by Gabriel's leadership in the work stoppage, in viola-
15 tion of §1153(a) of the Act. Because there is no evidence that
16 Gabriel engaged in Union activities in Fernando's presence, I find
17 that there are no violations of §1153 (c) with respect to Gabriel.

18 D. Jesus Duarte Hernandez

19 The Complaint alleges that Jesus was not rehired as
20 an irrigator in 1980 because of his Union activities, in violation
21 of §§1153(a) and (c) of the Act. In order to establish a prima
22 facie case that Respondent refused to rehire Jesus in violation of
23 §§1153(a) and (c), the General Counsel has the burden of showing
24 that the refusal was based upon Respondent's knowledge that, he had
25 engaged in activities on behalf of the UFW and that there is a
26 causal connection between the refusal to rehire and that activity.

1 Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979); Louis Caric &
2 Sons, 6 ALRB No. 2 (1980); and Tenneco West, Inc., 6 ALRB Mo. 3
3 (1980).

4 Like Maria Rico, Jesus was his crew's UFW representa-
5 tive and, in that capacity, distributed leaflets to other employees.
6 Unlike Maria, Jesus never discussed the Union with his foreman or
7 any other Company official. As an irrigator he worked largely with-
8 out direct supervision. He would generally see supervisors only in
9 the morning' before work began. For the most part, he would keep UFW
10 materials in his tractor and distribute them in the fields, out of
11 the presence of supervisors. Viewing the evidence of Company know-
12 ledge of Jesus' Union activities in a light most favorable to the
13 General Counsel, there is little to distinguish his Union activities
14 from those of the rest of the crew. At most, his supervisors may
15 have seen Jesus distribute leaflets to other employees on a few
16 occasions. But, there is no evidence that Jesus ever wore Union
17 buttons, discussed the Union with his supervisors, or in any other
18 manner advertised his status as crew representative to his foremen.
19 Even if supervisors were in the general vicinity of the workers when
20 they elected Jesus as their representative, there is nothing in the
21 record to indicate that they were in a position to overhear the pro-
22 ceedings or even to know that a crew representative was being se-
23 lected.^{4/}

24 ^{4/}The General Counsel invokes the NLRB's small-plant rule,
25 N.L.R.B. v. Joseph Antell, 358 F.2d 880 (1st Cir. 1966), in an
26 effort to impute' Company knowledge of Jesus' Union activities. The
small-plant rule is clearly inapplicable where, as here, there is clear
evidence that Jesus rarely worked in the presence of supervi-
sors,

1 As far as anti-Union animus or motivation on the part
2 of Jesus' supervisors is concerned, there was some testimony to
3 the effect that Cruz Reyes and Jesus Vasquez each requested Union
4 organizers to leave the field or the shop on one occasion. Accord-
5 ing to these supervisors, the organizers were in violation of the
6 Company's access agreement with the UFW, and there is nothing in
7 the record to indicate that this was not the reason they were re-
8 quested to leave. There is simply no other evidence of anti-Union
9 statements or conduct on the part of Jesus' supervisors. As a re-
10 suit, there is insufficient evidence of a causal connection between
11 Jesus' Union activities and his failure to be rehired, I find,
12 therefore, that the General Counsel has failed to establish a
13 prima facie case to support its allegation of a §1153(c) viola-
14 tion.

15 Even though I have determined that this allegation must
16 be dismissed, I will briefly review the Company's business
17 justifications for its refusal to rehire Jesus, for two reasons.
18 First, in the event that, upon review, it is determined that the
19 General Counsel did make out a prima facie case, it will be helpful
20 to have findings with respect to the Company's business defense,
21 Second, because the evidence discloses clear violations of its own
22 seniority policy by the Company, part of a pattern of more general
23 problems in the implementation of its seniority system, it may wish
24 to review its decision in this matter and the way in which it
25 communicates its seniority rules both to supervisors and to em-
26 ployees .

1 Jesus testified that Joel told him to return to ask
2 for work during the latter part of February or the early part of
3 March. Joel testified that he told Jesus to return in early
4 March. There is no contention by the Company that Jesus was not in
5 compliance with these instructions. Nonetheless, Joel had hired
6 Felimon Guevava, a worker with less seniority than Jesus, at the
7 end of February. According to the testimony of Kelly Olds, the
8 Company's labor relations supervisor, a worker in Jesus' position
9 should have been rehired immediately, even if a worker with less
10 seniority had to be laid off (R.T, 1:127-30). Joel again hired a
11 worker with less seniority than Jesus at just about the time that
12 Jesus checked with him the second time, Joel was evasive in his
13 answers when asked whether he had hired any employee with less
14 seniority than Jesus during the month of March.

15 The Company's only defense to the charge that it vic-
16 lated its own seniority system is extraordinarily technical. The
17 Company argues that because Jesus was not physically present in
18 the fields at the precise moments when hiring occurred, the Corn-
19 pany was justified in hiring people with less seniority. Following
20 this reasoning to its logical conclusions, the seniority system is
21 a mere sham. A worker would have to literally camp out in the
22 fields to be sure that he would retain his seniority rights. This
23 is particularly true in a small crew, such as the irrigation crew,
24 where workers are hired one at a time as the season progresses,

25 While I found Jesus Vasquez's testimony that he lost
26 Jesus Duarte's phone number to be credible, as was his testimony

generally, I find that Jesus Duarte also gave his phone number to Joel. I make this finding because of Joel's frequently vague or nonresponsive answers, in contrast to Jesus' generally precise testimony. It is certainly understandable why Jesus tried to get his job back with money and why he gave up after the treatment he received. Although Joel's testimony raises suspicions as to his motives, the evidence is too speculative to conclude that there was anti-Union motivation in the refusal to rehire. Rather, the evidence seems to reflect that the foremen simply did not consider the seniority system to be binding on them, Joel clearly treated Jesus like any job applicant without seniority. He testified that employees were to check for work every day. According to Joel, "when a worker is interested in getting a job, he keeps insisting" (R.T,VII;31). Such an attitude is inconsistent with a serious intent to implement a seniority system, but it is not evidence of anti-Union motivation.

II. The Wage Increase.

The General Counsel argues that the wage increase of July 16, 1980, made over the objections of the UFW, the certified collective bargaining agent for the Company's agricultural employees in the Salinas Valley, constitutes a per se violation of Respondent's obligation to bargain in good faith. In the absence of certain limited exceptions, it is clear that such unilateral changes in wages are violations of the Company's bargaining obligations pursuant to §1155.2(a) of the Act and are unfair labor practices under §§1153 (a) and (e) of the Act. N.L.R.B. v. Katz, 869

1 U.S. 736 (1962); McFarland Rose Production, 6 ALRB No. 18 (1980).

2 Respondent has raised four defenses to the charge: (1)
3 that unilateral action is not unlawful if only undertaken after the
4 Union has been given notice and an opportunity to bargain over the
5 proposed change; (2) that the Company and the UFW were at impasse
6 over the issue; (3) that the wage increase was granted automati-
7 cally in accordance with long established Company policy; and (4)
8 that the UFW bargained in bad faith over the proposed increase, re-
9 lieving the Company from any further obligation to continue bar-
10 gaining.

11 A. Notice And Opportunity To Bargain

12 Respondent has cited several cases which hold that
13 an employer may institute unilateral changes in wages or other
14 working conditions after it has given the union notice of the pro-
15 posed changes and an opportunity to bargain about them. It is un-
16 disputed that the Company met these conditions. However, the
17 cases cited, while the law of the Fifth Circuit, are not consis-
18 tent with either the current position of the NLRB or of our Board.
19 If such an approach were to be adopted, there would be an incen-
20 tive for an employer not to compromise. He would merely need to
21 present a proposal, afford the union a pro forma opportunity to
22 state its objections and then implement the desired change. The
23 union's role would be reduced to either agreeing to the change or
24 opposing it. In either case, the employer would be free to put it
25 into effect. In this way, the employer would be able to write its
26 own collective bargaining agreement, simply by offering piecemeal

1 proposals to the union. Such an approach is utterly inconsistent
2 with the employer's statutory obligation to negotiate in good
3 faith with the intent to reach an agreement if possible,

4 In Winn-Dixie Stores, 101 LRRM 1534, 243 NLRB No.
5 145 (1979), the NLRB noted the Fifth Circuit's position and then
6 explained its reasoning behind its refusal to adopt it:

7 We conclude, however, that the requirement
8 that the parties reach impasse before a
9 unilateral change may be lawfully imple-
10 mented, rather than merely discuss a pro-
11 posed change, is in accord with the basic
12 tenets established by the Court in
13 N.L.R.B. v. Katz, as quoted above, and by
14 Congress in enacting Section 8(d) of the
15 Act.

16 Indeed, under the Fifth Circuit Court of
17 Appeals' interpretation of the bargaining
18 obligation, an employer would be entitled
19 to change unilaterally any term or condi-
20 tion of employment, regardless of the
21 status of negotiations with its em-
22 ployees' collective-bargaining representa-
23 tive, as soon as the representative was
24 notified of the intended change and given
25 an opportunity to discuss it. By utiliz-
26 ing this approach with respect to various
employment conditions seriatim, an em-
ployer eventually would be able to imple-
ment any and all changes it desired re-
gardless of the state of negotiations be-
tween the bargaining representative of its
employees and itself.

We do not believe that this method of "bargaining"
satisfies the definition of
the duty to bargain collectively stated in
Section 8(d) of the Act as "the perform-
ance of the mutual obligation of the em-
ployer and the representative of ,the em-
ployees to meet at reasonable times and
confer in good faith with respect to
wages, hours, and other terms and condi-
tions of employment." Instead, under this
approach, form, rather than substance,

1 becomes the determinative factor in decid-
2 ing whether the bargaining obligation has
3 been fulfilled. In consequence, meaning-
4 ful collective bargaining is precluded and
5 the role of the bargaining representative
6 is effectively vitiated. We cannot en-
7 dorse an approach so clearly in disparage-
8 ment of the collective-bargaining process,

9 [101 LRRM at 1535,]

10 Here, at the very onset of the collective bargaining
11 process, the Company wanted to continue its past practice of uni-
12 laterally deciding the amount and timing of wage increases. I
13 take administrative notice of the fact that virtuall all of the
14 collective bargaining agreements between agricultural employers
15 and unions since the passage of the Act have been comprehensive in
16 nature, dealing with a wide variety of terms and conditions of ern-
17 ployment, as well as wages and fringe benefits. Such a comprehen-
18 sive agreement was obviously contemplated by the parties in thi
19 case. In the negotiations leading up to the signing of a compre-
20 hensive agreement there will obviously be give and take on various
21 provisions. If an employer can remove a subject, especially one
22 as central as wages, from the bargaining table unilaterally, then
23 the character of contract negotiations will have been fundamen-
24 tally altered. Such action, absent a genuine impasse in contrac-
25 tual negotiations, is a failure to bargain in fact, and consti-
26 tutes a per se violation of the Act, I find that the fact that
the Company gave the UFW notice of the proposed wage increase and
an opportunity to discuss it does not constitute a defense to the
charge of bad faith bargaining.

1 B. Impasse

2 In its brief, Respondent states that there was an im-
3 passe on the issue of wages, but does not support its bare asser-
4 tion with any argument. The Board has been very clear that unila-
5 teral changes in wages during the certification period can be im-
6 plemented only if there is a genuine impasse in bargaining on all
7 major outstanding items, A deadlock on just one issue will not
8 suffice. Here, substantive bargaining had not yet begun at the
9 time the wage increase was implemented. The early negotiation
10 sessions were given over to exchanges of information and initial
11 bargaining proposals. Clearly, there was no general bargaining
12 impasse. To the extent that the parties were opposed on the
13 issue of wages, it is possible as a matter of semantics to argue
14 that they were at impasse on that issue. However, the Board has
15 ruled unequivocally that:

16 A deadlock in some areas is not sufficient
17 reason for an impasse to be declared if
18 there is still room for movement on major
19 contract items [citations omitted] since
20 further negotiations in areas where move-
21 ment can be made offer the possibility
22 that ways will be discovered to compromise
23 on disagreements which had seemed intract-
24 able, [McFarland Rose Production, supra,
25 at p. 17.]

26 Respondent's contention that there was an impasse on
the issue of wages begs the question. There is never an occasion
for unilateral action unless the union has rejected the company's
offer. If, as Respondent argues, it is free to make whatever
changes it desires whenever the union and the company disagree on

1 whether the change should be made immediately, apart from a full
2 contract, the entire collective bargaining process would be re-
3 duced to a meaningless exercise.

4 C. The Company's Past Practice

5 Respondent argues that the wage increase was an auto-
6 matic adjustment to keep its wages competitive with other Salinas
7 Valley employers. During the term of its collective bargaining
8 agreements with the Teamsters, Respondent granted annual wage in-
9 creases on July 16, in accordance with the terms of the contract.
10 In 1978, the Company again raised wages on July 16. However, in
11 1979, wages were increased twice: once in March and once in
12 August. Respondent's efforts to characterize these wage adjust-
13 ments as "automatic" are specious. Respondent was under no con-
14 tractual or other legal duty to raise wages. Nor, contrary to
15 certain suggestions in the Respondent's brief, is there any evi-
16 dence in the record to establish that the Company had announced to
17 its employees a fixed policy of raising wages to the level of its
18 competitors. Only if a wage increase is granted pursuant to a well
19 established company policy, which is a part and parcel of the
20 existing wage structure, and over which the company has no signifi-
21 cant measure of discretion, is there a valid defense to a bad
22 faith bargaining charge, N.L.R.B. v. Ralph Printing and
23 Lithographic Co., 433 F.2d 1058, 1062, 75 LRRM 2267, 2270 (8th Cir.
24 1970); N.L.R.3. v. Katz, supra. I find that the raises granted by
25 the Company were neither automatic nor part of a fixed policy to raise
26 ages according to a certain formula at a specified time.

1 D. The UFW's Bargaining Posture

2 Finally, the Company argues that the UFW was guilty
3 of bad faith bargaining in that it (1) refused to give a counter-
4 proposal on the interim wage increase issue; and (2) refused to en-
5 gage in substantive discussions on the history or reasons behind
6 the proposed wage increase. Neither argument is well founded. The
7 UFW responded to the proposal for an interim wage increase by
8 suggesting that the pace of negotiations be accelerated. The UFW
9 negotiators' correspondence with the Company's negotiator makes it
10 clear that the Union understood why the Company wished to raise
11 wages. The letter also emphasizes the reasoning behind the
12 Union's rejection of the proposal: namely, that it would reduce the
13 Union's leverage to gain a comprehensive agreement (G.C, Exh. 8-F).
14 Particularly in light of the fact that bargaining had just begun,
15 two and one-half years after the initial certification, this was
16 not an unreasonable position to take. As the Board noted in
17 McFarland Rose Production, supra, where the employer was proposing
18 a similar interim wage increase: "The Union, then, was being asked
19 to give away a major element of its bargaining leverage with no
20 corresponding concession on Respondent's part," 6 ALRB No. 18, at
21 p. 18.

22 The fact that the UFW had not at this early stage of
23 the bargaining process provided the Company with all the informa-
24 tion it had requested with respect to the benefit funds, and that
25 its wage proposal may have been incomplete as to the anise crew, in
26no way suggests that it was not faithfully carrying out its

1 bargaining obligations.

2 I conclude that in unilaterally raising the wages of
3 its Salinas district employees, over the objection of the UFW, and
4 in the absence of any impasse in negotiations, the Respondent
5 committed a per se violation of Sections 1153(a) and (e) of the
6 Act.

7 THE REMEDY

8 Having found that Respondent has engaged in certain un-
9 fair labor practices within the meaning of §31153(a), (c), and (e),
10 and §1155,2(a) of the Act, I shall recommend that it cease and de-
11 sist therefrom and take certain affirmative action designed to
12 effectuate the policies of the Act. Specifically, I recommend that
13 Respondent be ordered to offer reinstatement to their former or
14 equivalent jobs, without loss of seniority, to Eugenio Hernandez,
15 Jr., and Gabriel Zamudio. I further recommend that Respondent make
16 each of these employees whole for any loss of pay or any other eco-
17 nomic losses he has suffered as a result of Respondent's unfair
18 labor practices.

19 The General Counsel argues that Respondent be ordered to
20 make its employees whole for any loss of pay or any other economic
21 losses they may have suffered as a result of Respondent's violation
22 of its duty to bargain in good faith with the UFW. In a case such
23 as this, presenting a nontechnical refusal to bargain in good
24 faith, the Board has held that the make-whole remedy authorized in
25 §1160.3 of the Act shall be applied. Perry Farms, Inc., 4 ALRB No.
26 25 (1978), rev'd on other grounds, 86 Cal.App,3d 448 (1978).

1 Therefore, I will recommend that the make-whole remedy be ordered
2 here.

3 I shall recommend that the make-whole period commence on
4 July 16, 1980, the date of the implementation by the Company of the
5 unilateral wage increase. The General Counsel and the UFW urge
6 that the make-whole period should run from the date of the Com-
7 pany's initial refusal to bargain on September 16, 1977. However,
8 the Board has already ruled that Respondent's technical refusal to
9 bargain was based on a reasonable, good faith belief that the ini-
10 tial certification should not have issued, I am not prepared, on
11 this record, to review that determination or invite the Board to
12 reopen the record in the original refusal to bargain case.

13 Upon the basis of the entire record, the findings of
14 fact and conclusions of law, and pursuant to Section 1160,3 of the
15 Act, I hereby issue the following recommended:

16 ORDER

17 Respondent, D'Arrigo Brothers Company of California, its
18 officers, agents, representatives, successors, and assigns, shall:

19 1. Cease and desist from:

20 (a) Discharging, laying off, refusing to hire or re-
21 hire, isolating from other members of their crew, or otherwise dis-
22 criminating against any agricultural employee for engaging in Union
23 or other protected concerted activity.

24 (b) Refusing to bargain collectively in good faith,
25 as defined in Labor Code §1155.2(a), with the United Farm Workers of
26 America, AFL-CIO (UFW), as the certified exclusive bargaining

1 representative of its agricultural employees, in violation of Labor
2 Code §§1153(e) and (a), and in particular by unilaterally changing
3 the wage rates of its employees in the absence of a bona fide im-
4 passe in the collective bargaining process between itself and the
5 UFW.

6 (c) In any like or related manner interfering with,
7 restraining, or coercing agricultural employees in the exercise
8 of the rights guaranteed to them by Labor Code §1152.

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

11 (a) Immediately offer to Eugenio Hernandez, Jr., and
12 Gabriel Zamudio full reinstatement to their former jobs or equiva-
13 lent employment, without prejudice to their seniority or other
14 rights or privileges.

15 (b) Make whole Eugenio Hernandez, Jr., and Gabriel
16 Zamudio for any loss of pay and other economic losses (according to
17 the formula in J & L Farms, 6 ALRB No. 43 (1980), plus interest
18 thereon at a rate of 7% per annum), they have suffered as a result
19 in of their respective discriminatory layoff and failure to be re-
20 hired.

21 (c) Upon request, meet and bargain collectively in
22 good faith with the UFW as the certified exclusive collective bar-
23 gaining representative of its agricultural employees and, if under-
24 standing is reached, embody such understanding in a signed agree-
25 ment.

26 d) Reimburse its agricultural employees for all

1 losses of pay and other economic losses sustained by them as the
2 result of Respondent's refusal to bargain, for the period from
3 July 16, 1980, to such time as Respondent commences to bargain in
4 good faith with the UFW and continues so to bargain to the point of
5 a contract or a bona fide impasse.

6 (e) Preserve and, upon request, make available
7 to the Board and its agents, for examination and copying, all payroll
8 records, social security payment records, time cards, personnel re-
9 cords and reports, and all other records relevant and necessary to
10 a determination by the Regional Director of the back pay period and
11 the amount of back pay and other make-whole relief due its em-
12 ployees under the terms of this Order.

13 (f) Sign the Notice to Employees attached hereto.
14 Upon its translation by a Board agent into appropriate languages,
15 Respondent shall, reproduce sufficient copies in each language for
16 the purposes set forth hereinafter.

17 (g) Mail copies of the attached Notice, in all
18 appropriate languages, within 30 days after the date of issuance of,
19 this Order, to all employees employed by Respondent in its Salinas
20 district, at any time between August 1, 1979, and the time such,
21 Notice is mailed.

22 (h) Post copies of the attached Notice, in all appropriate
23 languages, for 60 days in conspicuous places on its 24 property, the
24 period and place(s) of posting to be determined by -e the Regional
25 Director. Respondent shall exercise due care to re-place any copy or
26 copies of the Notice which may be altered,

1 defaced, covered, or removed.

2 (i) Arrange for a representative of Respondent or a
3 Board agent to distribute and read the attached Notice, in all
4 appropriate languages, to its employees on Company time and prop-
5 erty, at times and places to be determined by the Regional
6 Director. Following the reading, the Board agent shall be given
7 the opportunity, outside the presence of supervisors and manage-
8 ment, to answer any questions the employees may have concerning the
9 Notice or employees' rights under the Act, The Regional Director
10 shall determine a reasonable rate of compensation to be paid by
11 Respondent to all nonhourly wage employees to compensate them for
12 time lost at this reading and the question-and-answer period.

13 (j) Notify the Regional Director in writing, within,
14 30 days after the date of issuance of this Order, of the steps
15 Respondent has taken to comply therewith, and continue to report
16 periodically thereafter, at the Regional Director's request, until
17 full compliance is achieved.

18 IT IS FURTHER ORDERED that allegations contained in the
19 Complaints not specifically found herein as violations of the Act
20 shall be, and hereby are, dismissed,
21

22 Dated: January 16, 1981,

23 AGRICULTURAL LABOR RELATIONS BOARD

24 By



25 Joel Gomberg
26 Administrative Law Officer

NOTICE TO EMPLOYEE

1 After a hearing in which each side had a chance to present
evidence, the Agricultural Labor Relations Board has found that we
2 violated the Agricultural Labor Relations Act by raising wages when
there was no impasse in bargaining between us and the United Farm
3 Workers of America, AFL-CIO (UFW) , your bargaining representative,
as well as discriminating against several employees because of their
4 Union and other activities protected by the Act. The Board has ordered
us to post this Notice and to mail it to those who worked at the Company
in the Salinas district between August 1, 1979, and the present. We will
5 do what the Board has ordered and also tell you that the Agricultural
Labor Relations Act is a law which gives all farm workers these rights:

- 6 1. To organize themselves.
- 7 2. To form, join, or help unions.
- 8 3. To bargain as a group and to choose whom they want
to speak for them.
- 9 4. To act together with other workers to try to get a
10 contract or to help or protect one another.
- 11 5. To decide not to do any of the above things.

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

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

14 WE WILL OFFER Eugenio Hernandez, Jr., and Gabriel Zamudio their
15 old jobs back and we will pay them any money they lost, plus interest
16 computed at 7% per annum, as a result of their respective layoff and
failure to be rehired.

17 WE WILL NOT fire or otherwise discriminate against any other
18 employee with respect to his or her job because he or she belongs to or
supports the UFW or any other union,

19 WE WILL bargain with the UFW about a contract because it is the
representative chosen by our employees.

20 WE WILL pay each of the employees employed by us after July 16,
21 1980, any money which they lost because we have not bargained in good
faith with the UFW,

22 WE WILL NOT change the wages of our employees in the absence of
23 a genuine deadlock in bargaining with the UFW.

24 Dated:

D'ARRIGO BROTHERS COMPANY OF
CALIFORNIA

25 By _____
26 Representative Title

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS
BOARD, AIL AGENCY OF THE STATE OF CALIFORNIA. DO NOT REMOVE OR
MUTILATE.