Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TEX-CAL LAND MANAGEMENT, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-84-D 80-CE-15-D 80-CE-197-D 80-CE-22-D 80-CE-199-D 80-CE-24-D 80-CE-205-D 80-CE-26-D 80-CE-206-D 8O-CE-123-D 80-CE-208-D 80-CE-128-D 80-CE-209-D 80-CE-130-D 80-CE-210-D 80-CE-161-D 81-CE-17-D 8 ALRB No. 85

DECISION AND ORDER

On December 31, 1981, Administrative Law Officer (ALO) Arie Schoorl issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent and the United Farm Workers of America, AFL-CIO, (UFW) or Union), Charging Party, entered into a formal settlement of five of the above-captioned cases[1/] as to which the ALO had found violations. Respondent timely filed exceptions to the ALO's finding of violations in five of the remaining unsettled cases, and a supporting brief, and General Counsel timely filed a reply brief.

Pursuant to the provisions of Labor Cede section 1146,[2/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

[1/] Case Nos. 80-CE-24-D (Eluterio Gutierrez); 80-CE-13C-D (Jose Torres); 80-CE-209-D (Antonio and Elena Jain-es); 80-CE-210-D (Pedro Ramirez, Elva Ramirez, Juan Garcia, Joaquina Flores de Garcia); 80-CE-197-D (Bernice Flores, Antonio Gonzalez, Sergio Gonzalez).

[2/] All section references herein refer to the California Labor Code unless otherwise indicated.

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

Unilateral Changes

We affirm the ALO's conclusion that Respondent violated sections 1153(e) and (a) of the Agricultural Labor Relations Act (ALRA or Act) by unilaterally contracting out: (1) harvest work at Respondent's El Poso Ranch in July and August of 1979; (2) vineyard repair work in 1979-80; (3) swamping work, in October and November of 1980; and (4) grape pruning work in January of 1981, all without following the contractual hiring provisions or giving the Union notice and opportunity to bargain about the changes.

We note, however, that all but the swamping work was contracted to a labor contractor, which is different from subcontracting to another employer in the sense of the National Labor Relations Board's (NLRB) Fibreboard decision which was cited by the ALO and General Counsel. (Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609].) Under section 1140.4 (c) of the ALRA, labor contractors are not agricultural employers and the agricultural employees provided by a labor contractor are members of the bargaining unit and employees of the employer for all purposes under the Act. Therefore it cannot be said that engagement of a labor contractor alone constitutes contracting out of bargaining unit work.

Although contracting to a labor contractor does not result in a loss of bargaining unit work, we conclude that Respondent violated section 1153(e) and (a) of the Act by unilaterally changing its hiring practices, thereby affecting the terns and conditions of employment of the members of the bargaining unit. Respondent has a duty to notify and bargain with the UFW about any changes which affect the terns and conditions of employment of its employees.

The UFW was certified as the exclusive collective bargaining representative of Respondent's agricultural employees on June 1, 1977. On May 11, 1978, Respondent and the UFW signed a collective-bargaining agreement which was in effect from May 11, 1978 through November 2, 1979. On November 2, 1979, the parties executed a second collective-bargaining agreement which was in effect from November 2, 1979, through July 31, 1980.[3/] The two contracts contained detailed provisions relating to hiring, management rights, and subcontracting. The contracts provided for Respondent's accepting applications pursuant to a centralized hiring procedure and required Respondent to give preference in hiring new employees "during harvest operations" to members of the families of present employees. An identical Management Rights provision, which preserved for Respondent "All functions, rights, powers, and authority which the Company has not specifically modified by this Agreement," was included in

[3/] The parties signed the second collective-bargaining agreement on November 2, 1979, but the contract states that it shall be in effect from September 1, 1979, through May 10, 1980. The contract was extended on a daily basis through July 31, 1980.

Article XVI in both contracts.

Article XVII of each contract set forth detailed, limits on Respondent's right to subcontract. The first contract permitted Respondent to subcontract only: (a) where its employees do not have the skills to perform the work to be subcontracted; (b) when the operation to be subcontracted requires specialized machinery or equipment not owned by Respondent; or (c) when the operation to be subcontracted has been subcontracted in the past by Respondent. The first contract also provided that before subcontracting work under Article XVII(a) and/or (b), Respondent must give notice to the Union and bargain with it about the decision to subcontract. The second contract set forth essentially the same limitations on subcontracting, but included a list of the operations which Respondent was permitted to subcontract. Harvesting and swamping of grapes, vineyard repair and pruning, the operations subcontracted in the instant matter, are not included in that list.

The provision of the first contract requiring Respondent to give prior notice to, and to engage in decision bargaining with the Union before subcontracting for lack of skills or specialized equipment does not appear in the second contract. However, the second contract required Respondent to utilize "normal" hiring procedures when additional workers were needed and to notify the Union when it needed assistance in procuring additional workers. The second contract also provided that, where the Union was unable to provide workers by a specific deadline set by Respondent, the Respondent was free to hire

workers from any other source.

The contracting out of harvest labor at Respondent's El Poso Ranch took place while the first collective-bargaining agreement was in effect. The contracting out of the vineyard repair work occurred during the term of the second agreement. Respondent subcontracted the swamping work to Brookins Trucking and contracted the grape pruning to labor contractor Mendez after the expiration of the second contract.[4/]

Where a term or condition of employment is established by past practice and/or contractual provision, a unilateral change constitutes "a renunciation of the most basic of collective bargaining principles, the acceptance and implementation of the bargain reached during negotiations." (Nedco Construction Corp. (1973) 206 NLRB 150 [84 LRRM 1205].) Even after expiration of the contract, an employer's unilateral change of any existing working condition without notifying and bargaining with the certified bargaining representative constitutes a per se violation of section 1153(e) and (a) of the Act. (Peerless Roofing Co., Ltd. (1980) 247 NLRB 500 [103 LRRM 1173]; Sacramento Union (1981) 258 NLRB No. 141 [108 LRRM 1193]; Shell Oil Co. (1954)

[4/] In Tex-Cal Land Management, Inc. (May 15, 1981) 7 ALRB No. 11, we found that Respondent committed a per se violation of 1153 (e) and (a) by refusing to sign the final typed copy of a third collective-bargaining agreement with the UFW) on August 1, 1930, which we found had been previously agreed to and initialed by the parties. On appeal, the Court of Appeals for the Fifth District reversed our finding of a per se violation of 1153(e) and (a) and remanded the case to us for further proceedings on the issue of Respondent's possible bad faith posture. We do not rely on the August 1, 1980, collective-bargaining agreement which Respondent refused to sign in reaching our decision in the instant matter.

149 NLRB 283, 287 [57 LRRM 1271].) Where the unilateral change relates to a mandatory subject of bargaining, such as subcontracting and hiring, a prima facie violation of section 1153(e) and (a) is established. (See Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co. , Chemical Division (1971) 404 U.S. 157 [78 LRRM 2974]; Axelson, Inc. (1978) 234 NLRB 414 [97 LRRM 1234]; C & C Plywood Corp. (1964) 148 NLRB 414 [57 LRRM 1015]. See also Fibreboard Paper Products Corp. v. NLRB (1965) 379 U.S. 203 [57 LRRM 2609].)

With respect to the three occasions of contracting out to labor contractors which the ALO concluded were unlawful, Respondent claims the ALO's conclusions and proposed remedy are unwarranted in view of the fact that its bargaining unit employees whose work was contracted out were assigned by Respondent to perform other work, and therefore, since they lost no work, the unilateral changes had no detrimental effect on the bargaining unit.[5/]

[5/] That unit employees who had been performing the work which was contracted out to a labor contractor's crews were assigned to other work with Respondent was not established by the record in this case as to each contract. Although the crew members which were replaced in the El Poso harvest were apparently not laid off as a consequence of the labor contract, as erroneously found by the ALO, they were apparently assigned to a less productive harvest where they could not earn as much at the piece rate. The evidence shows, and the ALO found, that, as a consequence of the 1979-80 vineyard repair contract, Erasmo Espinoza was laid off, Eluterio Gutierrez was refused rehire for filing a grievance and Manuel Ayala and Antonio Garcia were reassigned to pruning. The January 1981, grape pruning was performed by a crew of 81 workers hired by labor contractor Mendoza and no evidence was produced to substantiate Respondent's claim that all unit members were otherwise employed and thus suffered no loss of work or income as a result *of* Respondent's engaging Mendoza as its labor contractor.

Respondent fails to recognize that a unilateral change of an employer's hiring or subcontracting practice affects the terms and conditions of employment of the bargaining unit employees, regardless of whether bargaining unit members were actually displaced or suffered loss of employment or diminished income as a result of the change.

Respondent's defense to the one incident which involved subcontracting swamping work to another employer (Brookins) rather than to a labor contractor involves interpretation of the second collective-bargaining agreement.[6/] We affirm the ALO's finding that Respondent did not produce any evidence that grape trucks used in swamping should be, or ever had been, considered "specialized equipment" within the meaning of the subcontracting article, Article XVII, of either the first or second collective-bargaining agreement. On the contrary, the evidence showed that swamping had always been performed by the bargaining unit employees. In addition, Respondent's witnesses testified that the shortage which allegedly necessitated the Brookins subcontract was a shortage of trucks, not workers.

Accordingly, we conclude that for each of the three instances of contracting unit work to labor contractors, Respondent violated section 1153(e) and (a) by unilaterally changing its hiring procedure and that Respondent violated section

---

[6/] Although the second collective-bargaining agreement had expired, the hiring practices and work assignment procedures established by the contract .remain in effect as terms and conditions of employment which cannot be unilaterally changed without notifying and bargaining with the UFW, at its request, about those changes.

1153(e) and (a) by subcontracting bargaining unit work to another agricultural employer, Brookins Trucking. In each of the four instances the Union was given neither notice nor an opportunity to request bargaining about Respondent's decision to make such changes or about the effects of such changes on the unit employees' terms and conditions of employment.

Discriminatory Discharge of Crew No. 64 in 1980

Respondent excepts to the ALO's finding that Respondent discharged the employees in Crew No. 64 between the 1980 Arvin and Delano harvests because of their concerted protests concerning working conditions. According to Respondent, its decision to discharge Crew No. 64 was compelled by the prohibition, in Article IV, Seniority Section 13, of the contract, against "bumping" (displacing) more senior crews. We find no evidence in the record to substantiate Respondent's argument that bumping would have been required. Our independent review of the record supports the ALO's finding that the discharges were discriminatory. Accordingly, we adopt the ALO's findings and his conclusion that the discharges were in violation of section 1153(a) of the Act.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Tex-Cal Land Management, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Unilaterally changing its hiring practices by contracting out any bargaining unit work to a labor contractor

and/or subcontracting any bargaining unit work to another agricultural employer, including but not limited to, harvesting, swamping, vineyard repair and pruning, or otherwise making any unilateral change in its agricultural employees' wages, hours, or working conditions, without prior notice to and bargaining with the United Farm Workers of America, AFL-CIO (UFW), about such changes.

(b) Discharging, failing and/or refusing to assign work to, failing and/or refusing to rehire, or otherwise discriminating against, any agricultural employee(s) because of his/her (their) union activities and/or protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed in section 1152 of the Act.

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

(a) Offer to the employees of Crew No. 64, listed below, who were discharged between the 1980 Arvin and Delano harvests, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of their discharge; such amounts 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.

Zenaida I. Arcena
Mariano C. Bascon, Jr.
Guadalupe S. Bazaldua
Veronica Calivo
Fernando Carrillo
Margarito Carrillo
Rosa A. Cazares
Antonio H. Hernandez
Leonor Ilarde
Nora Johnson
Melessio Luke
Rosendo Luque
Eulalia Mares
Maria Mares
Mucio M. Martinez
Hermenegil Melendez
Feliberto Mosqueda
Josefina Mosqueda
Pedro Ordonez
Irene Pinon
Juan M. Pinon
Robert Pinon
Terrie C. Pinon
Estela V. Rangel
Teresa Reazola
Diana Rodriguez
Lydia Rodriguez
Angelina Romero
Esther Sandoval
Andrea Zapata
Augustin V. Zapata
Rafael S. Zapata
Rosa Zapata

(b) Upon request of the UFW, the certified collective bargaining representative of Respondent's agricultural employees, rescind any and all unilateral changes instituted by Respondent with respect to the assignment of harvesting, swamping, vineyard repair and pruning work which was performed by its employees, members of the bargaining unit prior to July 1979, and reinstitute the hiring procedures negotiated in its most recent collective-bargaining agreement with the UFW.

(c) Make whole all of its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's contracting out harvesting work at the Poso Ranch in August 1979, which caused them a diminution or loss of work and/or a diminution in rate or amount of pay, such amounts 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, and offer them immediate and full reinstatement to their former or substantially equivalent positions,

without prejudice to their seniority or other employment rights or privileges. The names of the employees and amount of makewhole and interest to be paid to each employee shall be determined by the Regional Director after consultation with both Respondent and the UFW.

(d) Make whole Manuel Galindo and all other present and former agricultural employees of Respondent for all losses of pay and other economic losses they have suffered as a result of Respondent's subcontracting out swamping work in October and November 1980, causing them a diminution or loss of work and/or a diminution in rate or amount of pay, such amounts 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, and offer them immediate and full reinstatement;, to their former or substantially equivalent positions without prejudice to their seniority or other employment rights or privileges. The names of the other employees and the amounts of makewhole and interest to be paid to each employee, including Galindo, shall be determined by the Regional Director after consultation with both Respondent and the UFW.

(e) Make whole all of its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result *of* Respondent's contracting out vineyard repair work in December 1979, and January, February, March, and April 1980, which caused them a diminution or loss of work and/or a diminution in rate or amount of pay, such amounts

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, and offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights or privileges. The names of the employees and amounts of makewhole and interest to be paid to each employee shall be determined by the Regional Director after consultation with both Respondent and the UFW.

(f) Make whole all of its present and former agricultural employees for losses of pay and other economic losses they have suffered as a result of Respondent's contracting out vineyard pruning work in January 1981, which caused them a diminution or loss of work and/or a diminution in rate or amount of pay, such amounts 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, and offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights or privileges. The names of the employees and amounts of makewhole and interest to be paid to each employee shall be determined by the Regional Director after consultation with both Respondent and the UFW.

(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 or makewhole period and the amounts of backpay or makewhole and interest due 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 employees employed by Respondent at any time from August 1979, until the date on which the said Notice is mailed.

(j) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places 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 copy or copies of the Notice which may be 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 its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the

Notice and/or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during 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 with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: November 24, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO, (UFW), the certified bargaining representative of our employees, the General Counsel of the ALRB issued a complaint which alleged that we, Tex-Cal Land Management, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by discharging the employees in Crew No, 64 because of their protected concerted activities, by unilaterally changing cur employees' working conditions without notifying or bargaining with the UFW, by contracting out table grape harvesting work in July 1979, by contracting out vineyard repair work in December 1979, and January through April 1980, by contracting out swamping work in October and November 1980, and by contracting out vineyard pruning work in January 1981. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all 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.

Especially:

WE WILL NOT subcontract out bargaining unit work or otherwise make any other unilateral change in our agricultural employees' wages, hours, or working conditions without prior notice to and bargaining with the UFW.

WE WILL restore and reassign to our employees the harvesting, swamping, vineyard repair and pruning work and any other bargaining work which we illegally contracted out in July 1979, and thereafter.

WE WILL offer to reinstate without loss of seniority or other rights and privileges any and all of our agricultural employees who we displaced or transferred to other jobs by our unlawful contracting out of their work in July 1979, and thereafter, and we will reimburse with interest all of our present and former employees who suffered any loss in pay or other money losses because we unlawfully contracted out their work".

WE WILL NOT discharge, suspend, fail or refuse to assign, fail or refuse to rehire or otherwise discriminate against any agricultural employee in regard to his or her employment because he or she has joined or supported the UFW or any other labor organization, or has participated in any other protected concerted activities.

WE WILL offer to reinstate the members of Crew No. 64 to work in the Delano harvest without loss of seniority or other rights and privileges, and we will reimburse them for all losses of pay and other monetary losses they incurred because we discharged them, plus interest.

Dated: TEX-CAL LAND MANAGEMENT, INC.

By: _____

Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contract any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 92315. The telephone number is 805-725-5770.

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

CASE SUMMARY

Tex-Cal Land Management, Inc.
(UFW)

8 ALRB No. 85
Case Nos. 79-CE-84-D,
et al.

ALO DECISION

ALO Arie Schoorl concluded that Respondent violated section 1153(c) and (a) of the Act by suspending seven agricultural employees (Jose Torres, Antonio Jaimes, Elena Jaimes, Juan Garcia, Joaquina Flores de Garcia, Pedro Ramirez, and Elva Ramirez) because of their union activities, and discharging Eluterio Gutierrez because he filed a grievance against Respondent. He found Respondent violated section 1153(a) by laying off and discharging three agricultural employees (Bernice Flores, Antonio Gonzalez and Sergio Gonzalez) who had engaged in protected concerted activity and by discharging Crew No. 64 because members of that crew engaged in protected concerted activity. The remaining charges of individual discrimination were dismissed. The ALO concluded that Respondent violated section 1153(e) and (a) by subcontracting grape harvest work at the El Poso ranch in July and August 1979, and vineyard repair work in December 1979, and January through April 1980, to labor contractor Renteria; by subcontracting swamping work in August 1980, to Brookins Trucking Company; and subcontracting vineyard pruning in January 1981, to labor contractor Tony Mendez, without notifying and bargaining with the United Farm Workers of America, AFL-CIO (UFW), the certified collective bargaining representative of Respondent's agricultural employees.

The ALO rejected Respondent's defense that the subcontracting of the swamping work was justified by a provision in the collective-bargaining agreement which allowed subcontracting when "specialized equipment" was needed. He found that grape trucks were not "specialized equipment." The ALO also rejected Respondent's argument that the members of the bargaining unit which had been displaced by Renteria's crew during the 1979 harvest, and Mendez' crew during the 1981 pruning were working in other jobs at the time of the sbucontracting. Even if the bargaining unit members were otherwise employed, Respondent was under an obligation pursuant to the (second) collective-bargaining agreement to notify the UFW of its plans to accept applications for harvesting work and to give preferential hiring to members of the families of present bargaining unit employees.

The ALO relied on the Board's Decision in Tex-Cal Land Management, Inc._ (May 15, 1981) 7 ALRB No. 11, which ordered Respondent to sign a third collective-bargaining agreement with the UFW in finding that Respondent violated 1153(e) and (b) by subcontracting the vineyard pruning work to Tony Mendez in January 1981.

BOARD DECISION

After the ALO's decision issued, Respondent and the Charging Party

entered into a formal settlement of the five cases, involving discrimination against individual employees, in which the ALO had found violations. The Board approved the settlement. No exceptions were taken to the ALO's dismissal of the remaining discrimination charges.

The Board affirmed the ALO's conclusions that Respondent violated section 1153(e) and (a) of the Act by contracting out: (1) harvest work at the El Poso ranch in July and August 1979; (2) vineyard repair work in 1979-80; (3) swamping work in October and November 1980; and (4) grape pruning work in January 1981, without following the contractual hiring provisions or giving the UFW notice and an opportunity to bargain about the changes. The Board noted that contracting out to a labor contractor was different from contracting out to another agricultural employer. Labor contractors are not agricultural employers and the agricultural employees provided by a labor contractor are members of the employer's bargaining unit. Although contracting to a labor contractor does not result in a loss of bargaining unit work, Respondent violated section 1153(e) and (a) of the Act by unilaterally changing its hiring practices, thereby affecting the terms and conditions of employment of its employees.

The Board also affirmed the ALO's conclusion that Respondent discriminatorily discharged the employee members of Crew No. 64 in 1980, because of their protected concerted activity, and thereby violated section 1153(a) of the Act.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TEX-CAL LAND MANAGEMENT, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, MARGARET ESPINOSA, ANTONIO P. GARCIA, ERASMO ESPINOSA, JUAN MANUEL RODRIGUEZ, RAUL CHAVEZ, BERNICE FLORES and MANUEL GALINDO, Charging Parties.	}	Case No.: 79-CE-84-D, et al

Appearances:

Nicholas F. Reyes, Esq.
for General Counsel

Sidney P. Chapin, Esq.
of Werdel & Chapin
for Respondent

Juan Cervantes, Esq.
for the Charging Party,
United Farm Workers

DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TEX-CAL LAND MANAGEMENT, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-84-C 80-CE-15-D 80-CE-197-D 80-CE-22-D 80-CE-199-D 80-CE-24-D 80-CE-205-D 80-CE-26-D 80-CE-206-D 80-CE-123-D 80-CE-208-D 80-CE-128-D 80-CE-209-D 80-CE-130-D 80-CE-210-D 80-CE-161-D 81-CE-17-D 8 ALRB No. 85

DECISION AND ORDER

On December 31, 1981, Administrative Law Officer (ALO) Arie Schoorl issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent and the United Farm Workers of America, AFL-CIO, (UFW) or Union), Charging Party, entered into a formal settlement of five of the above-captioned cases[1/] as to which the ALO had found violations. Respondent timely filed exceptions to the ALO's finding of violations in five of the remaining unsettled cases, and a supporting brief, and General Counsel timely filed a reply brief.

Pursuant to the provisions of Labor Cede sec-ion 1146,[2/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

[1/] Case Nos. SO-CE-24-D (Eluterio Gutierrez); 30-CE-13C-3 (Jose Torres); 80-CE-209-D (Antonio and Elena Jaimes): 80-CE-210-D (Pedro Ramirez, Zlva Ramires, Juan Garcia, Joaquina Flores da Garcia); 80-CE-197-D (Bernice Flores, Antonio Gonzalez, Sergic Gonzalez).

[2/] All section references herein refer to the California Labor Code unless otherwise indicated.

ARIE SCHOORL Administrative Law Officer: This case was heard before me on May 4, 5, 6, 7, *12,* 13, 14, 15, 18, 19, 21, 22, 26, 27 and 29, 1931, in Delano, California. The original complaint which issued on March 12, 1981, based on 16 charges filed by the above-named charging parties, and duly served on Tex-Cal Land Management, Inc. (hereinafter called Respondent) alleged that-Respondent committed numerous violations of the Agricultural Labor Relations Act (hereinafter referred to as the ALRA or the Act). On April 24, 1981, General Counsel filed a first amended complaint and it was duly served on Respondent. It contained additional allegations based on the aforementioned charges.

At the hearing, General Counsel moved to amend the complaint by deleting the allegations therein based on charges Nos. 80-CE-204-D and 81-CS-9-D and I granted said motion. At the hearing I granted General Counsel's motion to amend the complaint, adding a formal paragraph alleging a unilateral change in the disciplinary suspension policy without bargaining about the change with the certified union representative, the UFW.

Subsequent to the close of the hearing, General Counsel issued a Second Amended Consolidated Complaint which contained all the allegations in the original and first amended complaint, and the aforementioned allegation concerning Respondent's unilateral change in its disciplinary policy plus an allegation in Paragraph 8 of the Second Amended Consolidated Complaint that Respondent had violated section 1153 (e) and (a)

of the Act in February and March 1980 by unilaterally subcontracting to Gilbert Renteria, a labor contractor, certain bargaining unit work, i.e., vineyard repair work. In the original complaint, General Counsel alleged that Respondent had refused to rehire 5 employees, members of the bargaining unit, for that work, because of their support of the UFW. Evidence was presented in respect to this allegation.

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

I Jurisdiction

Respondent admitted in its answer, and I find, that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act and that the UFW, one of the charging parties herein, is a labor organization within the meaning of Section 1140.4(f) of the Act and the other charging parties are all agricultural employees within the meaning of Section 1140.4 (b) of the Act.

II. The Alleged Unfair Labor Practices

Respondent is alleged to have violated section 1153 (c) and (e) of the Act in July and August 1979 by subcontracting out certain bargaining-unit work, the harvesting of table grapes, to labor contractor, Gilbert Rentaria, without

bargaining with the UFW, the certified bargaining representative of Respondent's employees, and by denying such bargaining-unit work to Crew 57 because of their support of the UFW; Respondent is also alleged to have violated section 1153(c) and (a) of the Act: in January and February 1980 by refusing to rehire 5 employees because of their support of the UFW; in August, September, October, and November of 1980 by suspending 11 employees because of their support for the UFW; in August 1980 by refusing to rehire employee Mack Mejia because of his support of the UFW; in September 1980 by discharging through a labor contractor, Lalo Salinas, three employees because of their concerted activities; in September 19.. by discharging the employees comprising Crew £64 because of their support of the UFW; in October 1980 by refusing to rehire Manuel Galindo as a swamper because of his support of the UFW; and in November 1980 by discharging employee John Rodriguez because of his support of the UFW. Respondent is also alleged to have violated sections 1153(e) and (a) of the Act: in October 1980 by subcontracting bargaining-unit work (swamping) to a subcontractor, Brookins Trucking, and in January 1981 by subcontracting bargaining unit work (pruning table grape plants) to a subcontractor(s) George Baroga and/or Leon Mendez, without in either of the two instances bargaining with the UFW, the certified collective bargaining representative of its employees.

III. Background Information

Tex-Cal Land Management Inc. is engaged in farming

extensive acreage in the San Joaquin Valley and raises mainly wine and table grapes and some kiwis. All of the allegations of unfair labor practices in the instant matter except one[1/] deal with Respondent's table or wine grape crops. The grape crops are harvested first in the Arvin area in June, July and August, and afterwards in the Delano area in August, September, October and November.

Dudley Steele was Respondent's president and general manager until he retired in November 1979. His son, Randy Steele, replaced him in these two positions and has directed Respondent's farming operations ever since. The two superintendents who worked directly under Randy Steele were Martin Jellacich and Bill Pritchett. The next in line were the two supervisors, Bill Harr and Douglas McDonald.

Respondent's employees elected the UFW to be its exclusive collective bargaining representative, and the ALRB certified said union as such on June 1, 1977,

On May 11, 1978, Respondent and the UFW signed a collective bargaining agreement with the UFW which was in effect from May 11, 1978, through November 2, 1979. On the latter date, Respondent and the UFW signed another collective bargaining agreement which was in effect from November 2, 1979 through July 31, 1980. On August 1, 1980, the parties met to sign a third collective bargaining agreement. However, Respondent refused to sign the said agreement, because it

---

[1/] The one allegation that deals with work other than that exclusively in the grape crops involves Respondent's refusal in January and February 1980 to rehire 5 employees to work in the grape and kiwi plantings because of their union, activities.

contended, the wording in the clause regarding subcontracting did not truly reflect the agreement of the parties on the subject. The UFW filed an unfair labor practice charge with the Board contending that the language in the clause accurately reflected the agreement of the parties on that subject. On October 23, 1980, the Administrative Law Officer, Michael H. Weiss, issued a decision finding that a valid collective bargaining agreement existed which Respondent was obligated to sign, indicating that the dispute as to interpretation of the subcontracting provision could be resolved under the arbitration clause of the contract. The Board in Tex-Cal Land Management, Inc., 7 ALRB No. 11 (1981), affirmed the administrative law officer's decision and ordered Respondent to sign the agreement and to give retroactive effect to all terms and provisions thereof.

Erasmo Espinoza, president of the UFW Ranch Committee testified that after August 1, 1980, the date Respondent refused to sign the agreement, he noted a change in Respondent's attitude and disciplinary policy toward the employees. Respondent employed hurry-up tactics and assigned increasing amounts of work to the employees. Respondent increased the number of warning notices and suspensions it issued. Prior *to* August 1, Respondent did not suspend or discharge any employee unless the employee had been previously issued warning notices.[2/]

[2/] Margarita Espinosa, wife of Erasmo Espinosa, and a grape harvest worker at Respondent's credibly testified that at the beginning of the harvest in July 1980 the foreman of her crew, Zack Lunitap, instructed the crew in respect to the picking of the grapes. He pointed cut to them that if they did not pick clean grapes that they would receive written warning notices and after receiving three of such notices, they would be suspended.

Subsequent to this date, Respondent began to suspend and discharge employees without any prior warning notice. Furthermore, Espinoza stated that, before August 1, Respondent seldom issued a warning notice, but after that date, the number of warning notices increased.[3/] Respondent called no witnesses to refute this testimony.

Alfredo Rodriguez, one of Respondent's swampers, testified that in September 1980 Randy Steele asked him and his brother whether the UFW had a contract with Respondent and, in response to their negative answer commented in a taunting manner, "You ain't going to get one."

[3/] The allegation in the Second Consolidated Complaint that Respondent effected a unilateral change in the disciplinary suspension policy without bargaining about the change with the certified union representative, the UFW is without merit. General Counsel claimed in all his allegations with respect to Respondent's suspensions of employees, that they all constituted a deviation from Respondent's disciplinary policy and were due to the employees' union activities. General Counsel can not have it both ways. I find that the most feasible theory is a discriminatory deviation from Respondent's customary disciplinary policy rather than a unilateral change and shall treat each allegation in respect to the suspensions in this manner. Accordingly I recommend a dismissal of the allegation concerning a unilateral change of Respondent's disciplinary policy.

/

/

/

/

IV Suspension of Juan Manuel Rodriguez and Raul Chave

a. Facts

Raul Chavez had worked for Respondent for seven years in various capacities, e.g., pruning, tying, de-leafing and swamping. In August 1980 he was working as a swamper in Leon Mendez' crew. He had been a member of the UFW since he started working at Respondent's ranch and was the second steward in his crew, although he had never processed a grievance. However, he had attended three negotiation sessions during the 1980 harvest season. He had a good work record and the last time he had been suspended from work was in 1977.

On August 13, he and his partner, Juan Manuel Rodriguez, reported to work at 6:00 a.m. and delivered a load of empty boxes to an area where a crew was going to harvest that morning. They assembled another load of empty boxes and were en route to the same harvest area when Rodriguez suddenly felt sick and commented on it to Chavez. At the latter's suggestion, they stopped at a liquor store located near the fields, at about 7:00 a.m., entered, and Rodriguez purchased a tin of Anacin and a quart of chocolate milk.[4/] As Rodriguez paid for the merchandise at the counter, Randy Steele entered the store, approached the counter, and was in a position to see the Anacin and the chocolate milk. Chavez noted a look of anger in Steele's expression as he contemplated

---

[4/] Chavez testified Rodriguez purchased the chocolate milk so as to have some liquid with which to wash the Anacin down.

him and Rodriguez in the store. Chavez and Rodriguez left the store and proceeded to the fields and delivered the boxes to the appropriate location. Shortly afterwards, a foreman, Shelby, approached them and delivered a warning notice to them, and explained that because they had stopped at the liquor store, they would be suspended for two days. Shelby asked them to sign the warning notices, but they refused and explained to Shelby that the reason they had stopped at the store was because Rodriguez felt sick and they had bought medicine there. Shelby replied that their excuse was not sufficient. He added that he himself had been suspended for one week for stopping at a store to buy a package of cigarettes.

A short time later, Chavez complained to supervisor Bill Pritchett about the unfairness of the suspension since they had only stopped to buy medicine for Rodriguez. Pritchett answered that the particular reason made no difference. That evening their foreman told them not to work the following day, August 14, and they did not report to work. The next day, the 15th, the two employees returned to work.

Chavez testified that the swampers customarily stopped at the liquor store while en route to and from the fields, to buy refershments and snacks because they had no lunch periods or breaks. Since they did not carry food or drink in their trucks, they made such stops on a daily basis, but usually not before 11 o'clock or 12 o'clock when it became very hot and they became thirsty and hungry. The swampers

did not ordinarily stop at the store as early as 7:00 a.m.

Leon Mendez, the foreman of the swamper's crew, testified that before August 1, it was the custom to give a swamper a warning notice rather than a suspension if he stopped at a store during work hours. Chavez and Rodriguez were the first swampers to receive a suspension rather than a warning notice for such conduct in the 1930 harvest season.

b. Analysis and Conclusion

General Counsel argues that Respondent suspended Raul Chavez and Juan Manuel Rodriguez because of Chavez' union activities and to retaliate against the UFW for its refusal to agree to Respondent's interpretation of the subcontracting clause in the collective bargaining agreement that was to have been signed on August 1st.

There are some indications that Respondent had an improper motive in suspending the two swampers. Respondent had knowledge of Raul Chavez' union activities as he had been attending negotiation sessions as the second steward of his crew. The suspension occurred just 13 days after the UFW refusal to go along with Respondent's version of the contract and thus the disciplinary action could have been to retaliate against the union for its stance.

However according to both ALRB and NLRB precedent, an employer can impose any penalty it wishes, e.g., a discharge, a suspension, a warning notice and for any or no reason as long as it is not based on union considerations.

Now to the authenticity of Respondent's reason

for the suspension. Respondent contends that it has *s.* longstanding rule that swampers are not to stop at stores during work hours.[5/] However there was a custom for swampers to stop after 11:00 a.m. or noon as they had no lunch break and became hungry and thirsty by that time. Leon Mendez, the swampers' foreman, testified that the custom was to issue the swampers only a warning notice not *a* suspension if they stopped at the store during work hours.

The important fact here is that there was no custom for the swampers to stop as early as 7:00 a.m. at the store. The record indicates that the custom was restricted to the noon time hours or perhaps later because of the need for the swampers to have food and drink at that time. Consequently when Randy Steele discovered that the two swampers had stopped at the store at 7:00 a.m. a short time after work began, he apparently considered it a direct violation of the rule without the mitigating circumstances of the noontime need for food and drink. The suspension for two days is certainly not out of line with Respondent's disciplinary policy in regard to a direct violation of work rules.

Later it appears that when Chavez and Rodrigues made known to the foreman Shelby and supervisor Pritchett the reason for stopping, i.e. to purchase aspirin for

---

[5/] This fact is based on Leon Mencez' credible and uncontroverted testimony.

Rodriguez' headache, Respondent relented and reduced the suspension to just one day. Respondent's leniency in this regard dispels any doubt about the legitimacy of its motive.

I find that Respondent had a legitimate business reason to suspend the two swampers for two days. Accordingly, General Counsel had failed to prove by a preponderance of the evidence that Respondent suspended Raul Chavez and -Juan M. Rodriguez to discourage union activities. I recommend that this allegation be dismissed.

V. Suspension of Jose Torres

a. Facts

Jose Torres is a tractor driver who has worked for Respondent since 1978. Henry Salgado has been his foreman and Bill Pritchett his supervisor since 1979.

In 1979 Torres filed *a* charge with the ARLB and in 1980 testified at a hearing concerning the issues raised by his charge. Later he was present when a settlement was reached between General Counsel and representatives of the Respondent and the UFW. Torres credibly testified that, while he was outside the room where the settlement was signed, he noticed that Bill Pritchett and Bill Harr, a foreman for Respondent, were conversing[6/] and as both of them looked at Torres, Pritchett said to Harr, "He's going to pay back."[7/] Torres was a steward

---

[6/] Harr and Pritchett were standing at a distance of 4 to 5 yards away from Torres.

[7/] Torres testified that since the two supervisors were looking at him when Pritchett made the remark he thought that Pritchett was referring to him. Respondent never called Pritchett to refute this testimony.

for his tractor drivers' crew at the poso Ranch, but there was no evidence that he ever processed a grievance with Respondent. A part of the settlement agreement provided for Torres to return to work for Respondent which he did in April 1980.

On August 18, 1980, Respondent suspended Torres three days for being absent on the previous day without previous notification. Torres testified that during the previous week his automobile stopped running due to some dirt in the carburetor and he had been driving to work in a truck he had borrowed from a friend. On the morning of the day he was absent, Torres was about to leave for work in the truck and his friend notified him that he would no longer lend him the truck since he was afraid someone at Respondent's would throw dirt in the truck as "someone" had done to Torres' car. So because of this late development, Torres was unable to go to work or to notify Salgado of that fact. Salgado admitted in his testimony that Torres had informed him about the problems with his own car, but he was unaware that Torres had been coming to work in the borrowed truck.

The day after this absence Torres explained the reason for his missing work and failure to notify but nevertheless Salgado gave him a written warning notice and suspended him for three days.[8/] Bill Pritchett was present, but

---

[8/] Salgado told him he was being suspended for being absent the day before without previous notification and mentioned nothing about it being the third time.

according to Salgado's testimony, Salgado decided on his own to suspend Torres without consultation with Pritchett. However, Salgado admitted in his testimony that Pritchett told him he had to suspend Torres because this was the third time he had been absent without previous notification. Torres refused to sign the notice because he claimed it was unfair. Pritchett then signed the notice as a witness to the fact that Torres refused to sign.

Salgado testified that it was his practice to suspend a worker who has been absent without previous notification three times during a two to three month period. He added that Torres had been absent without previous notification 3 or 4 times during such a period. Salgado admitted however, that Torres had been the only one he had suspended for such a reason and the only one to whom he had given a written notice during the last year. He also admitted that Torres had only been absent without previous notification a little more than the other workers.

Torres was absent on various occasions but always sent *a* message to Salgado through a fellow-worker on such occasions. The fellow-worker informed Salgado when he arrived at work that Torres would miss that day and sometimes, but not always, he would relay to Salgado the reason for the absence provided him by Torres.

Although Salgado never gave another worker a written disciplinary notice for being absent without previous notification, he did make a note on pieces of paper or his

notebook the dates of their unexcused absences. However, he failed to produce such papers and notebooks at the hearing since, as he explained, he had lost them.

b. Analysis and Conclusion

In respect to the suspension of Jose Torres, I must decide whether Respondent imposed the three-day suspension because Torres had participated in union acitivities and/or because he had taken recourse to the ALRB or because of a legitimate business reason.

Torres had been a member of the UFW since he went to work for Respondent in 1978, and had become a shop steward for the tractor drivers at the Respondent's Poso Ranch. He, along with his fellow workers, had filed charges through the UFW against Respondent in 1979 and later Torres testified at the ensuing ALRB hearing.

Consequently, Respondent had knowledge of Torres' union activity, his recourse to the ALRB and his testimony at a subsequent hearing.

Respondent claims it had a legitimate business reason to have suspended Torres for three days. Salgado testified that it was his practice to suspend a worker who had been absent without previous notification three times during a two to three month period and that Torres had committed such an infraction 3 to 4 times during such a period and that was the reason he decided to suspend him. Moreover, according to Salgado, Torres had been absent much more than his co-tractor drivers.

However, there exist salient points that do not support Respondent's profferred explanation,

1. Four months before the suspension, Superintendent Bill Pritchett expressed an intent to retaliate against Torres in the latter's presence at a scene of the settlement talks dealing with, among other charges, a charge Torres had filed against Respondent with the ALRB.

2. Pritchett was present at the time Salgado decided to suspend Torres and in fact according to Salgado's own testimony urged the latter to do so.

3. Salgado admitted that Torres was just a little more absent without previous notification than his co-workers and the latter never received a written warning notice from him while Torres received a three-day suspension.[9/]

4. At the time of the suspension Salgado indicated it was for being absent without notification for one day and later at the hearing contended it was for three to four unannounced absences on the part of Torres.

5. Respondent declined to call Pritchett to testify at the hearing and made no claim that he was unavailable for testifying. I make the inference that if Pritchett had been called he would not have refuted Torres' testimony nor corroborated Salgado's.

All of these factors point to a connection between Respondent's knowledge of Torres' union activities and his

---

[9/] Salgado claimed he kept a record of employees' unannounced absences on loose pieces of paper but explained that he had lost all of them.

recourse to the ALRB and Respondent's subsequent suspension of this employee.

Torres admitted that he was frequently absent but always sent word of his absences with Erasmo Espinoza at times with details of the reason and sometimes not. However he had a valid explanation for many of his absences and it was the fact that his son's illnesses obliged him to take him to Bakersfield for treatment and on such short notice that he was not able to give previous notice to Respondent. Torres had cleared this problem up with a personnel employee so Respondent cannot effectively utilize his absences in this respect as a legitimate basis for the suspension. Accordingly, I find that but for Torres' recourse to the ALRB and his testifying in this respect, Respondent would not have suspended him for three days. In so doing, Respondent violated Section 1153(d) and (a) of the Act.

VI. Suspension of Antonio and Elena Jaimes

a. Facts

Antonio Jaimes was a year-round worker for Respondent beginning work in January with pruning and ending work in November with harvesting. During the last three years, he and his wife Estela had worked in Galindo's crew and during the last two years he had been the union steward for said crew. As the steward of the crew he attended negotiation sessions in 1979 and 1980, and on such occasions informed his foreman that he was taking time off from work to attend the sessions. Jaimes testified that at the meetings he saw Randy Steele, Respondent's lawyer Sidney Chapin, a secretary, and the UFW negotiators. As a steward, he had never processed

a grievance for any employee in his crew.

On October 28, 1980, Antonio Jaimes and his wife, Estela, were picking and packing grapes at 9:30 a.m. The quality control man, Juan Mesa, noticed that they were picking and packing grapes that were too green. He informed Mrs. Jaimes of that fact and she replied that all the grapes were green. Mesa told her to throw them away and not to pack them. He passed by where Mrs. Jaimes was packing the grapes later in the morning and the grapes were of the right color.

About 1:30 p.m. Mesa noticed Mr. Jaimes coming out of the fields with a wheelbarrow loaded with immature green grapes. He informed both the Jaimes that they were picking too close, that the grapes were too green, and they should be left on the vine. Mesa called Bill Pritchett on the radio to come and to inspect the grapes. Mrs. Jaimes stated that they had been picking the same quality of grapes the day before and asked why he had not mentioned it then. Mesa replied that the grapes had been better that day. Pritchett arrived and inspected the Jaimeses grapes and commented that he did not like them. Pritchett then informed the two Jaimeses that they were suspended for three days and for two reasons. One vas that Jaimes was a shop steward, and two was that the grapes were no good. Jaimes asked Pritchett why he only stopped at his table and not at the others, and Pritchett declined to reply.

Jaimes testified that later Pritchett perfunctorily checked one box of grapes at each of the other teams' tables. Pritchett arranged to have Denise Briceno, an office employee of Respondent's come out to the field with a camera, and she took pictures of the green grapes.

The Jaimes couple left the field and did not work the next three days, the period of their suspension. They returned to work the following Monday. Juan Mesa testified that he had not given a warning notice or suspended any other workers during the entire 1980 season. Mesa admitted that he had not recommended that Pritchett suspend the Jaimeses but had just wanted them to repack the grapes or quit picking green grapes. That day Mesa had occasion to tell other workers not to pick green grapes as it was a general problem.

Mesa admitted that the picking of green grapes is a daily occurrence and that every day piles of green grapes are at the end of every packing table. Mesa changed his account of how many times he called the Jaimeses' attention to the green grapes. At first, it was only twice at 9:30 a.m. (only to Mrs. Jaimes), and then at 1:30 p.m. Later, he claimed that he had been telling them all along ... . and he had to do something about it. Mesa also changed his account of whether he was present when Pritchett informed the Jaimeses that they were suspended. At first he said he was not there and later on cross-examination he admitted he had translated the

conversation between Pritchett and the Jaimeses Mesa testified that during the picking of the grapes he never had occasion to call Pritchett about any problem with the quality of the grapes. Also, during the entire 1980 season as far *as* Mesa knew, neither Pritchett nor any other foreman or supervisor ever gave a warning notice to any of the workers because of the quality of their pick or pack.

b. Analysis and Conclusion

As to the suspension of Antonio and Estella Jaimes, I must decide whether Repondent imposed the three-day suspension because Antonio Jaimes was a shop steward or because of a legitimate business reason.

Jaimes had been the shop steward for his crew and had attended negotiating sessions in 1979 and 1980. Although he admitted he had not processed any grievances against Respondent during his tenure, Mesa testified that both he and Pritchett knew he was the crew's steward. Consequently, Respondent had knowledge of Jaimes' union activities.

Respondent claims it had a legitimate business reason for suspending the Jaimeses for three days. Juan Mesa, Respondent's quality control man, stated that the Jaimeses kept on picking green grapes despite his admonitions and that as an ultimate recourse he called Bill Pritchett, Respondent's supervisor, to the fields. He admitted it was Pritchett, not he, who decided on the three-day suspension for them. According to Mesa, all he had in mind was repacking or a convincing talk from Supervisor Pritchett so

they would stop picking green grapes. Respondent failed to call Bill Pritchett to testify, so there is no evidence of why Respondent decided on a three-day suspension rather than a repack or a written warning notice.

Respondent presented photographs of the green grapes picked by the Jaimeses and they indicate that the grapes were too green to be harvested. There is no doubt that the two times Mesa talked to the Jaimeses about the grapes, they were too green. Nevertheless, the important question to be answered is why did Respondent decide to suspend the Jaimeses for three days for a seemingly minor offense.

The most apparent answer to that question is the reason Pritchett gave to Jaimes: "Because you are a steward." I credit Jaimes when he testified to that fact. He testified in a straightforward and consistent manner. Moreover, Respondent's attorney declined to call Pritchett to testify and refute Jaimes' testimony and failed to make any claim of his unavailability. Consequently, I draw a negative inference and conclude that Pritchett did inform Jaimes that one of the reasons for the suspension was the fact that Antonio Jaimes was a steward. Moreover, Mesa, in his testimony, stated that Pritchett never gave the Jaimeses any reason other than the green grapes for the suspension, but *I* discredit Mesa in respect to this testimony.[10/]

[10/] The reason I discredit Mesa's testimony on this point is because at first he testified he was not present at the conversation between Pritchett and Jaimes which indicates Masa was reluctant to testify on this crucial point of whether Pritchett mentioned Jaimes being a steward *as a* reason for the suspension and therefore his subsequent testimony in this respect is highly suspect.

From Pritchett's words "suspension for picking green grapes and for being a steward," it appears that there was a dual motive for the Jaimes suspension. According to NLRB and ALRB precedent, if there are dual reasons for discriminatory conduct, the test is to determine whether an employee would have been discharged, laid off or suspended "but for" union activities.[11/]

In the instant case, there is evidence which shows that "but for" Jaimes being a Steward, he and his wife would not have received a three-day suspension: (1) Juan Mesa, the quality control man, himself did not consider the three-day suspension appropriate; he considered that a repack or a convincing talk from Bill Pritchett to the Jaimeses would have sufficed; (2) the offense itself was slight; Mesa testified the green grapes were a recurring problem and that all pickers had picked their share of them; he had spoken only twice to the Jaimeses about this problem; and (3) there had been no previous warnings made to the Jaimeses about the quality of their work.

Accordingly, I find that the reason Respondent suspended the Jaimeses for three days rather than meting out a lesser penalty was because of Antonio Jaimes' union activities as a steward and *as* a participant in union negotiations, and would not have suspended them but for the said activities. Therefore, Respondent violated Section 1153(c) and (a) of the Act by discriminating against the Jaimeses because of Antonio Jaimes' union activities.

11. Martori Brothers Distributors v. ALRB (1931) 29 Cal.3d 721, citing Weight Line, Inc. (1930) 251 NLRB Mo. 130, 10 5 LRRM 1169.

VII. The Suspension of Juan Garcia, Joaquina Flores de Garcia, Pedro Ramirez and"" Elva Ramirez.

a. Facts

Juan Garcia, his wife Joaquina Flores de Garcia, Pedro Ramirez and his wife Elva worked as a harvest team at Respondent's during the 1980 harvest season. The Ramirezes picked the grapes, Joaquina packed them, and Juan carried them out for packing and at times assisted his wife in her task. Juan Garcia had worked in the harvest at Respondent's for four years, and the Ramirezes two years. It was Joaquina's first year at Respondent's, but she had six years' experience in picking and packing grapes elsewhere.

Juan Garcia had been a member of the UFW for four years and had attended negotiation meetings in 1979 and 1980. In March of 1980, Juan Cervantes, the UFW representative, Garcia and some coworkers met with Randy Steele and consulted with him about their desire to be assigned the work of cleaning ut the almond orchards subsequent to the pruning. Garcia and his coworkers informed Steele that they had performed that particular work the year before and thought that they should be assigned the work again, but Steele declined to comply with their request.

On Tuesday, November 11, the Garcias and Ramirezes had picked and packed 90 boxes before the lunch break. Their foreman, Jose Medina, Sr., had inspected their grapes and found them to be somewhat dirty, but they were of a good enough quality to pass inspection. Nevertheless, he went into the vineyard and reminded the pickers, the Ramirezes, to clean the grapes. At 1:00 p.m., he inspected the boxes again and found

that there were a few rotten grapes mixed in, but he let them pass. At approximately 2:00 p.m., Supervisor Bill Pritchett arrived in his pickup and drove down the avenue looking at the grapes, and he noticed Joaquina Garcia packing the grapes quickly and not looking at them. He got out of his pickup, inspected the grapes, and told Medina to tell the Garcias and Ramirezes to start repacking the grapes-. Medina complied and the team began the task of cleaning and repacking the grapes. A few minutes later Randy Steele arrived and he and Pritchett conferred for a few minutes and then informed the team that all four were suspended for three days. Medina suggested to the four that they return the next day to see whether Respondent would let them go back to work without missing a day. ' Garcia testified that they decided not to do so since he thought it was a useless act. The Ramirezes returned to work on Saturday, at the termination of the three-day suspension, while the Garcias returned on the following Monday.

On cross-examination, Joe Medina admitted he was surprised by the severe punishment because the usual penalty was to have a team repack the grapes. He affirmed the fact that although the boxes Pritchett had inspected at the Garcias' table had a sufficient number of rotten grapes so they would not pass inspection. Garcia confirmed Medina's testimony about the penalty, and in fact stated that he had never known or heard of a worker suspended due to the picking and packing of substandard grapes. He added that no one had ever complained to

them before about the quality of their work. Garcia filed a charge with the ALRB claiming that the actual reason for the suspension was his union activities. He mentioned to Medina that there was going to be a hearing on his charge. Medina replied that it was all right with him that Garcia had filed the charge and there was no reason for him, Medina, to take sides. b. Analysis and Conclusion

In respect to the suspension of Juan Garcia, his wife Joaquina and the Ramirezes, *I* must decide whether Respondent imposed the three-day suspension because of Juan Garcia's union activities or because of a legitimate business reason.

Juan Garcia had been a member of the UFW for four years, attended negotiating meetings and participated in the meeting with Steele when he and his coworkers", and their UFW representative, requested in vain a work assignment. It is clear, and I find that Respondent had knowledge of Garcia's participation in union activities.

Respondent claims it had a legitimate business reason for suspending the Garcias and the Ramirezes for three days. Jose Medina, Sr., Respondent's quality control man, testified that Suprevisor Bill Pritchett had noticed that the Garcias were packing dirty grapes and instructed them to repack the boxes. Later, after conferring with Randy Steele, Respondent's general manager, Pritchett, suspended the entire four-person crew for three days. Respondent failed to call either Bill Pritchett or

Randy Steele to testify so there is no evidence as to why Respondent decided on a three-day suspension rather than Pritchett's initial penalty of repacking the boxes.

It was Respondent's customary practice to compel a crew which packed substandard grapes to repack the boxes containing the substandard grapes. In the instant case, Jose Medina, Sr., Respondent's witness, stated that he considered the three-day suspension excessive for such an infraction and was surprised then Steele and Pritchett suspended the quartet for three days. In fact, he was so surprised that he suggested to the four that they return the next day and check with the office to see whether the three-day suspension was still in effect. Prior to the suspension, there had been no criticism of the quartet's quality of work. So there exists convincing evidence that the severity of the penalty far exceeded the degree of the infraction.

Respondent has offered no explanation for this incongruity. Respondent's counsel declined to call Pritchett and Steele, who could supply information along these lines, to testify and made no claim about their unavailability. Consequently, I draw a negative inference that there is no explanation of a legitimate business reason for the application of a more severe penalty in a situation where a much lesser penalty was appropriate. The only explanation left is that Respondent decided to increase the degree of the penalty

because of Juan Garcia's active participation in union activities.

This conclusion is supported by the fact that when Randy Steele, the one individual among Respondent's personnel who had first-hand knowledge of the full extent of Garcia's union activities, as he had been present when Garcia and co-workers complained about work assignments and when Garcia attended negotiating meetings, made his appearance at the scene of the infraction herein, the penalty was increased from repacking to a three-day suspension. The only logical conclusion is that Steele decided that due to Garcia's prior union activities, the three-day suspension would be more fitting than just a repack.

Accordingly, I find that Respondent, through its general manager, Randy Steele, and its supervisor, Bill Pritchett, suspended Juan Garcia and the three other members of his crew because of Garcia's union activities and therefore violated Section 1153(c) and (a) of the Act.

VIII. Alleged Discriminatory Suspension of Hermenegildo Melendez, Antonia Hernandez Morales and Teresa Real Sol.

A. Facts

Hermenegildo Melendez had worked for Respondent for five years as a year-round employee beginning in January or February in the pruning and ending in November in the harvest. He had been a dues-paying member of the UFW for 16 years and always wore a UFW button at work.

In the 1980 harvest season in Arvin he worked as a packer in Crew #64 and for twenty days had attached to the roof of his table a large sign with a message which read "Sign the Contract and Wages Demanded $4.50 an Hour, $.30 a Box." As previously mentioned, after extended negotiations, Respondent had refused to sign the contract on August 1, claiming the clause on contracting-out unit work was ambiguous.

On the morning of August 20, Melendez arrived at work and, as usual, attached this same sign to the roof of the table at which he was packing.[13/] At approximately 7:30 a.m., Douglas McDonald, supervisor, drove up in his pickup and parked in front of Melendez' table. He got out and inspected some of the boxes Melendez had packed and found that they were in inferior condition. He summoned Ida Tabieros, the crew foreperson, and in her presence told Melendez his grapes were substandard and he should try to improve their quality, and he agreed. About 45 minutes to an hour later, McDonald returned to inspect Melendez' boxes and found the quality of the grapes had not improved much. McDonald told Melendez that everyone else was doing a good job and asked him whey he couldn't. Melendez replied that he was trying, and McDonald left to inspect other tables.

12. The sign was made of white butcher paper about 30 inches by 20 inches with large black letters and numbers.

13. There was conflicting testimony about whether there was *a* sign on Melendez' table the day he was suspended. I find that he actually had posted one that morning and it was on display when he received the suspension notice. I discredit Bazaldua's testimony that she did not see the sign that day. She was not very sure whether she had seen signs before or after that day, so I find it hard to believe why she would be so sure she saw one that day. *I* do not think she consciously lied about the sign but I do not trust her memory. I credit Melendez' testimony that he posted the sign that morning. I also credit Lydia Rodriguez testimony that confirmed that fact. See footnote 28 for further discussion about Rodriguez' credibility.

A few minutes later a government inspector gave McDonald the number of one of the crews whose grapes would not pass inspection. The number corresponded to Melendez' crew. McDonald, Tabieros and the inspector went to Melendez' table. The inspector explained the defects to Melendez. McDonald, who is bilingual, translated. McDonald informed Melendez and the other two crew members that they were suspended for three days. McDonald tried to deliver to Melendez a written disciplinary notice, but Melendez refused to accept it and told McDonald that he was going to quit. Melendez and the other two crew members left the field.[14/] Guadalupe Bazaldua, a picker with the crew next to Melendez, testified that she went over and looked at some of the boxes Melendez had packed and the grapes were rotten. Estela Rangel, a, former member of the Melendez crew, testified that Melendez was always pressuring her to concentrate on quantity not quality of the picking of grapes. McDonald testified that he had given Melendez two oral warnings about inferior grapes previous to that day.

On Friday, August 22, Melendez returned to the crew to pick up his check and he conversed with McDonald. He asked McDonald whether he had suspended him because of his union activities or because in reality the grapes were no good.

---

14. Lydia Rodriguez, a fellow crew member, who also displayed a similar sign on the roof of her packing table, testified that she noticed - that McDonald had suspended Melendez and his crew for three days and thought the real reason was because he had the sign on the roof of his table. She took her sign down immediately because she was afraid McDonald might retaliate against her for the same reason.

McDonald laughed and replied, "Okay, okay, uncle you'll always have your job here." The following-Monday, Melendez and the other two crew members returned to work, during the remainder of the season Melendez and his crew picked and packed quality grapes and McDonald testified that he had no further cause to reprimand Melendez in this respect.

b. Analysis and Conclusion

In respect to the suspension of Hermenegildo Melendez and his crew, I must decide whether Respondent imposed the three-day suspension because Melendez had participated in union activities or because of a legitimate business reason.

Melendez had been a member of the UFW for 15 years and always wore a UFW button at work. Since the first of August he had been displaying a sign at his packing table which called for the signing of the UFW contract and a raise in pay. Consequently, Respondent had knowledge of Melendez' support of the UFW and his participation in union activity.

Respondent contends that Melendez and his three fellow crew members were suspended because they had picked and packed grapes that were of such inferior quality that they could not pass inspection of the U.S. Department of Agriculture and furthermore, Respondent had warned Melendez twice before about his subpar work in this respect. I find merit in Respondent's contention.

There was credible evidence that Melendez' grapes were of an inferior quality. An impartial observer, the

inspector from the U.S. Department of Agriculture, so determined. Moreover, McDonald credibly testified that it was the inspector who called his attention to the inferior grapes being packed at Melendez' table that were the subject of the inspector's citation. McDonald credibly testified that he had warned Melendez twice before about the condition of the grapes which fact was corroborated by his writing on the suspension notice to the same effect.[15/]

In view of the foregoing, I find that Respondent suspended Melendez and his crew for a legitimate business reason and that General Counsel has failed to prove that the suspensions were based on or related to Melendez' union activities.

Accordingly, I recommend that this allegation be dismissed.

IX. Alleged Refusal to Rehire Mack Mejia

a. Facts

Mack Mejia has worked for Respondent in clippings[16/] in January and February and in harvesting August[17/] through November for seven years. Mejia did not work the last week of the 1979 harvest season, as he requested and was granted a leave of absence to assist a relative whose house had been destroyed by fire.

---

15. I find that McDonald was a credible witness. He testified in a conscientious manner and had a good memory for details

16. Planting of cuttings from grapevines to start new plants.

17. Mejia testified that he only worked the Delano harvest season, August to November. He never worked the Arvin harvest (July) except for one year, some time back.

Mejia returned to work for Respondent in the first part of 1980 to work in clippings. In February, Rosa Jaurequi, the foreperson of Mejia's crew, contacted him and offered him pruning work but he explained to her that he already was working for Respondent at that time in clippings and therefore could not accept the pruning assignment. Mejia finished out the clippings season.

Mejia and Jaurequi both testified at the hearing and gave versions of facts with significant variations.

Mejia's version is the following: Mejia expected a call from Respondent in early July to inform him when to report to work for the Delano harvest. In the last week of July, not hearing from Respondent, he attempted to telephone David Vandergrift, a personnel officer, but could not make contact with him until the following week. On that occasion, Mejia asked Vandergrift why Respondent had not called him for the harvest work. Vandergrift explained that Respondent had called him but that he would check with the foreman of Mejia's crew and find out the situation. Since Vandergrift failed to call him back in the next few days, Mejia attempted to telephone him but was unsuccessful for a period of a week. When Mejia finally talked to Vandergrift, the latter informed him that Respondent's records indicated that Respondent had called him to report to work in July for the harvest season. Nevertheless, Vandergrift said, he would see whether there was room in Jaurequi's crew for Mejia and told Mejia he would contact him

soon. Mejia waited some days more without word from Vandergrift and then went to the UFW to discuss the matter and eventually filed a charge with the ALRB.

In 1979 Mejia and his foreperson, Rosa Jaurequi, discussed the UFW on several occasions, and she expressed her opposition to the union because according to her it promoted trouble. Mejia replied that forepersons thought that way because without the union, forepersons could do anything they wanted with the workers. The majority of the members of Mejia's crew favored the union. Mejia attended only one negotiation session, in May 1979. He was present with approximately 30 other employees of Respondent. In 1976 or 1977, Mejia had a conversation with one of Juarequi's predecessors, Pura Montemayor, Mejia explained the benefits of a UFW contract and Montemayor vehemently criticized the union. Mejia admitted that ever since he voiced these pro-UFW sentiments to his foreperson he had not received any discriminatory treatment.

Rosa Jaurequi's version is the following: Juarequi became foreperson of Crew £51 during the 1979 Delano harvest. She denied ever having conversation with Mejia or any other member of the crew in 1979 about her feelings toward the UFW.

In January 1980, Juarequi telephoned Mejia and offered him work with Respondent in pruning but he explained that he could not accept the work because he was currently working for Respondent in clippings. Juarequi telephoned him again in May and offered him work in the preharvest and

he rejected the job offer and told her he was working elsewhere. She recorded on a seniority list she was using to call up workers that Mejia was working as a "supervisor in Dinuba and had so notified her." On July 3, Jaurequi telephoned Mejia and offered him a job for the harvest (Arvin & Delano), and he hold her that he would not work for the company and would talk to the office, so she marked "quit" next to his name on the seniority list from which she was calling.

Later David Vandergrift asked her whether she had called Mejia and she informed him that she had done so. Some time afterwards, Denise Briceno in the personnel office asked her the same question and she once again answered in the affirmative.[18/]

Mejia had participated in union activities to some extent. He was a member of the UFW and had attended one negotiation session. He testified that in 1976 or 1977 he had had an argument with his foreperson, Pura Montemayor, in which he praised the UFW and she criticized it. He also claimed that he had had a similar argument with his foreperson, Rosa Jaurequi, during the 1979 harvest season. However, there is no evidence that he was treated in *a* discriminatory manner following these incidents.

18. I credit Rosa Jaurequi's testimony regarding her communications with Mejia about work assignments. She testified in a sincere and cooperative manner and her testimony was confirmed by Respondent's business records.

General Counsel argues that because Mejia was active in the UFW and had an argument about the UFW with Rosa Jaurequi that Respondent refused to recall him for the Delano grape harvest. However, Respondent has presented evidence which indicates it harbored no ill feelings toward Mejia due to any alleged expression by him of his support for the UFW to Rosa Jaurequi. First of all, in January, it recalled Mejia to work in the clippings. Then later, Respondent through this same foreperson, Jaurequi, made two offers of work, one in pruning and one in the preharvest. If Respondent harbored any animus against Mejia, it certainly would not have made two job offers to him for employment in which he had no seniority. Thus, during the months preceding the alleged discriminatory refusal to rehire in July for the Delano

t

harvest, Respondent made overtures to the alleged discriminatee which goes a long way to dispel any inference that it might have felt some animosity toward him because of his alleged outspoken support of the UFW.

As to Respondent's conduct in respect to the alleged rehire of Mejia for the 1980 Delano harvest, Jaurequi testified she telephoned him, but Mejia denied receiving any such telephone call. Nevertheless, Mejia's testimony regarding Vandergrift[1]s reactions to his telephone calls to Jaurequi support her version of the facts. Jaurequi testified that after she telephoned Mejia's home and received a negative response from him, Vandergrift asked her whether she had telephoned

Mejia and she told him *she* had. Mejia testified that after he told Vandergrift that no one from Respondent's had contacted him regarding the Delano harvest, Vandergrift later communicated with him that Respondent's records showed he had been contacted in July for the harvest work but had not reported in. It is true that Vandergrift told him that he would check to see whether there was an opening in Jaurequi's crew and would contact him again and then failed to do so. Vandergrift was not called to testify. However, no inference can be made from Vandergrift's conduct that the reason for not contacting Mejia again was because of animus due to Mejia's alleged union activities.

Because of the foregoing, I find that General Counsel failed to prove by a preponderance of the evidence that Respondent failed or refused to rehice Mack Mejia because of his union activities. Accordingly, I recommend that this allegation be dismissed.

X. The Alleged Discriminatory Discharges of Bernice Flores, Antonio Gonzalez and Sergio Gonzalez.

a. Facts

Bernice Flores, Antonio Gonzalez and Sergio Gonzalez went to work in Arvin the last week of August 1980 for a labor contractor named Gilberto Renteria. Respondent had retained Renteria to employ and supervise workers of Respondent's wine grape harvest.[19/] Renteria testified that Lalo Salinas was a foreman in charge of the gondola picking crews during the

19. I find Gilberto Renteria to be a labor contractor as defined by Section 1682 of the Labor Code based on his credible testimony and his payroll records which were admitted into evidence.

1980 harvest in Arvin.[20/]

The three employees formed a work group under the supervision of foreman Salinas in which Flores and Antonio Gonzalez picked grapes and Sergio Gonzalez drove a tractor which pulled a gondola in which the grapes were transported to the edge of the fields. The three harvest workers worked five days the first week from 6:00 a.m. to 3:00 p.m. every day, and they encountered no problems with Salinas.

During the Monday morning of the second week, Flores went to Salinas' pickup for a drink of water and not finding any glasses queried Salinas about it. Salinas told her to look in the front seat. She complied but could not find any. She reported this fact to Salinas who made no comment or gesture but just turned and walked away from her. Later, Flores had so much thirst that she drank the water at the pickup cupping the water to her mouth with her hand.

Later that day Flores, while working close behind her fellow workers, Antonio and Sergio Gonzalez, complained to Salinas about the fact that there was no restroom in the field. Salinas shrugged and walked away without answering. That day Salinas changed the work locations of these three employees thrice. At one of the other locations, Flores again asked Salinas for water[21/] and this time he told her to accompany

---

20. I find that Lalo Salinas was a supervisor as defined by section 1140.4(j) of the Act.

21. She testified that she asked Salinas for water on that occasion for herself and the two Gonzalezes since none of them had any water.

him in his pickup to where there was some water, but she turned down this offer. Flores testified that Salinas sent her and the two Gonzalezes to areas where the picking was bad and sent other workers to where the grapes were good.

The following day the three harvest workers arrived in the field at 5:10 a.m. and noticed that Salinas had assigned another worker to drive the tractor that Sergio Gonzalez had driven the day before. The latter asked Salinas the reason he had assigned the tractor to someone else. Salinas declined to answer, but rather got into his pickup and drove away. Flores testified that she had not seen the new tractor driver or the other employees working with him before that morning,

Flores and the two Gonzalezes left the field and returned home. The next day the three workers, returned to the fields at 4:50 a.m. Salinas put the three back to work and assigned Sergio Gonzalez to drive the same tractor again. An hour later, Salinas came over to Sergio Gonzalez and instructed him to turn over the tractor to the worker who had driven the tractor the previous day, and Sergio Gonzalez complied. Salinas informed Gonzalez he was following the orders of the rancher. Flores and the two Gonzalezes went and asked the rancher[22/] through an interpreter, Jorge Benavides, whether it was true he had given orders to Salinas to fire them. The rancher answered that he had not taken their jobs away, and they could continue to work. Salinas arrived on the scene by this

22. There was no evidence to indicate that the rancher was anyone in authority either in respect to Renteria's crews or Respondent's own agricultural operations. It appears from the evidence that he was the owner of the land where Renteria as a labor contractor was harvesting wine grapes for Respondent.

time. The rancher then told Salinas that it was up to him to decide whether the employees should continue working.

Salinas still failed to assign a tractor to them, and so they approached him and explained that they were unable to work unless he assigned them a tractor. Salinas shrugged and walked away. The three workers then left the fields for home.[23/]

b. Analysis and Conclusion

General Counsel contends that Respondent laid off Bernice Flores, Antonio Gonzalez and Sergio Gonzalez because of Flores' protected concerted activities in protesting about working conditions at Respondent's Arvin fields.

The Board in Lawrence Scarrone, 7 ALRB No. 13 (1981), held that the same criteria used in deciding section 1153(c) discrimination cases, involving discrimination based on employees' union activities should be used in deciding section 1153(a) cases based on employees' protected concerted activities. Accordingly, General Counsel must prove by a preponderance of the evidence that the employer knew, or at least believed, that the employee(s) had engaged in protected concerted activity and discharged or otherwise discriminated against the employee(s) for that reason.[24/] In applying these

---

23. I credit Bernice Flores' uncontroverted testimony. She testified in a straightforward manner and had a good memory for details.

24. Jackson Perkins Rose Co. (1979) 5 ALRB No. 20.

criteria to determine the reason for the employer's discriminatory action, the Board in Scarrone also took into account the timing o. the discriminatory action and the employer's explanation of its conduct.

In Shelly & Anderson Furniture Mfg. Co. v. N.L.R.B. (9th Cir. 1974) 497 F.2d 1200, the court described the elements of protected concerted activity as follows: (1) a work-related complaint; (2) which furthers a common interest; (3) a specific remedy is sought; and (4) no illegal or improper method utilized.

It is clear from the record that Bernice Flores engaged in protected concerted activities when she protested to Salinas about hygienic working conditions affecting her and her two coworkers, the two Gonzalezes, i.e., the unavailability of water and restrooms on the job site,[25/] and requested a remedy that these two items be supplied forthwith. The method used, i.e., consulting with the foreman, was neither illegal nor otherwise improper.

It is evident that Respondent knew about her protected activity since she spoke to the labor contractor's foreman, Salinas, who was in effect Respondent's foreman, and his knowledge as a foreman is imputed to Respondent.

The factor of timing infers an improper motive on the part of Respondent since the assignment of picking bad grapes and the constructive layoff of the three employees occurred immediately after Flores protested about the water

---

25. The Board in Foster Poultry Farms, 6 ALRB No. 15, and Miranda Mushroom Farms, Inc., 6 ALRB No. 22, held that an individual employee's actions are protected and concerted in nature if they relate to matters of mutual concern to all affected employees. In the case herein, the availability of water and restroom facilities in the fields is clearly a matter of mutual concern to the affected employees.

and the restrooms» Flores protested to foreman Salinas on Monday/ and later the same day, he sent her and the two Gonzalezes to an area where the grapes were of an inferior quality. The following day, Tuesday, Salinas permitted them to work only an hour or two and then constructively laid them off for the day. On Wednesday, he once again allowed them to start work and then constructively discharged them by reassigning their work to some new workers.

So, .on the third day after the protest about working conditions, Salinas in effect discharged the three alleged discriminatees without any explanation for his action. At the hearing, Respondent offered no evidence to refute the testimony of Bernice Flores and no explanation of its motive in discharging the three employees.

As General Counsel has proved a prima facie case, and as Respondent has offered no evidence or explanation as to the layoffs or the discharges, I infer that it did not have a legitimate business reason or any other non-disciminatory reason to lay off and later terminate the three employees. Accordingly, I find that Respondent violated Section 1153(a) by discriminatorily laying off and discharging employees Bernice Flores, Antonio Gonzalez and Sergio Gonzalez because of Bernice Flores' protected concerted activities.

XI. Alleged Discriminatory Discharge of Crew $64 Because of Their Concerted Activities and Support of the UFW

a. Facts

The crew members of Crew #64 customarily worked the Arvin grape harvest season and then would be transferred to the Delano harvest operations on the first day of the harvest in that area.[26/] In 1980, Ida Tabieros was the foreperson for Crew #64, having assumed that position during the 1979 season.

At the beginning of the 1980 harvest season in Arvin, the crew members jointly complained to Tabieros about the shears, the drinking water, and the lack of toilet paper in the restrooms. They also asked her for higher wages ($4.50 an hour) and an hour's pay to compensate them for the travel time between Arvin and Delano once the harvest moved to the latter area. The crew members continued to bring the aforesaid complaints to Tabiero's attention, and she invariably disclaimed any responsibility for the working conditions and arranged meetings between her supervisor, Douglas McDonald, and the crew members. At the meetings, McDonald's invariable response to the employees' complaint was that he did only what he was told to do. During the time just preceding the move to Arvin, the crew members met on two or three occasions with McDonald and repeated their demand with respect to the compensation for travel time between Arvin and Delano.

---

26. The unrefuted testimony of Lydia Rodriguez establishes that ever since she worked for Respondent (1977, 1973 and 1979) Crew #64 had worked both the Arvin and Delano grape harvest.

Four days before the harvest ended at Arvin, the crew met with McDonald in the morning at the request of the crew. The entire crew was present and repeated their often-expressed grievances, including their request for travel-time compensation. McDonald replied that he would relay their requests on to Martin Jellocich.

On September 11, the last day of the Arvin harvest, Tabieros instructed the crew to speed up the picking so they would finish up at Arvin and be ready Monday to move onto Delano. The crew worked six hours that day and at quitting time Tabieros told them that on Monday she would notify them where in Delano they would start picking. Having not heard from her over the weekend, Lydia Rodriguez telephoned Tabieros Monday morning and the latter told Rodriguez that she had been unable to contact the foreman, and that if she heard anything, she would call the workers. During the rest of September, various members of Crew £64 called Tabieros three to four times a week inquiring about when they would be called to work in Delano. She always replied that she had been unable to contact the bosses.

Tabieros arranged for a meeting between Douglas McDonald and the crew members at 8:00 a.m. at Respondent's office in Arvin on October 1. When the crew members arrived at the office, McDonald took Tabieros into another room and conversed with her for 30 to 45 minutes. As they exited, the employees observed that Tabieros had been crying since there were tears in her eyes. Everyone went outside, and McDonald informed the crew that superintendent Martin (Jellocich) did not want them over at the Delano ranch because they gave too many problems to Respondent. McDonald added that he was

not a boss over in Delano so if they wanted to know the truth they should go to Delano and speak to Martin Jellocich or Randy Steele.

The crew members left Arvin and arrived at Respondent's Delano office at approximately 11:00 a.m. They entered the office and Tabieros told the receptionist that they wanted to talk to Jellocich and Steele. The receptionist and a secretary replied that they did not know where the men were. Some of the crew members requested them to contact Jellocich and Steele, but they declined to do so. The crew waited in the reception room until about noon time when the receptionist and the secretary informed them that they had to leave because they were going to close the office doors at 12:00 noon.[27/] During the time the crew was waiting, neither the receptionist nor the secretary attempted to contact either of the two supervisors by the two-way radio equipment that was available in the office. All of Respondent's pickups are equipped with such equipment so Jellocich and Steele could have been contacted by office personnel.

After the office was closed, the crew left and went to the ALRB office to file a charge. The Delano grape harvest ended during the first days of November, and Crew £64 was never recalled to work there.[28/]

---

27. Lydia Rodriguez testified that she had gone to Respondent's office in 1979 and 1980 to pick up her paycheck and each time the office was open at noontime.

28. My findings of fact regarding Grew f(34 and these incidents are based on Lydia Rodriguez' uncontroverted testimony as Respondent never presented any evidence in respect to this allegation. Rodriguez was an impressive witness who testified in a

(Footnote 23 continued ----)

b. Analysis and Conclusion

General Counsel contends that Respondent refused to transfer Crew #64 to the Delano harvest operation because the crew engaged in union activities by jointly protesting about various working conditions (e.g. the drinking water, lack of restrooms, clippers (shears)), and demanding higher wages and Arvin-to-Delano travel time compensation.

(Footnote 28 continued——)

straightforward manner and had a good memory for details. Douglas McDonald, who testified for Respondent regarding the suspension of Hermenegildo Melendez, was never called upon by Respondent to controvert any of Lydia Rodriguez' testimony. In Respondent's post-hearing brief, Respondent's only defense to this allegation regarding Crew No. 64 is the unreliability of Lydia Rodriguez' testimony. Respondent argues that all of Rodriguez' testimony in regard to the alleged discrimination against Crew 64 should be discarded because Estela Rangel's testimony in regard to Rodriguez' alleged remorse about testifying for Melendez casts serious doubts about her veracity.

I discount Rangel's testimony about Rodriguez saying she was not sure whether Melendez had a sign posted on his packing table the day McDonald suspended him. (In her testimony, Rodriguez testified without qualifications that Melendez indeed had a sign posted on the day in question.)

First of all, Rangel does not get along with Melendez and, because of that fact, sought and secured a transfer from his crew. Secondly, in her testimony it appears Rangel was arguing with Rodriguez, just after the latter had a heated discussion with Melendez about a personal matter, and was trying to convince her that she was not sure whether she had seen a sign or not. About the only comment by Rodriguez that appears to be solely Rodriguez' was her saying that she had reservations about testifying for Meiendez because he was not good. Furthermore, Rangel's whole approach to eliciting from Rodriguez comments that would be damaging to Melendez' case indicates her bias against Melendez.

Because of the aforementioned reasons, I discount Rangel's testimony about Rodriguez recanting her testimony in favor of Melendez and reiterate my evaluation of Rodriguez as a reliable witness who gave completely credible testimony as to both the Melendez affair *and* the alleged discrimination against Crew #64.

It is clear from the record that the entire crew participated in the concerted protests, and that Respondent had knowledge of said activities derived from the numerous meetings between the crew members and foreperson Tabieros and supervisor Douglas McDonald.

The timing of the crews' protests in August and the denial of Delano harvest work immediately afterwards in September, supports an, inference that Respondent did so because of the crews' protected activities during the Arvin harvest.

At the hearing, Respondent presented no evidence or explaination as to the reason for its refusal to call or assign Crew #64 to work in the Delano harvest as it had customarily done in previous years.

General Counsel has presented a very strong prima facie case and Respondent has offered no evidence in refutation thereof. Accordingly, I find that General Counsel has proven by a preponderance of the evidence that Respondent denied the members of Crew #64 work in the Delano grape harvest because of their protected concerted activities, and I conclude that Respondent has thereby violated Section 1153(a) of the Act. I find, however, that the record does not establish that Respondent violated Section 1153(c) of the Act, as the employees activity does not appear to be a form of union activity. XII. Alleged Refusal to Rehire Manuel Galindo as a Swamper.

a. Facts

Manuel Galindo had worked for Respondent since 1975 as a year-round employee beginning in January or February of each year

with pruning and ending each November with swamping for the harvest. He was the assistant union steward in the swamping crew and as such had attended four negotiation meetings. However he had never processed a grievance. He has been a member of the UFW ever since Respondent and the UFW first signed a contract in 1973.

Galindo began the 1980 harvest season in Delano in August as a swamper. However, in the latter part of October, when the truck to which he was assigned became unoperable, crew foreman Leon Mendez, assigned him to work as a picker. Mendez testified that he was forced to make that assignment because the truck Galindo was working on was not in running order, and there were no other trucks available. Galindo spoke to two supervisors, Luciano Gomez and Mike Gonzalez, about transferring him back permanently to swamping, but both told him they could do nothing about it. On November 4, Gonzalez assigned him to work as a swamper for one day with Antonio Davila, in place of another swamper who had been suspended. The next day, Galindo went back to picking and was not thereafter assigned to swamping during the rest of the harvest season.

During the harvest season, Galindo observed four workers, who had less seniority than he, working on Tex-Cal trucks as swampers while he was picking. These were Alfredo Rodriguez, Arturo Saucedo and two swampers employed by Brookings, a subcontractor *to* Respondent. However, Respondent had assigned Rodriguez to swamping work pursuant to the terms of an ALRB settlement agreement.

b. Analysis and Conclusion

General Counsel contends that Respondent refused to rehire Manuel Galindo as a swamper because of his support for and activi-

ties on behalf of the UFW.

Reviewing the record as a whole, it is difficult to infer that Respondent selected Galindo from all the other swampers and decided to deny him swamping work because of his union sympathies.

First of all, he was not particularly that active a UFW adherent. He was a second steward, but he had never processed a grievance against Respondent and the extend of his union activities was attending four negotiation meetings over a period of four months ending on August 1.

Secondly, although Respondent did not provide him with his preference in respect to work, swamping, it did keep him fully employed as a picker and did assign him work as a swamper on the one day when an opening occurred.

It is true Respondent assigned Arturo Saucedo, who had less ^ swamping seniority than Galindo, and two new swampers (from Brookins Trucking) to work swamping on Respondent's trucks. However, I ascribe this to a defect in a rather informal seniority system rather than a desire on the part of Respondent to retaliate against Galindo because of his union membership or union activities. The record does not establish any causal connection between his union activities and the less desirable work assignment he received.

Accordingly, I find that General Counsel has failed to prove by a preponderance of the evidence that Respondent failed or refused to reassign Manuel Galindo to swamping work because of his union activities, and I recommend that the 1153(c) allegation as to Galindo be dismissed.

Respondent's failure to reassign Galindo to swamping work

is discussed infra with respect to the 1153(e) allegation that Respondent improperly subcontracted out swamping bargaining unit work to Brookins Trucking. XIII. Alleged Discriminatory Discharge of John Rodriquez

A. Facts

John G. Rodriguez had worked 8 years for Respondent as *a* year-round employee beginning in March of every year (after the prunning season) and ending each November with swamping for the harvest.

In the 1980 season, he was assigned to Leon Mendez' crew of swampers and drove a truck transporting empty boxes to the fields and packed boxes to the cold storage facilities nearby. On November 4, 1980, at approximately 7:00 a.m. he drove his truck, loaded with empty boxes, past another truck, driven by coworker Alex Sanchez. As he pulled over in front of the other truck, after passing it, the rear fender of his truck collided with the front fender of the other truck. Sanchez, in the belief that Rodriguez' maneuver was intentional, retaliated by pursuing the Rodriguez truck and forcing it off the road. Rodriguez brought his truck to a halt and the engine stalled. As the truck's starter was defective, Rodriguez was unable to restart the engine. Meanwhile, Sanchez continued on his way in the other truck.

Rodriguez informed other fellow truck drivers of his plight, and 30 minutes later Leon Mendez arrived and Rodriguez explained to hint what had occurred. Soon afterwards, Alex Sanchez and his fellow swamper, Antonio Davila, arrived. Rodriguez was very angry at Sanchez and shouted some epithets at him. A few minutes

later, Randy Steels arrived and Mendez informed him what had happened and Gteele called Rodriguez and Ganchez a couple of asses and told them they were suspended for three days. Rodriguez retorted that there was no need to suspend anyone, that it was not his fault, and besides, the truck needed a occur steel than rear-vision mirror on the right side so those kinds of accidents would not informed the two truck drivers that they were suspended for five days Rodriguez challenged Steele to a fight, and Steele declined and called Rodriguez an ass. Steele then told Rodriguez that he had been fired. Rodriguez informed Steele that he would report the matter to the ALRB and the union, and Steele replied that if Rodriguez did so that he (Steele) would fight it. Then Steele told Luciano Gonzalez, a supervisor, to drive Rodriguez off the premises in his pickup truck.

Later that day, Rodriguez went' to the ALRB office in Delano to file a charge, but was advised there to return to Respondent's and request his job back. Three days later, Rodriguez returned to Respondent's office, picked up his paycheck, and spoke with Steele. He told Steele that he had not initiated action with the ALRB yet and would like to receive his job back. Steele replied that there were no exceptions and that he, Steele, knew that the truck accident was not Rodriguez' fault, but that the latter's conduct three days' previous was uncalled for and that right away Rodriguez had wanted to go and file charges with the ALRB and the union. Steels thanked Rodriguez for his interest in continuing to work for Respondent and, in parting, told Rodriguez to tell the UFW head organizer in the area, Ben Maddux, that he, Maddux, was a son-of-a-bitch, etc.

Steele used additional expletives, but which expressed his complete contempt and dislike of Maddux. He added that if he ever saw Maddux on his property, he would shoot his ass off.

b. Analysis and Conclusion

General Counsel contends that Respondent discharged Johnny Rodriguez because during his argument with Randy Steele on his last day of work with Respondent he threatened to file charges with the ALRB and the UFW.

Respondent contends that Steele discharged Rodriguez during the argument, but prior to Rodriguez' remark about the ALRB and the UFW, and therefore the discharge had been effected before any such remarks by Rodriguez and consequently those remarks could not have played any role in Steele's decision to discharge him.

The apparent key question to answer is whether Rodriguez said he would go to the ALRB and the UFW before or after Steele dismissed him. I find that Rodriguez made the statement about resorting to the ALRB and the UFW after Steele had told him he had been fired. I base my finding not only on the testimony of the various witnesses who testified to that effect[29/] but also on the fact that it would be unlikely for Rodriguez to make these kinds of threats in response to either *a* three- or five-day suspension. On the other hand, it would be very logical for an employee to make such threats if an employer had just dismissed him from a job. In

29. Antonio Sanchez, Antonia Davila and Leon Mendez all stated on direct examination that Steele fired Rodriguez and then Rodriguez mentioned the ALRB and the UFW. On cross-examination, Davila did not waiver, but both Sanchez and Mendez said they could not remember the sequence for sure. Rodriguez claimed the discharge came after his remark about the ALRB and the UFW.

the former situation, one could end up with no job. In the latter, one had already lost one's job, and had nothing further to lose.

General Counsel argues that Steele's comments to Rodriguez when the latter returned and asked for his job back confirms the fact that he had discharged Rodriguez after and therefore because of his threatening to go to the ALRB and the union.

General Counsel points out that Steele commented that "right away you (Rodriguez) wanted to file charges with the ALRB and the union" and then told him, using extremely vulgar terms, to give a message to union organizer, Ben Maddux, not to come on Respondent's property again.

General Counsel argues that the first remark is an admission on the part of Steele that one of the reasons he fired Rodriguez was because he wanted to file charges with the ALRB and the union. I find it does not have that significance at all. Steele clearly meant that Rodriguez' conduct that afternoon of insulting Steele and threatening to fight him was uncalled for and certainly sufficient grounds for dismissal, and after Steele took the very appropriate measure of discharging him, Rodriguez surprisingly still wanted to recur to the ALRB and the union. According to Rodriguez' testimony during the conversation about the impossibility of the latter returning to work for Respondent, Steela kept repeating that the reason for the discharge was Rodriguez' uncalled-for behavior three days previous which clearly corroborates the fact that Steele discharged Rodriguez only for his insubordinate conduct.

Steele's remarks about Maddux may be interpreted to show

anti-unionism animus on the part of Steele, but it mainly indicates Steele's ire toward Maddux and his tactics (whether legal or illegal) of coining onto Respondent's property and cannot by itself convert this incident of Rodriguez' discharge for cause into a discriminatory termination.

Accordingly, I recommend that this allegation be dismissed.

XIV. Alleged Refusal to Rehire Manuel Ayala Because of Union Activities

a. Facts

Manuel Ayala has worked for Respondent as a regular part-time employee since 1976, performing various functions, such as driving tractors, laying irrigation pipes, planting new vines, cutting weeds, repairing vineyard stakes and wires, etc.

Ayala has been a member of the UFW since 1974. He particpated in various union activities, including picketing in Visalia and Delano and attending UFW rallies in Los Angeles and Sacramento. He attended 7 of the negotiation meetings between Respondent and the UFW in 1979 and one on August 1, 1980.

In 1977 and 1978, after the harvest season ended in November, - Ayala, with other regular part-time employees, continued in Respondent's employ throughout the winter months cleaning up the harvested fields by removing broken boxes/ papers, packing tables, etc., and then noved on to planting new vines and installing stakes and wiras for the newly-planted vines to grow on. They also repaired the stakes and wires in the established vineyards. Ayala and the other steadies performed numerous other tasks until June when they resumed their work as swampers and continued during the

harvest months from July through November.

At the end of the harvest season in November 1979/ superintendent Martin Jellocich informed Ayala that there was no additional work at present, but that he should report to work on January *2,* 1980. On the latter date, Ayala went to Respondent's office and informed his foreman, Luciano Gonzalez, that he was ready to return to work. Gonzalez replied that there was no work as yet for him or the other two steady employees, Alejandro Sanchez and Jose Talamantes and that Respondent would contact him when work was available.

Ayala checked back at Respondent's office every five days. A woman office employee told him that he did not have any seniority for pruning and there was no available work for the steadies at that time.[30/] In late January, Respondent put Ayala to work as a pruner and he worked for a few weeks as such until the pruning season ended. Ayala testified that during the winter months he observed that the tractor drivers and the employees of Labor Contractor Gilberto Renteria were performing the work in the vineyards that he and the other steady employees had performed during the previous two winters.

---

30. Ayala testified that Luciano *Gonzalez* told him that the company was losing money and there was less work for the steady workers and that is what they get for being in the union. General Counsel argues that this comment by a supervisor of Respondent shows that Respondent denied steady employees work because they were union members. I disagree with that interpretation of the remark. It merely signifies that because of the union contract Respondent was losing money and therefore there was less work for the steady employees.

After the pruning layoff, Ayala returned every few days to Respondent's office seeking reemployment. Fifteen days after his latest layoff, he returned to work under the supervision of foreman Mike Gonzalez, performing the usual variety of tasks assigned to the steady employees. In July, the harvest season began and Ayala switched over to swamping until the end of the harvest season in November. He was laid off at that time and his foreman, Mike Gonzalez, told him he did not know when work would again be available for Ayala. The pruning work resumed January 13, 1901, and Ayala was rehired and joined a pruning crew on January 22 and worked the entire pruning season. After being laid off at the end of the pruning season, Ayala was rehired by Respondent a few days later. He went to work under the supervision of Luciano Gonzalez and performed a variety of tasks. During the first part of April, Gonzalez assigned him a job of cutting down tall thorny weeds chat grow in the vineyards. Ayala testified that it was a very uncomfortable job since the weed, upon being struck, gives forth a fine dust from cotton-like dried blossoms. The dust caused him to sneeze, and made his eyes smart and his skin sting. He further testified that because he always worked alone in isolated places, his fellow workers called him the "outcast" and said his only co-employees were the jack rabbits and squirrels.

Ayala brought a shovel to the hearing that Respondent had issued to him when he returned to work in March. It was evident that it was in poor condition with the metal part well worn and the handle cracked in the middle with a piece of tape wrapped around it so that the handle wouldn't break in two. Under cross-examination,

Ayala admitted that Respondent had issued him a new shovel 3 days before the hearing.

Luciano Gonzalez, one of Respondent's supervisors/ testified that approximately four years ago Manuel Ayala first came to work for Respondent and first performed work repairing wires and crossstakes in the vineyards. He confirmed the fact that Ayala was a steady employee who performed a varity of duties at Respondent's ranches. Gonzalez added that currently Ayala and one other employee, Faustino Montez, were assigned to clearing grass.

b. Analysis and Conclusion

General Counsel alleged that Respondent refused to rehire Manuel Ayala as a steady employee during the Spring of 1980 and thereafter assigned him to undesirable work, all because of his union activities.

The record as a whole fails to" establish any discriminatory or unlawful basis for Respondent's hiring and assigning practices regarding Manuel Ayala.

First of all, Ayala's union activities were not of such a degree that Respondent would single him out for discriminatory treatment. There was no evidence that Respondent had knowledge of Ayala's union activities in respect to picketing and rallies. The only knowledge that could be inferred would be from his attendance at negotiation meetings.

Secondly, Respondent continued to employ him in a variety of tasks. The only difference is that Respondent employed Ayala for the pruning work in the winter months rather than for vineyard repair work as in previous years. It appears the reason for this

was that Respondent subcontracted out the vineyard repair work so that it was not available for the steady employees.

Finally, General Counsel presented evidence to show Respondent's discriminatory attitude toward Ayala as manifested in its assignment of work to him. It may be true that Ayala failed to receive choice work assignments since he usually had to work alone performing uncomfortable jobs such as clearing obnoxious weeds. However, General Counsel presented no evidence to show a connection between Ayala's union activities which were known to Respondent, i.e., the attendance at seven negotiation meetings/ and its assignment of unpleasant tasks to Ayala.

Ayala was not the only employee who had to clear the obnoxious weeds, as Faustino Mendez also was assigned to the sane task. Even though Ayala was working with a defective hoe for a number of weeks, this is no proof of discriminatory treatment since there was no evidence to indicate that Respondent's other employees were equipped by Respondent with better tools. It strains credibility to believe that because Ayala attended some negotiation meetings along with many other employees, Respondent would continue to penalize him by assigning him lonely unpleasant tasks and providing him with a defective shovel.

In view of the foregoing, I find that General Counsel has failed to prove by a preponderance of the evidence that Respondent has engaged in discriminatory conduct in respect to its employment of Manuel Ayala and accordingly, *I* recommend that the allegation be dismissed.

XV. Alleged Discriminatory Refusal to Rehire Antonio Garcia and Hire Eugenio Barajas

a. Facts

Antonio Garcia had been a steady employee at Respondent's for approximately four years. He had worked at a variety of tasks including irrigation, swamping and repairing cross-bars and wires in the vineyards with the other steady workers in the winter months. Respondent laid him off with the other steady employees at the end of the 1979 harvest season (November) and informed him that he would be recalled the first of the year. Not hearing from Respondent, Garcia went to the personnel office shortly after the first of the year and conversed with Irene Perales, Respondent's personnel manager, who informed Garcia that the steady workers would not start yet but there was work available for them in pruning. Garcia requested pruning work for his foster son, Hugenio Barajas. Perales explained that they almost had a full complement of pruning employees so they were hiring only seniority employees, their relatives and steady employees at that time. Garcia was upset about work being denied his foster son and informed Perales that in that case he would wait until his regular steady work became available later on. Garcia testified that he had never done pruning work before. During January and February Garcia observed labor contractor Rentaria's employees performing vineyard repair work.

Respondent failed to recall Garcia in February so in March he sought and secured employment *as* an irrigator elsewhere. During the last few days of March, Martin Jellocich, Respondent's superintendent, visited Garcia's home and offered him employment as an irrigator. At first Garcia agreed, but after conferring with his

wife about the two job alternatives, contacted Jellocich and informed him that he rejected the job offer because he felt obligated to continue with his current employment.

Garcia had been a member of the UFW since coming to work for Respondent. There was no further evidence of any union activities on his part.

b. Analysis and Conclusion

General Counsel alleges that Respondent refused to rehire Antonio Garcia as a steady employee and refused to hire his foster son, Eugenio Sarajas, as a pruning worker because of Garcia's union activities.

The record as a whole fails to support the allegation that Respondent had a discriminatory or unlawful reason for not rehiring. Garcia for the vineyard repair work and Barajas for pruning work in January 1980.

First of all, although Garcia was a union nember, there is no evidence that he engaged in any union activities for which it would be likely for Respondent to single him out for discriminatory treatment. He was a dues paying member of the UFW as were hundreds of his fellow workers at Respondent's operations. Secondly, Respondent offered him work in the pruning in January and in irrigation in March. The only difference from previous years is that Respondent decided to employ Garcia for pruning work in the winter months rather than in vineyard repair work. It appears the reason for that was that Respondent contracted out the vineyard repair work so that it was not available for the steady employees.

I find that the General Counsel has failed to present a

prima facie case in respect to the alleged discriminatory treatment of Antonio Garcia and Sugenio Barajas, General Counsel has presented no evidence that would distinguish Garcia from all his co-workers in respect to union activities. Respondent has presented ample and credible evidence of its legitimate business reasons foe-its hiring practices in respect to Antonio Garcia and Eugenic Barajas in the first part of 1980.

In view of the foregoing, I recommend that this allegation be dismissed.

XVI. Alleged Discriminatory Discharge of Eluterio Gutierrez

a. Facts

Eluterio Gutierrez went to work for Respondent as *a* tractor driver in November 1979. In his job application, he wrote that he had had experience in driving a tractor. He drove the tractor for burning weeds and also making ditches for irrigation. There is no evidence that during the weeks he was driving the tractor, anybody in authority at Respondent's ever criticized his ability to drive one. In January, Gutierrez and his fellow tractor drivers were laid off for four days because of extremely muddy soil. All of the tractor drivers returned to work except Gutierrez. That sane day Gutierres asked his foreman, Bill Harr, about when he would return to work, and Harr replied "Later". Gutierrez returned the next day and inquired about employment, and Harr replied, "Not yet", because it was still too wet. On the third day, Gutierrez talked to Harr, and the latter told him there was still no work for him but to check

by telephone in the future. From that point on Gutierrez' wife[31/] telephoned Harr at his house every two or three days and Harr always told her, "Later".

On January 31, 1980, Gutierrez filed a grievance with the UFW which, in turn, notified Respondent of the grievance. In the grievance, the UFW charged Respondent with violations of the contract by subcontracting-out work which corresponded to members of the bargaining unit such as Eluterio Gutierrez.

A few days after Eluterio Gutierrez had filed the grievance with the UFW, foreman Bill Harr approached his brother Jesus Gutierrez, also an employee of Respondent's, and showed him a copy of the grievance and said, "Do you know what this meant?" Jesus testified that Harr's expression indicated he did not like the fact that the grievance' had been filed.

During February, Jesus Gutierrez, also asked Harr about when his brother would return to work, and Harr always answered "Later."

On February 26, Gutierrez' wife made the last phone call ~c Harr about employment for her husband, and Harr informed her that Respondent would not hire him because he did not know how to drive a tractor.

On February 23, Gutierrez filed an unfair-labor-practice charge with the ALRB, alleging that Respondent had since January 3,

31. Gutierrez testified that he asked his wife to make the telephone calls to Harr because she speaks English while he doesn't, and she would have less chance of misunderstanding in communicating with the English-speaking Harr.

1980, through its agent, Bill Harr, discriminatorily refused to rehire Eluterio because of his participation in concerted activities.

In the first part of March, Jesus Gutierrez once again asked Harr about his brother's employment, and Harr answered that he was not going to recall him since he did not know now to drive a tractor.

Irene Perales, Respondent's personnel manager, testified that Bill Harr and Sill Pritchett, Respondent's superintendent informed her in the early part of the year that Eluterio Gutierrez did not know how to drive a tractor. Later one of the supervisors or foremen (she thought it was Bill Pritchett) told her that Gutierrez was dismissed so she typed a letter and mailed it to the union on Friday, January 11.[32/] The letter said that Respondent dismissed Gutierrez because of his inability to drive a tractor and also pointed out that Gutierrez had claimed on his application form that he had experience in driving a tractor, but it soon became evident that he did not know anything about tractors and, despite instructions, could not learn how to drive one. Perales admitted that the collective bargaining agreement called for Respondent to notify the union and the employee within three days of a discharge, but she could not remember whether she .sent a notice to Gutierres. There was nothing in the letter to indicate that she had.

32. The notice was typewritten with the exception of the date "January 11, 1980" which was in handwriting.

b. Analysis and Conclusion

General Counsel alleges that Respondent refused to rehire Eluterio Gutierrez because he filed a grievance with the UFW under the collective bargaining agreement.

In discriminatory discharges cases, General Counsel customarily must prove the employee's union activity, the employer's knowledge of such activity, and a causative connection between the union activity and the employer's discriminatory conduct.

In the instant case, Eluterio Gutierrez engaged in union activity when he filed a grievance on January 31 with respect to Respondent's refusal to rehire him under the collective bargaining agreement then in effect between Respondent and the UFW. Respondent had knowledge of this fact since it admittedly received a copy of the grievance with Eluterio Guttierrez' name thereon as the grievant. On February 26, Respondent notified Mrs. Gutierrez that her husband's services were no longer needed as a tractor driver because of his alleged lack of ability to drive a tractor.

Respondent argues that it dismissed Eluterio Gutierrez on January 11 and sent a copy of the dismissal notice to the UFW, and so the grievance filed by Gutierrez on January 31 could not have been a factor in its decision to dismiss him. It is true that its personnel manager, Irene Perales, testified that two of Respondent's supervisors, Bill Harr and Bill Pritchett, informed her in early January of Gutierrez' ineptitude as a tractor driver and that one of the two (probably Bill Pritchett) told her Gutierrez was dismissed and that on January 11 she sent a notice of such dismissal to the UFW.

The record viewed as a whole indicates that Respondent did not make a decision to discharge Gutierrez in January, nor did it send a dismissal notice to that effect to the UFW in that month.

If Respondent had decided to fire Gutierrez on January 11, it would be incongruous for Bill Harr to continue to tell Eluterio Gutierrez' wife, when she telephoned him every two or three days inquiring about her husband returning to work, "Later". The normal reaction, if Gutierrez had been dismissed in January, would have been to inform her of that fact.—'

Furthermore, if Respondent had decided to discharge Gutierrez in January, why did supervisor, Bill Harr, upon seeing Gutierrez' brother a few days after the grievance was filed in late January, ask him what the filing of the grievance signified, with a look of displeasure rather than inform the brother that Eluterio had been discharged earlier in the month because of his inability to drve a tractor? Moreover, Harr's reaction of annoyance to Eluterio having filed a grievance supports the fact that Respondent decided after the filing of the grievance not to rehire Gutierrez, and therefore an inference is created that it was because of the grievance it made that decision.

Moreover, there are factors which indicate that Respondent never sent a notice of dismissal to the UFW in January. One factor is the handwritten date on the notice which indicates the notice of

33. In its post-hearing brief, Respondent tries to explain away Harr's reluctance to let Gutierrez' wife know the harsh news about her husband's discharge: because he wanted to let him down gently. This may be a credible reason for a one-week delay but it is patently incredible for a period of approximately four weeks.

dismissal was typed and then some time later the date was added in handwriting. Normally if a notice is made up and sent out on *a* certain day/ the date would be typed in at the sane time the body of the notice is typed. Another factor which indicates that the notice of dismissal was not sent to the UFW in January is the fact that when the UFW filed its grievance on behalf of Gutierrez on January 31, it made no mention of a dismissal which indicates the union never received the notice.

Of course, Respondent could have cleared up some of circumstances surrounding the discharge if it had called Bill Harr to testify especially in regard to the reason he continued to tell Gutierrez' wife and brother that Respondent would recall Gutierrez for tractor work later on and his comments to Gutierrez' brother about the filing of the grievance. Respondent's attorney declined to call Harr to testify, and made no claim that Harr was unavailable. Since Respondent had within its power the ability to explain in detail about the incongruities in its conduct, and perhaps demonstrate that it possessed a legitimate business reason for failing or refusing to rehire Gutierrez and it decided not to do so, these are further indications that it possessed no legitimate business reason to discharge Gutierrez.

In view of the foregoing, I find that General Counsel has proven by a preponderance of the evidence that Respondent failed and refused to rehire Eluterio Gutierrez because of his union activity, i.e., filing a grievance against Respondent through the UFW and thereby violated Section 1153 (c) and (a) of the Act.

XVII. Unilateral Subcontracting Out of Bargaining Unit Work, Swamping in October and November 1980.

a. Facts

Previous to 1980, all swamping work at Resondent's had been performed by its own employees. At the beginning of the 1980 harvest season, Respondent had 10 trucks operating manned by 20 swampers, two to a truck. On or about October 10, one of the ten trucks was rendered inoperative by a fire. Another of the ten trucks was also inoperative because of mechanical problems. Superintendent Martin Jellocich testified that due to the hot weather, increasing amounts of grapes needed to be hauled out of the fields and with only eight trucks in operation, Respondent was falling behind in this task. On or about October 14, he communicated this information to Randy Steele who said he would take care of the problem. Steele did not instruct Jellocich to contact the UFW.

Respondent's foreman in charge of the trucks, Leon Mendez, testified that he also realized that more trucks were needed and spoke to Jellocich about it on October 14th, and the next day three trucks manned by six swampers from a company called Brookins reported in to work and from then on engaged in the transportation of empty and packed boxes in Respondent's harvesting operation.

On October 15, Alfredo Rodriguez and his partner Juan M. Rodriguez, swampers in Respondent's employ, encountered three unknown swampers transporting loads of Tex-Cal grapes in trucks with the insignia Brookins Trucking on the door panels. Alfredc Rodriguez and his partner conversed with the three swappers and learned that they were receiving no hourly rate, as were swampers

working directly for Respondent, but rather a piece rate of s.05 a box.

That same day, the two Rodriguezes asked Leon Mendez about a changeover to piece-rate for Respondent's swampers.[34/] The next day Mendez told them that Randy Steele had suggested that they go talk to him about the subject. Then Rodriguez replied that they would contact the UFW with reference to consulting with Steele about the matter. There was no evidence that either Respondent or the Rodriguez brothers ever contacted the UFW about subcontracting swamping work to Brookins or about paying piece-rate to swampers employed directly by Respondent.

Ten days later, Alfredo Rodriguez and his partner were in Respondent's fields and consulted with Jellocich and some other foreman about the possible switchover to the piece-rate system. Jellocich told them to wait until Randy' Steele came. A few minutes later, Steele arrived and told the two not to discuss that subject with him, that if he had his own way, the following year, he would not directly employ any swampers and therefore he would not have to see their (expletive deleted) faces around. Steele concluded by telling Rodriguez he had 60 seconds to get on the truck or get off the ranch,

Leon Mendez testified that beginning on November 4 two new swampers from Brookins began to work with a Tex-Cal truck. Mendez also testified that Respondent's practice was to hire new swampers

---

34. Respondent's swampers were paid S4.10 an hour and 3/1C cents per box.

from pickers who, because of their large size, would be able to do the heavy swamping work. Marine! Galindo testified that he worked only that one day, November 4, and then was assigned to a picking crew once again.

Respondent continued to subcontract out the additional swamping work to Brookins Trucking until the harvesting season ended in late November.

In Tex-Cal Land Management Inc., 7 ALRB No. 11 (1931), General Counsel and Respondent's attorney entered into the following stipulation:

> "At no time after August 1, 1980, through April 17, 1981, did Respondent negotiate, give notice or inform the UFW of its decision to subcontract work previously performed by the bargaining unit."—'

b. Analysis and Conclusion

The issue to be decided is whether Respondent failed in its obligation to bargain in good faith by subcontracting out swamping work to Brookin Trucking without notifying the UFW.

It is well settled, according to ALRB and NLRB precedents,[36/] that an employer which institutes unilateral changes in the wages, hours or other working conditions of its employees without notifying their collective bargaining representative violates his collective bargaining obligation under Section 1153(e) of the ALRB (Section 8(a)(5) of the NLRA). In Fibreboard Paper Products Corp. v. N.L.R.B. (1964) 379 U.S. 203, 13 L.Ed. 2d 233, 57

35. At the hearing General Counsel requested that I take administrative notice of this stipulation and I hereby do 'so.

36. N.L.R.B. v. Katz (1962) 369 U.S. 735, 50 LRRM 2177; A5-K-NE Farms (1980) 6 ALRB No. 9.

LRRM 2609, the NLRB decided that the subcontracting out of bargaining unit work did constitute such a unilateral change and the employer was abliged to notify and bargain with the labor organization which represented its employees and failing to do so would violate Section 8(a)(5) of the NLRA (Section 1153(e) of the ALRA).

It is clear from the record that Respondent subcontracted bargaining unit work to Brookins Trucking. Swamping work had always been performed by Respondent's regular employees whose working conditions were covered by the collective bargaining contract between Respondent and the UFW. Respondent introduced no evidence to show that it had notified the UFW of its decision to subcontract this swamping work to an outside firm and, in fact, entered into a stipulation in a previous case that it had not notifed the UFW of any decision to subcontract bargaining 'unit work during a period of time which includes October and November 1980.

The Board in Tex-Cal Land Management Inc., supra, ordered Respondent to sign the collective bargaining agreement it reached with the UFW on June 11, 1980, and to give retroactive effect to all terms and provisions of that agreement for the period from June 11, 1980, and therefore a collective bargaining agreement was in effect at that time. It could be argued that by the terms of such agreement Respondent had the right to subcontract out the swamping work without an obligation to notify the UFW. However, a review of said contract indicates that Respondent has no right to contract out such work without bargaining with the UFW first. In Article 17, Section B, it states that subcontracting will be limited to a list

of ten activities, and harvesting table grapes is not included and, of course, the swamping work in question was in connection with the table grape harvest.

Moreover, in Article 17, Section 3, the Respondent agreed "it shall not contract any operation which bargaining unit employees have performed in the past, and it shall not subcontract to the detriment of the bargaining unit of the Union." In the instant case, Respondent's employees, members of the bargaining unit, had performed all the jobs connected with the table grape harvest which included the swamping operation.

Respondent claims that its reason for subcontracting the swamping work to Brookins Trucking was that it no longer had a sufficient number of trucks to transport the grapes since two of them were inoperable and it had no time to rent or purchase additional trucks, and therefore it subcontracted out the swamping work so as to have access to the use of the specialized equipment owned by Brookins Trucking. However, the collective-bargaining contract permits contracting-out "when the operation to be subcontracted requires specialized equipment not owned by the company." Trucks are not considered specialized equipment, so Respondent cannot use this clause to avoid its duty to bargain with the UFW over the subcontracting-out of the swamping work. Accordingly, *I* find that Respondent violated Section 1153(e) and (a) of the Act in unilaterally subcontracting bargaining unit work in October and November 1980.

XVIII. Respondent Allegedly Contracted Out Harvesting Work at the Poso Ranch Without Bargaining With the UFW.

a. Facts

Margarita Espinoza, a member of Crew #57 testified that in August 1979 a crew working for Gilbert Renteria, a labor contractor, finished up the harvest of the table grapes at the Poso Ranch in Arvin. She further testified that during the last week that the Renteria crew harvested at the Poso Ranch, all the rest of Respondent's Arvin crews, including Crew #57, were laid off. The following week all of the Arvin crews moved to Respondent's Delano area ranches and resumed their harvesting work there.

Dudley M. Steele, Jr., former President of Respondent, testified that he was the general manager of Respondent in 1979 and admitted that Respondent contracted with labor contractor Renteria to finish the harvest of the table grapes at the Poso Ranch. tie explained that due to the unseasonably hot weather, Respondent had fallen far behind in its harvesting, and it became quite evident that Respondent's regular crews could not keep up. He further testified that the grapes were maturing so fast that they were becoming overripe, and Respondent was losing fruit at that time. He added that all of the regular crews were working at that time, so there was no other recourse but to contract help from the outside, and so Respondent contracted Renteria for that purpose. Steele in his testimony never mentioned any attempt on the part of Respondent to contact the UFW about its decision to contract out the table .grape harvest at the Poso Ranch to Renteria. However, he stated he thought someone at Respondent's had contacted the UFW.

Espinoza further testified, that Crew =37 performed the

preharvest work at the Poso Ranch, and she noticed that the grape crop there would be superior. The grapes were good size, abundant and closely bunched. According to her opinion, any crew harvesting the grapes at the Poso Ranch would be indeed fortunate since they would be working at *a* piece rate, so rauch a box, they would be able to make more money there than at other ranches.

Renteria's Contract Labor Logs, (G/C 3) substantiated the fact that Renteria's crews worked at the Poso Ranch during the first three weeks of August in 1979.

b. Analysis and Conclusion

The issue to be decided is whether Respondent failed in its obligation to bargain in good faith v/hen it subcontracted out the harvesting of table grapes at the Poso Ranch in August 1979 without notifying the UFW.

It is well settled according to ALRB and NLRB precedents[37/] that an employer which institutes unilateral changes in the wages, hours or working conditions of its employees without notifying their collective bargaining representative violates its collective bargaining obligation under Section 1153(5) of the ALRA (Section 3(a) of the NLRA). In Fibreboard, supra, the NLRB decided that the subcontracting out of bargaining unit work did constitute such a unilateral change and the employer was obliged to notify and bargain with the labor organization which represented his employees *an.** failing to do so would violate Section 3 (a) (3) of the NLRA (Section 1153(e) of the ALRA).

37. N.L.R.B. v. Katz, supra AS-H-ME Farms, supra.

It is clear from the record that Respondent subcontracted bargaining unit work to Gilbert Renteria. The harvest of table grapes has always been performed by Respondent's bargaining unit employees. So it follows the Respondent was under a legal obligation not to make a unilateral change but rather to notify the UFW about contracting out the harvest of the table grapes to Renteria. Respondent introduced no evidence to show that it had notified the UFW in this respect, other than the general manager, Dudley Steele, at that time, testifying at the hearing that he thought someone at Respondent's had notified the UFW. It is obvious that Respondent had within its power the means to produce more substantial evidence along these lines and, because of its failure to do, *I* find that it failed to notify the UFW of its decision to subcontract the harvest of the table grapes.

Respondent argues that at the time the Poso Ranch harvest work was subcontracted out to Renteria that all of the bargaining unit employees were in Respondent's employ harvesting grapes at other ranches. This is not a valid defense to Respondent's failure to notify and bargain with Respondent about the subcontracting because under the collective bargaining contract in effect at that time Respondent was under an obligation to notify the UFW in advance of the dates it would accept applications for employment and to continue to give preference in hiring new employees during harvest

operations to members of the families of present employees.—' Moreover, Margarita Espinoza credibly testified that during the last week that the Renteria crew harvested at the Poso Ranch, all the rest of Respondent's Arvin crews, including her own (Crew £57) were laid off.

Accordingly, I find that Respondent violated Section 1153 (e) and (a) of the Act by subcontracting grape harvest work in August 1979 without notifying and bargaining with the certified bargaining representative of its employees, the UFW.

XIX. Lay Off of Erasmo Espinoza and Other Employees on February 9, 1980, Allegedly Because of Support of UFW.

a. Facts

Erasmo Espinoza began to work for Respondent in 1977 and later on that year became a steady worker, *a* swamper in the harvest season and a tractor driver during the 'rest of the work year (usually January through November). He testified that the usual practice at Respondent's was to have the steady workers perform the vineyard repair work, which involves repairing and replacing stakes and wires. In 1979, Espinoza was a shop steward for the tractor drivers and the irrigators, and in 1980 he was president of the Ranch committee. He attended the negotiating sessions with Respondent during his presidency in 1980.

In the winter of 1973-79 (December, January and February) Respondent's "steady employees" were the only workers who performed

38. Furthermore, Respondent cited no authority to indicate that the fact no bargaining unit employee was denied work could be a defense to an allegation of illegally subcontracting bargaining unit work without notice to or bargaining with a certified bargaining representative.

vineyard repair work. At the end of the grape harvest in 1979, Respondent laid off the steady employees and informed them 'that they would be recalled after the first of the year. Respondent recalled some of the steady employees, including Espinoza, on December 5 and they worked until December 21. During that period of time, Espinoza testified, he observed 7 to 10 employees of Gilbert Renteria, a labor contractor, working on the Poso Ranch and performing some of the vineyard repair work that only the steady employees had performed the year before.

Gilbert Renteria testified that his employees did vineyard repair work but that they did not begin until after the pruning was finished in each vineyard. His records indicate that his employees performed such work from the last few days of January until the middle of March 1980.

Dudley M. Steele, Jr., testified that even though he was no longer President of the Respondent during the winter of 1979-30, he daily drove around and inspected all of Respondent's operations. He did this in his capacity as President of Tex-Cal Land Incorporated, and the purpose was to verify that their properties and improvements were being taken good care of.[39/] He testified that Renteria did not perform any vineyard repair work and that Renteria employees were engaged strictly in the installation of stakes, cross bars and wires in the new plantings (new work rather than repair work).

Espinoza testified that almost all the steady employees returned to work on January 7, 1980, on a regular basis. Espinoza

---

39. Tex-Cal Land Incorporated owned all lands farmed by Respondent and leased these lands to the latter.

testified that from that date on until raid-February he observed employees of Renteria and other labor contractors performing vineyard repair work on Ranch 88, Sampaing and Marshall Ranches.

b. Analysis and Conclusion

General Counsel alleges that Respondent laid off steady employees such as Erasmo Espinoza, Manuel Ayala, Antonio Garcia and Eluterio Gutierrez, and subcontracted out the vineyard repair work which the latter normally performed, during the same months of their lay off during previous years, because of their union activities.

I find that Respondent actually contracted out the vineyard repair work in the first months of 1980. Renteria's records clearly show that fact and, furthermore, Renteria confirmed it in his oral testimony. Renteria's records contain words such as "vineyard repair work" and, despite Dudley Steele's explaining that it meant "vineyard installation work", it strains credibility to believe that Renteria would use such clear cut language to mean something else. I believe Dudley Steele was sincere in his testimony about his not observing Renteria's crews performing vineyard repair tasks during the period in question, but I do not believe he could have been at all of Renteria's work sites at all times when work was being performed and observed closely enough to determine whether Renteria's crews were engaged in vineyard installation or vineyard repair activities.

We come now to the question of whether Respondent denied this vineyard repair work to its steady employees because of their union activities.

First of all, the only employee among the four who was

somewhat active in union affairs was Erasmo Espinoza, who was *a* union steward and also attended negotiations meetings. However, as I have already found, supra, in other parts of this decision, the other three employees' union activities were minimal.

Secondly, Respondent continued to employ, or at least offered employment to, three of the four employees in a variety of jobs during this entire period. Of course, we cannot include Eluterio in these generalizations since the circumstances surrounding his treatment by Respondent is completely apart from the circumstances of this particular allegation.

Finally, it is difficult to believe that if Respondent actually harbored animus against these three employees, Espinoza, Ayala and Garcia, it would have withheld just one aspect of their work duties as steady employees and at the same time provide or offer them a variety of other work. I'do not see how any anti-union message would get through to the employees, based on these subtle changes in work assignments. No inference can be drawn from such a set of nebulous circumstances to indicate an unlawful act on the part of Respondent. General Counsel has failed to establish a prima facie case that Respondent subcontracted out vineyard repair work because of the union activities of its steady employees. Accordingly/ I recommend that this allegation be dismissed.

In a second consolidated complaint which was filed by General Counsel after the close of the hearing, it is alleged that Respondent violated Section 1153(e) of the Act in not assigning the vineyard repair work to these steady employees and subcontracting such work to Gilbert Renteria. General Counsel failed to move to

amend the complaint in this respect at the hearing. However, sufficient facts have been proven that provide a basis for a finding that Respondent violated Sections 1153(e) and (a) in subcontracting out the vineyard repair work in January and February 1980.

Previous to 1980 all vineyard repair work at Respondent's was performed by the steady part-time employees. The collective bargaining contract in force in the beginning of 1980 provided that Respondent had the right to subcontract out certain kinds of operations and vineyard repair work was not included.[40/]

Respondent attempted to prove that Renteria's crew only performed the "staking and construction of cross arms on new vines" that is the "new work". However, I decided that these crews also performed vineyard repair work. See discussion, supra. There is no evidence in the record that Respondent ever verified or bargained with the UFW about subcontracting out such work.

Accordingly, I find that Respondent violated Section 1153(e) of the Act in unilaterally changing the conditions of employment by subcontracting out vineyard repair work in 1980 without notifying or bargaining with the UFW.

XX. Respondent in January 1981, Subcontracted Vineyard Pruning Work Without Bargaining with the UFW.

a. Facts

Previous to 1981, all vineyard pruning work at Respondent's had been performed by its own employees. General Counsel contends

40. The collective bargaining contract permits Respondent to contract out the staking and construction, of cross arms for new vines.

that the collective bargaining contract in force at that time provided for vineyard pruning work to be performed exclusively by Respondent's employees who were all included in the bargaining unit represented by the UFW.

In January 1981, Respondent contracted out vineyard repair work to Tony Mendez, a labor contractor. The work involved approximately 86 workers employed for a period of one week from January 22 to January 23, 1981.[41/]

In Tex-Cal Land Management, Inc., 7 ALRB No. 11 (1981), General Counsel and Respondent's attorney entered in the following stipulation:

> "At no time after August 1, 1980, through April 17, 1981, did Respondent negotiate, offer to negotiate, give notice or inform the UFW of its decision to subcontract work previously performed by the bargaining unit."[42/]

b. Analysis and Conclusion

The issue to be decided is whether Respondent failed in its obligation to bargain in good faith by subcontracting out vineyard repair work to Tony Mendez. It is well-settled, according to ALR3 and NLRB precedents, that an employer which institutes unilateral changes without notifying the certified representative of its employees violates its collective bargaining obligation under Section 1153 (e) of the Act.

---

41. Respondent stipulated to these facts and expressed no objections to the receipt into evidence of the payroll records of Tony Mendez substantiating these facts.

42. At the hearing General Counsel requested that I take administrative notice of this stipulation, and I hereby do so.

It is clear from the record that Respondent subcontracted bargaining unit work, i.e., vineyard pruning work in January 1931 to a labor contractor and failed to notify or bargain with the UFW.

The Board decided in Tex-Cal Land Managements, Inc./ supra, that a collective-bargaining agreement was in effect at that time. A review of said contract indicates that Respondent had no right to contract out such work without first notifying and bargaining with the UFW. In Article 17, Section B, it states that subcontracting will be limited to a list of ten activities, which did not include vineyard pruning work. Moreover, in Article 17, Section 3, Respondent agreed "it shall not contract out any operation which bargaining unit employees have performed in the past and it shall not subcontract to the detriment of the bargaining unit of the union."

Respondent's only defense to this allegation is that bargaining-unit employees were otherwise working during this period of time, and there appears to be no anti-union animus motivating this choice. It is well known that anti-union animus is not an element necessary to *be* proved in a Section 1153(e) unilateral-change violation. Respondent cited no authority to indicate that the fact that no bargaining unit employee was denied work could be a defense to an allegation of illegally subcontracting bargaining unit work without notice to or bargaining with a certified bargaining representative.

It is evident from the foregoing, that Respondent had the duty to notify and bargain with the UF'7 when it contracted out bargaining unit work *to* the labor contractor, Tony Mendez, and

failing to comply with such duty violated Section 1153(e) and (a) of the Act.

ORDER

Respondent, Tex-Cal Land Management, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Subcontracting out bargaining-unit work, or otherwise making unilateral changes in its agricultural employees' wages, hours and working conditions, without prior notice to and bargaining with the United Farm Workers of America, AFLCIO (UFW).

(b) Discharging, failing or refusing to assign work to, suspending or failing or refusing to rehire or otherwise discriminating against agricultural employees because of their union and/or protected concerted activities.

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

(a) Reimburse Jose Torres, Antonio Jaimes, Estela Jaimes, Juan Garcia, Joaquina Flores, Pedro Ramirez and Elva Ramirez for all wage losses and other economic losses they have suffered as a result of their suspensions during Respondent's 1930 grape harvest, reimbursement to be made according to the formula stated in J & L Farms, 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(b) Reimburse Bernice Flores, Antonio Gonzalez and Sergio Fonzalez for all wage losses and other economic losses they have suffered as a result of their discharge in July 1980, reimbursement to be made according to the formula stated in J & L

Farms, 6 ALRS No. 43, plus interest thereon at a rate of seven percent per annum, and offer them reinstatement to their respective jobs for the next wine grape harvest either directly or through a labor contractor, without prejudice to their seniority or other rights and privileges.

(c) Reimburse Eluterio Guiterrez for all wage losses and other economic losses he has suffered as a result of his discharge, reimbursement to be made according to the formula stated in J & L Farms, 6 ALRB No, 43, plus interest thereon at a rate of seven percent per annum and offer him reinstatement to his job without prejudice to his seniority or other rights and privileges.

(d) Reimburse the employee-members of Crew 64 for all wage losses and other economic losses they have suffered as a result of Respondent's failure and refusal to assign them to work in the 1980 Delano grape harvest season, reimbursement-to be made according to the formula stated in J & L Farms, 6 ALRS No. 43, plus interest thereon at *a* rate of seven percent per annum, and offer them reinstatement to their respective jobs for the next Delano grape harvest season. The names of the employees to receive reinstatement and backpay and the amounts to be paid each shall be determined by the Regional Director after consultation with Respondent and the Charging Parties.

(e) Reimburse all those employees who suffered a diminution or loss of work as a result of Respondent subcontracting harvesting work at the poso Ranch in August 1379 for all wage losses and other economic losses suffered thereby, reimbursement to be made according to the formula stated in J & L Farms, 6 ALRB No. 43, plus

interest thereon at a rate of seven percent per annum. The names of the employees to receive reinstatement and backpay, and the amounts to be paid each shall be determined by the Regional Director after consultation with Respondent and the Charging Parties.

(f) Make whole Manuel Galindo and all other employees who suffered a diminution or loss of work or a diminution in the rate of pay as a result of Respondent's subcontracting swamping work in October and November 1980 by reimbursing then for all wage losses and other economic losses suffered thereby, reimbursement to be made according to the formula stated in J & L Farms, 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum. The names of the employees, other than Manuel Galindo/ to receive payment and the amounts to be paid each, including Manuel Galindo, shall be determined by the Regional Director after consultation with Respondent and the Charging Parties,

(g) Make whole all those employees who suffered a diminution or loss of work or a diminution in the rate of pay as a result of Respondent's subcontracting vineyard repair work in December 1979 and January, February, March and April 1980 by reimbursing them for all wage losses and other economic losses suffered thereby, reimbursement to be made according to the for.r.ulc[1]. stated in J & L Farms, 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum. The names of the employees to receive payment and the amounts to be paid each shall be determined by the Regional Director after consultation with respondent and Charging Parties.

(h) Make whole all those employees who suffered a

diminution or loss of work or a diminution in the rate of pay as a result of Respondent's subcontracting vineyard pruning work in January 1981 by reimbursing them for all wage losses and other economic losses suffered thereby, reimbursement to be made according to the formula stated in J & L Farms, 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum. The names of the employees to receive payment and the amounts to be paid each shall be determined by the Regional Director after consultation with the Respondent and Charging Parties.

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

(j) 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.

(k) 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 from August 1979 until the date on which the said Notice is mailed.

(1) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or

copies of the Notice which may be altered, defaced/ covered, or removed.

(m) Arrange for *a* representative of Respondent or *a* Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at 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 employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate then for time lost at this reading and during the question-and-answer period.

(n) 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: December 30, 1981.

ARIE SCHOORL
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by

1. suspending Antonio Jaimes, Estela Jaimes, Juan Garcia, Joaquina Garcia, Pedro Ramirez and Elva Ramirez on account of union activity and support;

2. suspending Jose Torres because he sought help at the ALRB and testified at an ALR3 hearing;

3. discharging Bernice Flores, Antonio Gonzalez, and Sergio Gonzalez due to their protected concerted activities;

4. discharging Eluterio Gutierrez because of his union activity;

5. failed and refused to assign Delano table grape harvest work to the employees in Crew 64 because of their protected concerted activities; and

6. unilaterally changed working conditions without notifying or bargaining with the United Farm Workers of America, AFL-CIO, our employees' certified bargaining representative, by subcontracting table grape harvesting work in July 1979, subcontracting vineyard repair work in December 1979 and January through April 1980, subcontracting swamping work in October and November 1980 and subcontracting vineyard pruning work in January 1981.

The Agricultural Labor Relations Board has told us to send out and post this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farmworkers in California these rights:

1. To organize yourselves;

2. To form, join or help unions;

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

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

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

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

Because this is true, we promise that:

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

Especially,

WE WILL NOT suspend, fail or refuse to assign, fail or refuse to rehire or discharge or otherwise? discriminate against any employee in regard to his or her employment because he or she has joined or supported the UFW or any other labor organization, or has participated in protected concerted Activities, or has sought help at the ALRB, or has testified at an ALRB hearing.

WE WILL NOT subcontract out bargaining unit work or otherwise make unilateral changes in our agricultural employees' wages, hours or working conditions without prior notice to and bargaining with the UFW.

WE WILL reimburse Jose Torres, Antonio Jaimes, Estela Jaines, Juan Garcia, Joaquina Flores, Pedro Ramirez and Elva Ramirez for any loss of pay or other money losses because we suspended then, plus interest at seven percent per annum.

WE WILL offer to reinstate Bernice Flores, Antonio Gonzalez, Sergio Gonzalez and Eluterio Gutierrez to their previous work, or in substantially equivalent jobs, without loss of seniority or other rights or privileges, and we will reimburse them for any loss of pay and other money losses they incurred because we discharged them or failed to rehire them, plus interest at seven percent per annum.

TEX-CAL LAND MANAGEMENT, INC.

By: _____

Representative Title

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

DO NOT REMOVE OR MUTILATE.