Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. R. NORTON COMPANY Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	)	Case Nos. 80-CE-12-SAL 80-CE-34-SAL 80-CE-39-SAL 80-CE-49-SAL 80-CE-70-SAL 80-CE-90-SAL 80-CE-94-SAL 80-CE-131-SAL 80-CE-131-1-SAL 8 ALRB No. 89

DECISION AND ORDER

On April 24, 1981, Administrative Law Officer (ALO) Stuart A. Wein issued the attached Decision in this proceeding. Thereafter, the United Farm Workers of America, AFL-CIO (UFW or Union), Respondent and General Counsel each timely filed exceptions,[1/] and the UFW and General Counsel filed reply briefs.

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

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

[1/] IN J.R. Norton Company (Oct. 13, 1982) 8 ALRB No. 76, we denied a UFW motion to consolidate that matter with the instant matter. In its exceptions brief herein, the UFW requests that this matter be consolidated with Case Nos. 79-CE-73-EC, et al. (8 ALRB No. 76) and Case Nos. 80-CE-16-EC, et al. We decline to consolidate the three matters, as we find that consolidation would not effectuate the purposes of the Act.

We affirm the ALO's conclusions that the work stoppage of Maria Sagrario Perez' crew on May 9, 1980, did not constitute protected concerted activity, and that Respondent did not violate Labor Code section 1153(a) by discharging the Perez crew members. We also affirm the ALO's conclusion that Respondent did not discriminatorily discharge Jose Amador on June 6, 1980.

Failure to Recall or Rehire Marcelino Quintero and Pablo Quintero

We find that General Counsel did not establish a prima facie case that Respondent discriminatorily failed to recall Marcelino Quintero and Pablo Quintero for the-1980 Salinas harvest. Their foreman, Pedro Juarez, had customarily visited Pablo's house in Mexicali to tell them when each season was starting. On occasions when he did not find them at home, he gave them such information at one of the workers' gathering places in Calexico or Mexicali. In April 1980, Juarez distributed his crew's paychecks from Arizona at the usual gathering places, and told the employees when the Salinas work would begin. As the Quinteros were not present to pick up their checks on that occasion, they did not learn of the starting date of the Salinas harvest until after work had begun.

Juarez apparently abandoned his practice of personally telephoning or visiting employees to notify them of harvest starting dates as a means of keeping the 1979 Salinas work stoppage participants out of his 1980 Salinas crew. However, we find no causal connection between the concerted activities of the work stoppage participants and Respondent's failure to recall the Quinteros. Further, General Counsel did not show a causal

connection between the union activities of Marcelino Quintero or his father Juan Quintero and the failure to recall Marcelino and Pablo.

We hereby reverse the ALO's finding that Respondent committed an unalleged violation of Labor Code section 1153(c) and (a) by a discriminatory failure to rehire (rather than recall) the Quinteros. When the two workers arrived one or two days late in Salinas, Juarez told them the crew was full. Several witnesses testified that Respondent had a three-day "grace period" for workers who had communicated their interest in working. However, the evidence did not show that other workers were hired instead of the Quinteros on the day they arrived, and there is no evidence that Respondent had a practice of permitting former employees to replace new hires under the three-day rule.

Failure to Rehire Guadalupe Martinez

Guadalupe Martinez was one of the workers in Maria Sagrario Perez' crew who was discharged for stopping work in protest of Perez' termination of May 9, 1980. Martinez testified that sometime in September 1980, she was denied reemployment by a new foreman, Juan Gonzales Ignacio. Although the ALO correctly concluded that the Perez crew's protest was unprotected activity, he found that remarks made by Respondent's attorney during his opening statement constituted a condonation of the crew's activity, and concluded that Martinez' participation in the "condoned" activity caused foreman Ignacio to deny her rehire. We reject the ALO's treatment of counsel's opening statement as evidence, and we hereby reverse his finding of an unalleged section 1153(a)

violation in Respondent's denial of reemployment to Martinez.

Discharge of Juan Quintero

We affirm the ALO's conclusion that Respondent discriminatorily discharged Juan Quintero on May 28, 1980, in violation of Labor Code section 1153(c) and (a). Although the ALO did not cite Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] in his Decision, we find that he applied the correct Wright Line analysis in determining that Quintero would not have been discharged but for his union activity and other protected concerted activities.

Failure to Rehire Work Stoppage Participants for the 1980 Salinas Harvest

In late August 1979, Respondent's Salinas harvesting employees began a series of intermittent work stoppages with the purpose of convincing their employer to commence collective bargaining. The stoppages, which ranged in length from two hours to full days, were organized by the ground crews, whose members often encouraged employees in the wrap machine crews to join their protest.

Respondent decided to replace the protesting crews on September 14, 1979. However, Respondent allowed the replaced workers to return to work upon their signing a document in which they promised to follow their supervisors' orders and not to stop working unless told to do so. Most of the workers signed the document and returned to work to finish the harvest.

General Counsel alleged that in the spring of 1980 Respondent discriminatorily failed to rehire for its Salinas harvest all of the 1979 work stoppage participants who had signed

the aforementioned document. In support of that allegation, General Counsel presented the testimony of 26 workers who signed the document and were unable to obtain work with Respondent from the fall of 1979 through the spring of 1980.

Many employees testified that for several years they had followed Respondent's harvesting circuit from the Imperial Valley to Blythe, Arizona (Marana), Salinas, New Mexico (Hatch), then back to Arizona, Blythe and the Imperial Valley. At the end of a particular harvest, workers were invited by their foreman or forewoman to continue working at the next harvest location. Some of the workers received telephone calls or personal visits at their homes to let them know when the next harvest season was scheduled to begin. Others were notified by agents of Respondent at one of their customary gathering places in Calexico or Mexicali.

The 26 document signers testified that after the 1979 Salinas season, they experienced numerous difficulties in obtaining reemployment with Respondent from October 1979 through spring 1980.

For instance, employee Ramon Diaz testified that after the 1979 Salinas season ended, he was unable to learn from foreman Pedro Juarez or supervisor Aldaberto Pena when the New Mexico harvest would start. In previous years, Juarez visited Diaz' house in Mexicali to tell him when the New Mexico season would begin, but in 1979, Juarez failed to do so. When Diaz located Juarez at a gas station in Calexico, Juarez told Diaz that he was not going to promise him work, and that he had orders from harvesting supervisor Celestino Nunez not to give work to any of the Salinas troublemakers,

Rosendo Rios Casillas worked in Salinas in 1979 under

foreman Pedro Flores. On the last day of the season, he asked Flores for work in New Mexico and was told there was no guarantee that Flores himself was going there. About ten days later, Flores delivered Casillas' paycheck to him at his house and told Casillas that he did not know anything about the prospects for work in New Mexico. Casillas later asked assistant foreman Abelardo Velasquez for work in Blythe and was told that there were orders not to hire any workers who had participated in the Salinas work stoppages. Casillas was unable to obtain work from Flores in the Imperial Valley. Two or three weeks before the 1980 Salinas season started, he asked Flores for work and was told to leave his telephone number; he did so, but Flores did not thereafter telephone him.

Other employees were told by assistant foremen Abel Luna and Abelardo Velasquez and foremen Juarez and Flores that there were company orders not to rehire any of the workers who had taken part in the work stoppages. Some of the workers, after applying unsuccessfully at several harvest locations, became discouraged and did not thereafter apply for work in Salinas. Others talked to fellow workers who had been rejected, and decided that it would be futile to make further applications.

Respondent asserts that it had no recall or seniority system, and the testimony of supervisors and workers indicated that Respondent had no formal seniority system. However, many witnesses, including some of Respondent's, testified that there was an informal system of giving hiring preference to former employees. At the end of a particular harvest season, workers would be invited by their

foremen to work at the next harvest location. A three-day grace period was given to workers who were unable to arrive on time, provided they notified their foremen that they would be late. Foremen often telephoned or visited workers at their homes to let them know when the harvest was to begin. Respondent honored long-term employees at its annual awards dinner. Admitted into evidence was a notebook kept by foreman Pedro Juarez in which, at Respondent's request, he kept a list of workers' names with their employee numbers and dates of hire.

Respondent argues that many of the 1979 Salinas workers were not rehired in 1980 because they applied late when no jobs were available. As the ALO observed, there was no record of the workers having previously applied belatedly, and the evidence suggested that Respondent's agents deliberately withheld information about harvest starting times, and gave false information, to ensure that the Salinas work stoppage participants did not show up on time for other harvests after the 1979 Salinas season. We affirm the ALO's finding that Respondent abandoned its previous seniority and recall hiring practices long enough to exclude the activist employees from the New Mexico, Blythe and Imperial Valley harvests, and then conveniently reinstituted its practice of inviting crews (by that time filled with new hires) to follow the harvest circuit.

Respondent contends that many of the 1979 Salinas workers did not obtain jobs in 1980 because their foremen no longer worked for the company. However, most of the 26 witnesses described the hiring practices of foremen Pedro Juarez and Pedro Flores and

forewomen Maria Perez and Sara Favila, all of whom hired workers in both the 1979 and 1980 Salinas harvests. Furthermore, the employees also encountered discriminatory treatment from Respondent's supervisors, such as Aldaberto Pena and Celestino Nunez, as well as from foremen, when seeking reemployment.

Respondent argues that the work stoppage activity in which the employees engaged at Salinas was not a protected concerted activity under the Agricultural Labor Relations Act (Act), because the employees' conduct seriously interfered with Respondent's operation of its business. National Labor Relations Board (NLRB) decisions have upheld the right of employers to discharge employees who disrupt the employer's business by engaging in partial, intermittent or recurrent work stoppages. (NLRB v. Blades Mfg. Corp. (8th Cir. 1965) 344 F.2d 998 [59 LRRM 2210].) We find it unnecessary to decide whether the work stoppages were protected or unprotected activity, because Respondent's subsequent reinstatement of the work stoppage participants on September 17 and 18, 1979, constituted a condonation of the activity.

> After a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise discriminate against them.
> (NLRB v. E. A. Laboratories (2nd Cir. 1951) 188 F.2d 885 [28 LRRM 2043], cert. den. 342 U.S. 871 [29 LRRM 2022].)

All of the work stoppage participants who signed the agreement to obey their foremen's orders were reinstated (or offered reinstatement) to their jobs. By reinstating the workers, Respondent clearly demonstrated its willingness to forgive the alleged misconduct, "wipe the slate clean," and resume an employment relationship with the employees. Thus, those employees who

signed the agreement and returned to work in the 1979 Salinas harvest were entitled to the protection of the condonation doctrine, and Respondent could not rely on the former alleged misconduct to discharge, refuse to rehire, or otherwise discriminate against the employees.[2/] (NLRB v. Colonial Press, Inc. (8th Cir. 1975) 509 F.2d 850 [38 LRRM 2337]; Confectionery and Tobacco Drivers and Warehousemen's Union v. NLRB (2nd Cir. 1963) 312 F.2d 108 [52 LRRM 2163]; NLRB v. E. A. Laboratories (2nd Cir. 1951) 188 F.2d 885 [28 LRRM 2043].)

We find that General Counsel made a prima facie showing that Respondent discriminatorily failed and refused to rehire the 1979 work stoppage participants for the 1980 Salinas harvest. We also find that Respondent's asserted business justifications for not rehiring the discriminatees are pretextual. In making our findings, we do not rely on the testimony of Maria Sagrario Perez. We agree with the ALO that Perez satisfactorily explained her prior perjured testimony in J. R. Norton Company, supra, 8 ALRB No. 76, but that General Counsel made a strong prima facie case even in the absence of Perez' testimony.

Generally, to establish a prima facie case of discriminatory failure or refusal to rehire, General Counsel must prove that the discriminatee made a proper application at a time when work was available, that the employer's policy was to rehire former employees, and that the employer's failure or refusal to rehire

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[2/] We note that in J. R. Norton Company (Oct. 13, 1982) 8 ALRB No. 76, Respondent did not except to the ALO's finding that Respondent had condoned the conduct of the work stoppage participants by allowing the replaced employees to return to work.

was based on the employee's union activity or other protected concerted activity. (Verde Produce Company (Sept. 10, 1981) 7 ALRB No. 27.) However, where an employer has made clear its discriminatory policy not to rehire a particular group of persons (such as union members or strikers), each member of the group need not undertake the futile gesture of offering in person to return to work. (NLRB v. Park Edge Sheridan Meats, Inc. (2nd Cir. 1963) 323 F.2d 956 [54 LRRM 2411], citing NLRB v. Valley Die Cast Corp. (6th Cir. 1962) 303 F.2d 64 [50 LRRM 2281] and NLRB v. Lummus Co. (5th Cir. 1954) 210 F.2d 377 [33 LRRM 2513].)

Thus, in NLRB v. Valley Die Cast Corp., supra, 303 F.2d 64, during the course of a strike some of the employer's officials told strikers on the picket lines that they would not get their jobs back. After the strike ended, only six or seven of the employees made unconditional application for reinstatement. However, the court found that statements by Valley officials that returning strikers would not be reinstated, as well as the company's rejection of the six or seven specific applications, constituted substantial evidence from which the national board could infer that it would have been equally futile for the other employees to apply personally for reinstatement. The court thus upheld the NLRB's order directing the employer to reinstate all seventy-one striking employees with backpay.

In Piasecki Aircraft Corp. (3rd Cir. 1960) 280 F.2d 575 [46 LRRM 2469] the employer, after buying a Delaware plant from another corporation, locked the plant doors to prevent application for employment by the seller's former employees, who had been

involved in union activities. Piasecki contended that its unfair labor practices, if any, were cured by its subsequent letter to the former employees inviting them to apply at Philadelphia for employment. The appeals court affirmed the NLRB's finding that the former employees were justified by Piasecki's lockout actions in concluding that their union affiliation would prevent Piasecki from hiring them, and that the trip to Philadelphia would be a futility. Thus, despite the failure of the former employees to make actual application for hire, the national board's finding of discriminatory denial of employment to the union members was upheld.

An NLRA case involving circumstances strikingly similar to those in the instant case is NLRB v. Nevada Consolidated Copper Corp. (1942) 316 U.S. 105 [10 LRRM 607J, cited in International Brotherhood of Teamsters v. U.S. (1977) 431 U.S. 324. In that case, the respondent's general manager had compiled a list of former union member employees who were not to be rehired upon the reopening of the respondent's mine and mill. The U.S. Supreme Court upheld the NLRB's finding that the respondent's refusal to hire a union member listed on the "blacklist" was discriminatory, although he applied for work only to the foreman and not to the superintendent who did the hiring, where the foreman told him that union men were not being hired and that it was useless for them to apply. The court also upheld the Board's finding of discriminatory failure to rehire four union members on the employer's list who failed to make any application for rehire after being advised by other former employees that it was useless for union members to apply for work.

The NLRA cases cited by our dissenting/concurring colleague do not support his contention that the circumstances herein do not justify a finding of discrimination against many of the work stoppage participants who failed to make actual application for work because of a reasonable belief that application would be futile. For example, the court in NLRB v. Anchor Rome Mills (5th Cir. 1956) 228 F.2d 775 [37 LRRM 2367] agreed with the general premise that where former strikers applied for jobs at a time when no vacancies existed, and it was apparent from the employer's discriminatory hiring policy that further application for employment would be futile, the applicants were not required to go through the useless procedure of reapplying when jobs were actually available in order to establish that they were victims of the discriminatory hiring policy. However, the court went on to say that because the board's order was predicated upon its specific findings that each of the applicants had made a personal, unqualified application (and that a nonstriker was hired in preference to each applicant), the board order could be upheld only insofar as the record supported those specific findings. The court did not (as Member McCarthy's opinion herein implies) suggest that in every case alleging a discriminatory hiring policy, an applicant must show personal application at a time when work was available, and the hiring of another person in place of the applicant; rather, the court was simply requiring that the board's specific findings be supported by the evidence.

Several NLRA cases are cited by our colleague as authority that a finding of anti-union animus alone is not sufficient for

finding an unfair labor practice. We agree. However, we find that Respondent's discriminatory conduct in denying reemployment to work stoppage participants consisted not only in specifically denying rehire to applicants who asked for work, but also in discouraging application through statements made by foremen, forewomen, and supervisors to former employees.

We believe that the evidence in the instant case is as strong as that in Valley Die Cast, supra, 303 F.2d 64, and Nevada Consolidated Copper, supra, 316 U.S. 105, in showing that many of the work stoppage participants failed to reapply for work because of a reasonable belief that such application would be futile. Some of the workers did not apply in Salinas in 1980 because they had already been refused employment in earlier harvests (such as New Mexico, Blythe, and the Imperial Valley) by foremen, forewomen, and supervisors who told them that there were company orders not to hire any of the participants of the 1979 Salinas work stoppages. Others did not apply in Salinas in 1980 because they had talked to other document signers who had been denied work and had been told of Respondent's intention not to rehire members of the group.

In Kawano, Inc. (Dec. 26, 1978) 4 ALRB No. 104, enforced Kawano, Inc. v. ALRB (1980) 106 Cal.App.3d 937, this Board held that where an employer's discrimination is directed not at individuals but at a group, it is not required that discrimination be proved as to each individual discriminatee but only that he or she is a member of the group which the employer discriminatorily treated. In Kawano, Inc., we cited International Brotherhood of

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Teamsters v. U.S., supra, 431 U.S. 324,- for the holding that even when nonapplicants are relieved of the burden of proving proper application, each must still show that he or she would have applied but for the employer's discriminatory policy. We noted that the Supreme Court suggested this requirement might be met by "evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire. ..." (Kawano, Inc. , supra, p. 5, fn. 4, citing International Brotherhood of Teamsters v. U.S., supra, at p. 372..)

We find, as we found in J. R. Norton Company, supra, 8 ALRB No. 76, that Respondent discriminated against the Salinas work stoppage participants as a group. Many of General Counsel's witnesses testified that Respondent's anti-union animus and discriminatory conduct were directed at the work stoppage participants as a group. For example, assistant crew foreman Abel Luna told employee Manuel Vasquez that Respondent was not hiring "agitators" who had participated in the work stoppages, and several employees testified that foreman Pedro Juarez and assistant foreman Raul Ramirez stated that they had "orders from above" not to rehire the Salinas strikers.

Respondent contends that a finding of group discrimination is inappropriate where some of the group members were rehired.

[3/]Although International Brotherhood of Teamsters v. U.S. is a case arising under Title VII of the Civil Rights Act of 1964, it cites several NLRA cases as authority for its assertion that failure to submit a futile application does not bar a finding that a person was discriminatorily denied employment. The court notes that the NLRA is the model for Title VII's remedial provisions. (International Brotherhood of Teamsters v. U.S., supra, at p. 366.)

In support of its contention, Respondent submitted payroll records purporting to show that 70 workers who worked during the period of the stoppages were rehired sometime after the 1979 Salinas harvest, We note that we have already found in J. R. Norton Company, supra, 8 ALRB No. 76, that Respondent discriminated against the work stoppage participants by failing to rehire them in New Mexico, Arizona, Blythe and the Imperial Valley following the 1979 Salinas harvest. The complaint herein alleges Respondent's discriminatory failure to rehire the work stoppage participants only in the 1980 Salinas harvest. Respondent did not produce payroll records for the 1980 Salinas harvest, nor any other evidence showing that any of the workers were rehired in Salinas in 1980. Of the 26 workers who testified, none was able to obtain employment with Respondent for the 1980 Salinas harvest. NLRB decisions finding group discrimination have not required a showing of complete exclusion of the group from the work force. (NLRB v. Shedd-Brown Mfg. Co. (7th Cir. 1954) 213 F.2d 163 [34 LRRM 2278]; Borg-Warner Controls (1960) 128 NLRB 1035 [46 LRRM 1459].) We conclude that there is ample evidence to show that Respondent discriminated against the 1979 work stoppage participants as a group.

In accordance with our Decision in J. R. Norton Company, supra, 8 ALRB No. 76, we find that the group of discriminatees includes those workers who participated in the work stoppages and/or signed the document agreeing not to engage in further work stoppages, and who either (1) testified at the hearing that they applied for and were available for work, or that their failure to apply for work was based on a reasonable belief that such

application would be futile; or (2) are persons who, according to credible testimony of others, applied for and were available for work or failed to apply because of a reasonable belief that application would be futile.

The ALO found that the 28 employees listed in Exhibit A attached to his Decision demonstrated, either through their own testimony or the testimony of others, that they were available for work in Respondent's 1980 Salinas harvest and either applied for work in that harvest or would have applied but for Respondent's discriminatory practices which caused them to believe their application would be futile.

We affirm the ALO's findings regarding the 28 workers, but find additionally that three other workers should be included in the group of discriminatees. Eduardo Gomez and Jose Alonzo were not included in the ALO's list although they and Ernesto Montiel were discharged after working one day in New Mexico by Pedro Juarez who said he had "orders from above" not to let them work. Montiel was the only one of the three who later tried to obtain work in the 1980 Salinas harvest, but Gomez' and Alonzo's failure to apply should be excused by Juarez' statement, which clearly suggested that any such application would be futile. A third worker, Baldomero Jimenez, went with his son Francisco Jimenez to the Salinas labor camp in spring 1980 where Pedro Juarez refused to hire them. Baldomero, who was omitted from the ALO's list, clearly should be included as a discriminatee. Thus, we conclude that Respondent violated section 1153 (c) and (a) of the Act by failing and refusing to rehire the following 31 employees for its 1980

Salinas harvest in retaliation for their participation in union activities and the 1979 Salinas work stoppages:

Carlos Aguirre
Jose Alonzo
Guadalupe Berlanga
Minerva Cabrera
Jose R. Camarillo
Magdalena Cardoza
Rosendo Rios Casillas
Jaime Cedillo
Elisa M. Covarrubias
Diego De La Fuente
Ramon Diaz
Jose Farias
Maria Garcia
Mirtha Garcia
Eduardo Gomez
Arturo Hoyos
Baldomero Jimenez
Francisco Jimenez
Filimon Lozano
Antonio Maldonado
Eduardo Melgoza
Maria Estela Mendoza
Ladislao Miranda
Ernesto Montiel
Pedro Naranjo
Juan Reyna
Agustin Roldan
Jose Rubio
Fernando Saldana
Manuel R. Vasquez
Jose Villasenor

We shall follow our usual custom of deferring to the compliance stage of our proceedings the determination as to the day on which each of the above-listed employees would have been hired absent Respondent's discriminatory conduct. (J. R. Norton Company, supra, 8 ALRB No. 76; Kawano, Inc., supra, 4 ALRB No. 104.) Thus, the backpay period for each employee will run from the date on which he or she would have been hired for work in the 1980 Salinas harvest (absent the Respondent's discrimination) and continue up to the date on which Respondent communicates a bona fide offer of reinstatement to the employee.

As in J. R. Norton Company, supra, 8 ALRB No. 76 and Kawano, Inc., supra, 4 ALRB No. 104, we shall apply the rebuttable presumption that each discriminatee would have worked the same number of hours after the discriminatory refusal to rehire as he or she did in the year preceding the discrimination. Thus, if a discriminatee previously worked in New Mexico, Arizona, Blythe, and

the Imperial Valley as well as in Salinas, there is a rebuttable presumption that the employee would have worked the same harvests after the 1980 Salinas season absent the Respondent's discrimination. The burden is on Respondent to show diminution of its backpay liability based on factors unconnected to the discrimination.

(Kawano/ Inc., supra.)

Failure to Bargain and Surface Bargaining

The UFW was certified as the exclusive collective bargaining representative of Respondent's "Northern" unit agricultural employees on November 24, 1975. Five negotiating sessions were held in 1976, four in 1977, and only one in 1978.

In August 1979, after the Salinas work stoppages began, UFW negotiator Marion Steeg requested bargaining, and the parties met on August 28. At the meeting, Respondent's negotiator, Richard Thornton, offered a lengthy written proposal based upon a proposal made to the UFW in the industrywide negotiations (in which Respondent was not participating) in June 1979. Thornton also proposed an interim wage increase subject to future negotiation.[4/] The Union responded that it wished to bargain for a full economic package, not just wages. At the end of the meeting, the UFW said it needed time to review the proposal and would contact Respondent within one or two weeks.

On September 5, 1979, Respondent sent the Union a mail-gram regarding its interim wage proposal. The following day, the

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[4/]In J. R. Norton Company, supra, 8 ALRB No. 76, we held that in granting this unilateral wage increase, effective for the week September 4 through September 10, 1979, Respondent violated section 1153(e) and (a) of the Act.

Union sent the company a rejection of the wage offer and asked for a meeting the next day (September 7), but Respondent was unable to meet until September 12.

At the September 12 meeting, the UFW proposed as "a fully negotiable bargaining position" the UFW's industrywide proposal of June 8, 1979, to be applied to all of Respondent's operations in and out of California, with retroactivity to January 1, 1979. As an alternative proposal, the Union offered the contract reached at Sun Harvest a few days previously (with minor or "local" issues negotiable), applicable to all the company's operations and retroactive to January 1, 1979. Respondent requested the UFW proposals in writing, but Steeg responded that Thornton already had the proposals in writing because he was at the industrywide bargaining table. Thornton replied that Respondent would need time to review the documents and would contact the Union when it was ready to respond.

In February 1980, at a "Southern" unit bargaining session, UFW negotiator Ann Smith mentioned to Respondent's attorney Charles Stoll that the company had never responded to the Union's proposal for both the Northern and Southern units. Stoll replied that he represented Respondent only for the Southern unit, and that any request for information about the Northern unit should be addressed to Richard Thornton. In March 1980, Ann Smith was assigned by the UFW to bargain for the Northern unit. On March 7, Thornton sent a letter rejecting the UFW's September 12, 1979, proposals, renewing Respondent's August 28, 1979, proposal, and requesting a meeting. Smith's reply of March 14 reiterated the Union's request for joint

North-South bargaining units sessions, but Thornton's response of April 3 conveyed a willingness to meet regarding the Northern unit only.

On April 18, 1980, Smith and Thornton were both at a meeting involving employers other than Norton. As they walked out together, Smith requested that Thornton present to Respondent a new Union proposal: a settlement on the terms of the Sun Harvest contract for the Northern unit only. Thornton said he would discuss the proposal with Respondent. About May 21, Smith telephoned Thornton to ascertain the company's response to her April 18 proposal. Thornton suggested they meet, and a meeting was set for June 4.

At the June 4 meeting, Smith asked for a response to the UFW's proposal of April 18. When company representatives said they had not heard about the proposal, Smith explained it and said she had expected it to be passed on to Respondent by Thornton. The company representatives caucused and then responded that the Sun Harvest contract was not acceptable, and that they wanted to continue bargaining. The UFW indicated that it would submit a complete proposal in writing.

Because of the parties' scheduling conflicts, the next meeting was not held until July 9, 1980. On July 1, Respondent had sent the Union a letter proposing interim wage increases and changes in the health and vacation benefits. At the July 9 meeting, the UFW submitted a lengthy written proposal and again stated its opposition to any interim wage increase, saying it wished to bargain and reach a contract on all issues. The Union suggested the company could

remain competitive by agreeing to pay the eventually agreed upon wage rate retroactively to July 15, 1980.

The UFW proposal included a $6.25 per hour basic wage rate, the Robert F. Kennedy Medical Plan (RFK Plan), and language regarding union security, hiring, seniority, grievances, and access. The company requested further information only about the RFK Plan. Respondent said it would review the proposal and get back to the UFW. Smith wanted to set a meeting for the near future, and even suggested the parties meet around-the-clock in view of Respondent's concern about competitors' wage increases. However, Thornton said he was too busy with other negotiations to set any further meeting dates.

On July 18, Smith tried to contact Thornton to determine the status of the UFW proposal. Thornton returned her call on the 21st, said he did not know what progress had been made and that he would get back to her. In the meantime, on July 19, the company notified the Union that it had increased wages effective July 15. On July 24, Thornton called Smith and said he was unable to meet until August 6.

At the August 6, 1980 meeting, Respondent presented a written proposal which was less favorable to the Union in many respects than the company's August 28, 1979, proposal had been: the new proposal provided for shorter rest breaks, eliminated extension of the contract to workers added through later ALRB certifications, provided for submission of dues on a monthly rather than weekly basis, provided for workers to cross picket lines in certain situations, and gave less favorable vacation benefits. The Union

caucused, returned to indicate agreement on eleven articles, and modified its own wage proposal by a reduction of five cents per hour. The parties still differed on many issues. The company decided to review the proposals and respond at the next meeting.

Smith suggested meeting on August 8, but Thornton was not available to meet until August 14. The meeting was set for the 14th/ but was cancelled by Thornton because of scheduling problems and reset for the 18th. Thornton subsequently cancelled the August 18 meeting and reset it for the 26th. In the meantime, on August 8, Respondent notified the Union that it had implemented its proposed changes in the health and vacation plans.

At the meeting on August 26, 1980, Respondent proposed wage and pension plan changes in response to the UFW's August 6 counterproposal. Thornton asked Smith for printed pamphlets on the RFK Plan, and Smith replied that the pamphlets would be provided as soon as they were printed. Another meeting was set for September 3.

At the September 3 meeting, Thornton said the company had been busy since August 26, and had not had time to consider the Union's proposal. The company had no changes to make in its proposal. Thornton requested information about the Martin Luther King Fund (MLK Fund). Smith questioned Respondent's need for this information, since the company in its August 28, 1979, proposal had agreed to make contributions to the fund. The Union caucused and returned with some changes in its proposal. The next meeting was set for September 17, although the UFW requested an earlier date.

When the parties met on September 17, Thornton again asked for information on the MLK Fund. Smith said she had tried to

get the information, and would make it available to Respondent as soon as she received it. At the end of the meeting the UFW asked the company to review its positions. The company said that upon receiving the MLK Fund information it would contact the Union regarding further meetings. There is no record of any subsequent meetings.

General Counsel alleged that Respondent has engaged in bad faith bargaining since September 12, 1979, by failing to respond to UFW proposals, failing to meet in bargaining sessions, and engaging in surface bargaining. Respondent has denied any violation of the Act and alleges bad faith on the part of the Union.

The duty to bargain in good faith requires an active participation in deliberations so as to indicate a present intention to find the basis of agreement. (NLRB v. Montgomery Ward & Co. (9th Cir. 1943) 133 F.2d 676 [12 LRRM 508].) The mere meeting of an employer with the employees' representative is not enough.

> ... [P]arties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective bargaining negotiations as they display in other business affairs of importance. (A. H. Belo Corporation (WFAA-TV) v. NLRB (1968) 170 NLRB 1558, 1565 [69 LRRM 1239], modified, (5th Cir. 1969) 411 F.2d 959.)

To show good faith, the parties do not have to reach agreement, but must make a sincere effort to resolve their differences. (0. P. Murphy (Oct. 26, 1979) 5 ALRB No. 63.) A party's intent, that is, its good or bad faith, is to be ascertained from the totality of its conduct. (0. P. Murphy, supra, p. 4, citing NLRB cases.)

At the end of the September 12, 1979, meeting, Respondent

agreed to respond to the UFW's two alternative proposals. However, the company's failure to respond until March 7, 1980, resulted in a delay of nearly six months. Respondent suggested that negotiations usually did not continue after the Salinas harvest season, but there were significant differences in the 1979 situation: Thornton had specifically promised a response; the suggestion that Thornton was waiting for a copy of the Sun Harvest contract is contradicted by his knowledge of the contract from other negotiations; the urgency of reaching an agreement was apparent from the work stoppage activity; and Thornton's late response was mailed precisely on the date that Respondent was served with General Counsel's charge of bad faith failure to bargain.

Further delay was caused by Thornton's failure to convey the April 18, 1980, change in the UFW's position to the company after his conversation with Ann Smith. Thus, six weeks elapsed until the June 4 meeting, and the company was not prepared at that meeting to respond to the April 18 proposal. Delays between June 4 and July 9, 1980, were apparently caused by both parties. However, after July 9, although Respondent claimed it was anxious to reach agreement on an interim wage increase by July 15, it rejected around-the-clock negotiations and was unable to meet until August 6 due to Thornton's busy schedule.

While Respondent was not responsible for all the delays, most of the delays are attributable to it. In several instances the lack of progress on issues was caused by the company coming to meetings unprepared, that is, without having considered the Union's previous proposals. The long periods of time between the company's

responses, its reluctance to set meeting dates, and its lack of preparedness at meetings, all suggest that Respondent was less than eager to reach a negotiated agreement.

Respondent's August 6, 1980, proposal was in many respects less acceptable to the UFW than the company's August 28, 1979, proposal. While the later proposal does not in itself evidence bad faith, we do find bad faith in Respondent's failure to explain why it had submitted a proposal that was less advantageous to the Union than the earlier proposal. Good faith bargaining at least required an explanation of the Respondent's rationale for the changes.

Respondent objected to the UFW's proposed union security clause because it feared the "potential for abuse" in giving the Union sole discretion for determining a worker's good standing with the Union. In isolation, the company's position might merely reflect a bargaining strategem. However, in view of Respondent's overall bargaining conduct, we find that its position on the proposed union security clause indicates bad faith, because it demonstrates a failure to accept the certified collective bargaining representative as the exclusive representative of the employees. (Montebello Rose (Oct. 29, 1979) 5 ALRB No. 64, affirmed in pertinent part, (1981) 119 Cal.App.3d 1; Akron Novelty Mfg. Co. (1976) 224 NLRB 998 [93 LRRM 1106].)

Respondent's conduct away from the bargaining table also supports a finding of bad faith. Such conduct includes Respondent's discharge of crew leader and bargaining committee representative Juan Quintero, its failure and refusal to rehire the work stoppage participants, and admissions by supervisors that the company had no

intention of signing a collective bargaining agreement.

Respondent contends that the UFW showed bad faith by changing negotiators and thereby causing delays in negotiations. However, there is no evidence of union negotiators being unprepared for any bargaining session, nor of any delays caused by Ann Smith replacing Marion Steeg as the UFW's chief negotiator.

Respondent claims that the Union refused to bargain over the interim wage proposal until all other contract terms were agreed upon. The evidence shows that, on the contrary, the UFW position was that wages should be part of an entire package, and the Union was willing to bargain around-the-clock in order to reach an agreement by July 15, 1980.

Respondent asserts that the Union presented its two alternative proposals on September 12, 1979, as ultimatums, and thus exhibited bad faith. Respondent also argues that the Union demonstrated bad faith by insisting that the company bargain for both the Northern and the Southern bargaining units. However, the UFW did not present any of its proposals as nonnegotiable, and once Respondent rejected the two-unit bargaining approach by its letter of March 6, 1980, the Union communicated its willingness to bargain for the Northern unit alone.

The Union also demonstrated bad faith, Respondent contends, by not timely providing information the company requested regarding the RFK Plan and the MLK Fund. We find that the interval between the company's two requests (made July 9, 1980 and September 3, 1980, respectively) and the UFW's provision of the information on September 29, 1980, did not significantly delay

bargaining and did not show bad faith on the part of the Union.

Finally, Respondent alleges that the UFW showed bad faith by offering a proposal on July 9, 1980, that was less acceptable to the company in many respects than the June 4, 1980, proposal. It is true that the second proposal's wage level ($6.25 per hour) was higher than the first proposal's ($5.40 per hour). However, the earlier proposal was an offer to settle along the lines of the already fully bargained Sun Harvest contract. After Respondent rejected the June 4 offer, the Union did not show bad faith by coming back with an offer that left room for compromise on wages and other issues.

In sum, we find that Respondent's conduct, both at the bargaining table and away from the table, shows substantial evidence of a bad faith approach to collective bargaining, and we conclude that Respondent's course of conduct during the negotiations constistuted a refusal to bargain in violation of Labor Code section 1153 (e) and (a).

Accordingly, we shall order Respondent to make its employees whole for all economic losses they have suffered as a result of the aforesaid violation during the period from September 12, 1979, until December 8, 1980, and during the period from December 8, 1980, until Respondent commences good faith bargaining which results in a contract or a bona fide impasse. The ALO recommended that makewhole should be applied only from June 4, 1980, because of the Union's position until April 18, 1980, that it wished to bargain for both the Respondent's Northern and Southern units, as well as the past custom of discontinuing negotiations from the

end of the fall Salinas harvest until the next season. However, we find that September 12, 1979, is the appropriate date from which to order makewhole, because the UFW never presented its two-unit bargaining request as being nonnegotiable, and because it was apparent in 1979 that the Union did not wish to suspend bargaining after September—in fact, at the end of the September 12, 1979, meeting, Thornton said he would review the UFW proposals and contact the Union when the company was ready to respond.

Per Se Violations of Duty to Bargain

We affirm the ALO's conclusions that Respondent's unilateral wage increase of July 1980 and its unilateral changes in its informal seniority and hiring practices after the 1979 Salinas season were per se violations of Labor Code section 1153(e) and (a). However, we overrule the ALO's conclusion that Respondent's discharge of Juan Quintero, Jose Amador and the Maria Sagrario Perez crew members constituted per se violations of Respondent's duty to bargain. We also conclude that Respondent violated that section of the Act by unilaterally changing its employees' health and vacation plans in August 1980.

We reject Respondent's contention that its July 1980 wage increase was not unilateral because the Union was given notice of the proposed increase and an opportunity to bargain over it. Respondent was not entitled to isolate the single issue of wages from the remainder of the contract terms and force the Union to bargain over that single issue. Rather, the Union was entitled to insist upon bargaining over all issues until a contract was reached. Both the NLRB and this Board have rejected a piecemeal approach to

negotiations because of the interdependence of bargaining issues/ and the fact that a proposal on one issue may serve as leverage for a position on some other issue. (J. R. Norton Company, supra, 8 ALRB No. 76; Korn Industries v. NLRB (4th Cir. 1967) 389 F.2d 117 [67 LRRM 2148]; Federal Pacific Electric Company (1973) 203 NLRB 571 [83 LRRM 1201].) Here, the Union was not given an adequate opportunity to negotiate the wage issue, since Respondent refused to negotiate at all between April 18 and June 4, 1980/ declined to engage in around-the-clock negotiations until the July 15 "deadline", and failed to respond to the UFW's July 9 proposal until August 6.

We also reject Respondent's contention that the July 1980 wage increase was an "automatic" increase which did not require bargaining under NLRB v. Katz (1962) 369 U.S. 736. The July 1980 increase was not fixed in amount and timing, since Respondent's own documents show increases of varying amounts and at varying times over the past several years (for example, the 1977 and 1978 wage increases were given in July, but the 1979 increases were granted in April and September). We affirm the ALO's finding that the July 1980 increase was timed to coincide with the resumption of the summer bargaining sessions. Thus, Respondent has not met its burden of showing that the wage increase was automatic and granted according to definite guidelines. (NLRB v. Allis Chalmers Corp. (5th Cir. 1979) 601 F.2d 870 [102 LRRM 2194].) Rather, the wage increase was informed by a substantial measure of discretion, and Respondent violated the Act by granting the increase without giving the UFW a reasonable opportunity to bargain about it in conjunction with all the other contract terms (NLRB v. J. H. Bonck Co.

(5th Cir. 1970) 424 F.2d 634 [74 LRRM 2103].)

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent J. R. Norton Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, failing or refusing to hire or rehire, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) or its authorized representatives by unilaterally changing the wages or any other term or condition of employment of its agricultural employees.

(c) Failing or refusing to meet and bargain collectively in good faith, on request, with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

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

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

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

(b) Make whole Juan Quintero for all losses of pay and other economic losses he has suffered as a result of his discharge, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(c) Offer to the employees named in Appendix A, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(d) Make whole each of the employees named in Appendix A for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them, 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.

(e) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment, and if agreement is reached, embody such agreement in a signed contract.

(f) Upon request of the UFW, rescind the unilateral changes heretofore made in its employees' wage rates in July 1980, in its seniority and hiring practices after the 1979 Salinas harvest, and in its health and vacation plans in August 1980.

(g) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW. The makewhole period shall extend from September 12, 1979, until December 8, 1980, and from December 8, 1980, until the date on which Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

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

(i) 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.

(j) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from September 12, 1979, until the date on which the said Notice is mailed.

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

(l) Provide a copy of the attached Notice to each employee hired by Respondent during the 12-month period following the date of issuance of this Order.

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

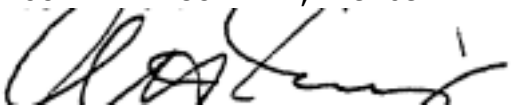
(n) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective

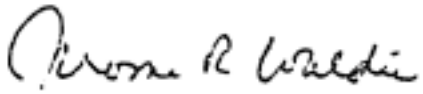
bargaining representative of the Northern unit agricultural employees of J. R. Norton Company be, and it hereby is, extended for one year from the date of issuance of this Order.

Dated: December 16, 1982

JOHN P. McCARTHY, Member



ALFRED H. SONG, Member



JEROME R. WALDIE, Member

MEMBER McCarthy, Concurring in Part, Dissenting in Part:

I agree with my colleagues except in the following particulars.

In J. R. Norton Company (Oct. 13, 1982) 8 ALRB No. 76, the General Counsel had failed to prove that the intermittent work stoppages, which also are at issue here, constitute a form of protected concerted activity. Therefore, in my separate opinion in that case, I found that the conditional strike-settlement agreement served only to preclude Respondent from later asserting that strike conduct as a basis for denying reinstatement to workers who were signatories to the agreement. Consistent with that opinion, I continue to reject the majority's broad reading of the doctrine of condonation.

My only additional quarrel with the majority decision concerns what I perceive to be an over-expansive application of the class discrimination analysis to the circumstances of this case. Even where a record is sufficient to support a finding of

discrimination directed at a class or group of workers, such a finding serves only to establish an employer's unlawful motivation. A finding of antiunion animus by itself is not sufficient to hold an employer in violation of the Act, as "[t]here must also be proof that the employer had an opportunity to and did in fact discriminate." (Arthur Collier, dba Arthur Collier Electric Co. (5th Cir. 1977) 553 F.2d 425 [95 LRRM 2615]; Piasecki Aircraft Corp. (3d Cir. 1960) 280 F.2d 575 [46 LRRM 2469]; Anchor Rome Mills (5th Cir. 1956) 228 F.2d 775 [37 LRRM 2367], cited with approval in Kawano, Inc. 'v. Agricultural Labor Relations Board (June 12, 1980) 106 Cal.App.3d 937, and quoted therein as follows:

> ...the testimonial evidence of employer unwillingness to hire strikers served to establish illegal motivation in refusing to rehire, but did not serve to establish, for each discriminates, effort to seek reinstatement and availability of position. Those elements could only be established by direct proof, for each discriminatee, of an inquiry for work and its availability as well as the hiring of another to do the job.1/

Absent evidence that an employer unequivocally makes known that it will not take back a class or group of employees, I do not believe that the Board can infer that it would be futile for all members of the class to apply for reemployment. (Valley Die Cast Corp. (6th Cir. 1962) 303 F.2d 64 [50 LRRM 2281].)

Dated: December 16, 1982

JOHN P. McCarthy, Member

1/ Where it is shown that it is customary for a sole applicant to request work on behalf of a group, e.g., a family or entire crew, I would not require that the other members of the group also make a personal application for work or to testify thereto.

APPENDIX A

Carlos Aguirre
Jose Alonzo
Guadalupe Berlanga
Minerva Cabrera
Jose R. Camarillo
Magdalena Cardoza
Rosendo Rios Casillas
Jaime Cedillo
Elisa M. Covarrubias
Diego De La Fuente
Ramon Diaz
Jose Farias
Maria Garcia
Mirtha Garcia
Eduardo Gomez
Arturo Hoyos
Baldomero Jimenez
Francisco Jimenez
Filimon Lozano
Antonio Maldonado
Eduardo Melgoza
Maria Estela Mendoza
Ladislao Miranda
Ernesto Montiel
Pedro Naranjo
Juan Reyna
Agustin Roldan
Jose Rubio
Fernando Saldana
Manuel R. Vasquez
Jose Villasenor

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, J. R. Norton Company, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the UFW regarding a collective bargaining agreement; by changing wage rates, seniority and hiring practices, and health and vacation plans without first negotiating with the UFW; by failing and refusing to rehire workers who participated in the 1979 Salinas work stoppages; and by discharging Juan Quintero on May 28, 1980. 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 discharge, fail or refuse to rehire, or otherwise discriminate against any employee because he or she has exercised any of the above rights.

WE WILL offer Carlos Aguirre, Jose Alonza, Guadalupe Berlanga, Minerva Cabrera, Jose R. Camarillo, Magdalena Cardoza, Rosendo Rios Casillas, Jaime Cedillo, Elisa M. Covarrubias, Diego De La Fuente, Ramon Diaz, Jose Farias, Maria Garcia, Mirtha Garcia, Eduardo Gomez, Arturo Hoyos, Baldomero Jimenez, Francisco Jimenez, Filimon Lozano, Antonio Maldonado, Eduardo Melgoza, Maria Estela Mendoza, Ladislao Miranda, Ernesto Montiel, Pedro Naranjo, Juan Quintero, Juan Reyna, Agustin Roldan, Jose Rubio, Fernando Saldana, Manuel R. Vasquez, "and Jose Villasenor their old jobs back, and will pay them any money they lost because we discharged them or failed to rehire them unlawfully, plus interest on such amounts.

WE WILL NOT make any changes in your wages, hours or conditions of employment without negotiating with the UFW.

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since September 12, 1979.

Dated: J. R. NORTON COMPANY

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3160. This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

J. R. Norton Company
(UFW)

8 ALRB No. 89
Case Nos. 80-CE-12-SAL
80-CE-34-SAL
80-CE-39-SAL
80-CE-49-SAL
80-CE-70-SAL
80-CE-90-SAL
80-CE-94-SAL
80-CE-131-SAL
80-CE-131-1-SAL

ALO DECISION

The ALO found that Respondent had violated Labor Code section 1153 (c) and (a) by discriminatorily refusing to rehire in its 1980 Salinas harvest a large number of workers who had participated in a work stoppage during the 1979 Salinas harvest. The ALO found that the work stoppages were unprotected activity, but that Respondent had condoned the employees' conduct by reinstating them after they had been replaced for three days. The ALO concluded that Respondent had discriminated against the work stoppage participants as a class, and that the group of discriminatees included those who had applied for and been denied rehire, as well as those who had failed to apply but had demonstrated the desire and availability for work and had shown that they would have applied but for Respondent's discriminatory practices.

The ALO also found that Respondent had violated Labor Code section 1153(c) and (a) by discriminatorily refusing to rehire Marcelino Quintero and Pablo Quintero for the 1980 lettuce harvest, and by discharging Juan Quintero, and had violated section 1153 (a) by refusing to rehire Guadalupe Martinez in September 1980. The ALO decided that Respondent had not violated the law by discharging Jose Amador. The ALO concluded that Respondent had not violated the law by discharging members of Maria Sagrario Perez' crew because of their work stoppage in protest of her discharge.

The ALO found that Respondent had violated Labor Code section 1153 (e) and (a) by failing to bargain in good faith and engaging in surface bargaining with the United Farm Workers of America, AFL-CIO (UFW), and by committing certain per se violations of the duty to bargain. He recommended that makewhole for Respondent's surface bargaining be applied from June 4, 1980, and that the UFW's certification be extended for one year from the date that Respondent commences bargaining in good faith.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions regarding the discharge of Maria Sagrario Perez' crew and the discharge of Juan Quintero. The Board found that the General Counsel had failed to

establish a prima facie case that Respondent discriminatorily failed to recall Marcelino Quintero and Pablo Quintero, and overruled the ALO's finding of an unalleged violation of Labor Code section 1153 (c) and (a) in discriminatory failure to rehire the Quinteros. The Board also overruled the ALO's finding of an unalleged violation of section 1153 (a) in the denial of reemployment to Guadalupe Martinez.

The Board affirmed the ALO's finding that Respondent had discriminated against the 1979 Salinas work stoppage participants as a group by refusing to rehire them for the 1980 Salinas season. In accordance with its decision in J. R. Norton (Oct. 13, 1982) 8 ALRB No. 76, the Board found that the group of discriminatees included those who testified at the hearing that they applied for and were available for work, or that their failure to apply was based on a reasonable belief that application would be futile, and group members concerning whom such testimony was given at the hearing. In addition to the 28 persons found to be discriminatees by the ALO, the Board found that three other work stoppage participants had been discriminatorily refused rehire by Respondent.

The Board affirmed the ALO's conclusion that Respondent had failed to bargain in good faith and engaged in surface bargaining. However, the Board found that September 12, 1979 (rather than June 4, 1980), was the appropriate date from which to apply makewhole.

The Board affirmed the ALO's finding that Respondent's unilateral wage increase of July 1980 and unilateral changes in its informal seniority and hiring practices after the 1979 Salinas season were per se violations of Respondent's duty to bargain. The Board also found that Respondent violated its duty to bargain by unilaterally changing its health and vacation plans in August 1980. However, the Board overruled the ALO's conclusion that Respondent's discharge of Juan Quintero, Jose Amador and the Maria Sagrario Perez crew members constituted per se violations of Respondent's duty to bargain.

The Board also extended the UFW’s certification for one year from the date of issuance of the Board's Order.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. R. NORTON COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-12-SAL 80-CE-34-SAL 80-CE-39-SAL 80-CE-49-SAL 80-CE-70-SAL 80-CE-90-SAL 80-CE-94-SAL 80-CE-131-SAL 80-CE-131-1-

James A. Sullivan, Esq.
of Salinas, CA
for the General Counsel

Terrence L. O'Connor, Esq.
of Salinas, CA
for the Respondent

Alicia Sanchez
of Keene, CA and
Chris A. Schneider
of Calexico, CA
for the Charging Party

DECISION

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer:

This case was heard by me on September 9, 10, 15, 16, 17, 1 22, 23, 24, 15, 29, 30, October 1, 2, 6, 7, and 3 in Salinas, California; on November 24, 25, 26, December 1, 2, 3, 4, and 5 in Blythe, California; and on December 3, 1980 in El Centro, California.

Three consolidated complaints, amended 0 September 1980, were based on nine charges filed by the UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereafter the "UFW" or "union"). The charges

were duly served on the Respondent J. R. NORTON COMPANY on March 7, May 1, May 6, May 12, Hay 29, June 11, June 16, July 10, and July 17, 1980.[1] The cases were consolidated pursuant to Section 20244 of the Agricultural Labor Relations Board's Regulations by order of the General Counsel dated 24 July 1980.

The amended and consolidated complaints allege that the Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the "Act").

The General Counsel, Respondent, and Charging Party (Intervenor) were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs after the close of the hearing.

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

FINDINGS

I. Jurisdiction

Respondent J. R. NORTON COMPANY is engaged in agricultural operations -- specifically the growing, harvesting, and shipping of iceberg lettuce in Monterey County, California, and elsewhere as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

[1]General Counsel Exhibits 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, l-G, 1-H, and 1-I.

I further find that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act, as was also admitted by the Respondent.

II. The Alleged Unfair Labor Practices

The amended and consolidated complaints charge Respondent with violations of Sections 1153 (a), (c) , and (e) of the Act by (1) refusing to rehire employees who had participated in work stoppages during the 1979 Salinas lettuce harvest because of these employees' participation in protected concerted activities and their support for the UFW; (2) refusing to notify seniority employees Pablo Quintero and Marcelino Quintero of the starting date of Respondent's 1960 lettuce harvest season in Salinas, and refusing to rehire these employees because of their support for and activities on behalf of the UFW; (3) refusing to rehire seniority worker Margarito Guevara because he had participated in work stoppages during the 1979 Salinas lettuce harvest and because of his union activities and support; (4) failing to bargain in good faith with the UFW by its failure to respond to the UFW proposals and/or to meet in bargaining sessions since 12 September 1979; and (5) engaging in surface bargaining with the intent not to reach a collective bargaining agreement with the UFW" for the unit in the Salinas-Watsonville area since 12 September 1979.

Respondent is further charged with violations of Sections 1153 (a) and (e) of the Act by (1) firing forewoman Maria Sagrario Perez because of her failure to carry out orders to

refuse to rehire those employees who had participated in protected concerted activities while employed by Respondent during the 1979 lettuce harvest in Salinas; (2) firing employees from the crew of Maria Sagrario Perez because they participated in protected concerted activities to show support for their forewoman; and (3) unilaterally increasing the wages paid to its harvesting crews and farm employees without reaching agreement and/or impasse on said subject with the UFW prior to the change.

The Respondent is finally charged with violations of Section 1153 (a) and (c) by its firing of Jose Amador because of the latter's protected activities and support for the UFW; and with violations of Sections 1153(a), (c) (d), and (e) by the first of Juan Quintero because of his support for the UFW, and because he had filed a prior unfair labor practice charge and had previously testified in an unfair labor practice hearing against the Respondent.

The Respondent denied that it violated the Act in any respect. Specifically, Respondent contends that there was no policy of refusing to rehire the 1979 work-stoppage participants, but rather that none of the alleged discriminatees applied for work in Salinas during the spring of 1980 when work was available. Since there was no seniority system, and no policy of notifying former employees when the Salinas harvest began. Respondent contends it could not have violated the Act by failing to notify Marcelino Quintero and Pablo Quintero of the commencement of the

1980 Salinas harvest. Respondent further contends that employees Juan Quintero and Jose Amador were fired for cause -- the former did not cut lettuce in a skillful manner and threatened his foreman Abelardo Velasquez; the latter caused serious damage to Respondent's equipment. The crew of Maria Sagrario Perez voluntarily quit their jobs, and their actions in support of the discharged forewoman were unprotected activity in any event. Finally, Respondent suggests that it has at all times been willing to and in fact has bargained in good faith with the UFW with the intent of reaching a collective bargaining agreement The unilateral wages merely reflected Respondent's past practices and were enacted to enable Respondent to remain competitive in the area. Any delays in the bargaining were occasioned by the seasonality of the Salinas harvest season, the pendency of certification litigation with respect to the "southern" unit, and the bad faith of the union in changing negotiators, insisting upon negotiations for both Southern and Northern California units as well as Arizona and New Mexico operations, and refusing to provide requested information.

At the close of testimony, Respondent moved to dismiss paragraph 5(f) of the complaint relating to case number 80-CE-90-SAL (the refusal to rehire Margarito Guevara) as no evidence was introduced in support of the allegations contained therein. The motion to dismiss was granted at the hearing. Respondent's motion to dismiss paragraph 5(g) relating to case number 30-CE-94-SAL (the discharge of Jose Amador) was denied

and will be discussed infra.

III. Background

Respondent grows, harvests, and ships iceberg lettuce and field crops in various localities in California, New Mexico, and Arizona. In the Salinas-Watsonville area, Respondent is primarily a lettuce company -- some of it grown on Respondent's own land, much of it grown on land belonging to others. The "northern" operation thus consists primarily of the harvest operation with very few farming employees. In the "southern" half -- in the Imperial Valley and Blythe -- Respondent has a very large general farming operation. There, some 10,000 acres of field crops -- including cotton, wheat, alfalfa, watermelons, cantaloupe, garlic, and onions -- necessitate a large work force of farm employees (irrigators, tractor drivers, thinners, and hoers). The total number of general farm employees in Salinas was 27 or 28 in 1980; the number in the Blythe area approached 120-130.

The level of harvesters, however, remains consistent -- approximately 220 workers -- some percentage of which would follow the yearly "circuit" around Respondent's various operations. Starting chronologically, the January, February, and March harvesting occurs in the Imperial -Valley (Brawley and El Centro). During the latter half of March and early April the crops are harvested in Blythe. In April, the operations move to Arizona (Marana), and then move to Salinas, California, 25 until late September or early October. In October, harvesting

moves to New Mexico (Hatch); November is primarily in Arizona; late-November through most of December is in Blythe, and then back again to the Imperial Valley approximately 20 December. While the number of acres to be harvested for any month is generally uniform, the length of the harvest season for each locality varies due to weather conditions.

The harvest work force pertinent to this case may be divided into two categories -- ground crews and wrap machine crews. Typically, Respondent utilizes three ground crews and four wrap machines for the harvest at any one particular area. Ground crews are composed of anywhere from eight to twelve trios (two cutters and one packer), plus two or three closers for each crew, and an equal number of loaders. A wrap machine crew typically contains twelve cutters who walk behind the machine with a lettuce knife, cut the lettuce, and place it on a table for the wrappers. The latter -- usually women -- sit at work stations elevated on the machine and wrap each head of lettuce in plastic, seal it with a heat source, and then place the product on a conveyer belt which brings all the lettuce to a central point to be packed by four packers. The closers finish the boxes of packed lettuce, leaving a line of boxes behind the machine as the machine traverses -the field. Finally, the loaders come to load the boxes onto the trucks, similar to the loaders for the ground crews.

The wrap machine, then, consists of a fixed compliment of people and does not vary in size throughout the harvest season.

The ground crews, on the other hand, may be increased or reduced by trios -- but generally not on a day-in, day-out basis. Rather, the number of hours may be reduced or increased for a particular day to accommodate changed needs.

Ground crews have been typically composed of men -- some 95%-- and the wrap machines are generally two-thirds women, with men assuming increasingly higher percentages of this work force.

The number of hours that are worked in a particular day will vary due to several factors: market, weather, field conditions, etc. The information regarding the quantity of lettuce to be harvested for a particular day is conveyed from the production foreman to the stitcher -- the employee on the truck who keeps count of the boxes of lettuce -- that very morning. Normal work starting time varies from 6:30 a.m. to 8:00 a.m., or as late as 10:00 a.m. to 11:00 a.m. if there is ice. Production of the lettuce will vary anywhere from zero cartons to a peak of about 35 cartons in one day. Depending on the market, the price per box will also vary significantly -- from $2.50 a box to $15.00 a box.

Respondent's Salinas office is located in downtown Salinas; the shop is at the Anderson Ranch, approximately two miles south of town. The labor camp is located on' the south edge of town, just off Highway 101, approximately 1 1/2 miles from the office and two miles from the shop. There are some twenty different locations of fields from Gilroy to Gonzales to Watsonville.

Art Carroll is the General Manager of the company; Peter Orr is in charge of the Salinas farming operations. Aldaberto ("Al") Pena is in charge of the entire harvesting operation which moves from location to location and he reports directly to Mr. Carroll. Mr. Pena is assisted by Celestino Nunez, and the various supervisory personnel who participated in the events which gave rise to the hearing including, inter alia, Obdulio Magdaleno ("Palatos"), Roberto Santa Maria, and forepersons Pedro Juarez, Pedro Flores, Maria Sagrario Perez, Sara Favila Figueroa, Jose Casimiro Lopez, Raul Ramirez, Antonio Roman Pasillas, and Carlos Jimenez. Pushers, or seconds -- e.g. Abel ("Acapulco") Luna, and Abelardo Velasquez -- assist the foremen in directing the work of the various crews. The chief negotiator for the "northern" unit is attorney Richard Thornton of the Grower-Vegetable Association of Central California.

On 2 September 1975, the UFW filed a petition for certification as Respondent's collective bargaining representative of its Bengard-Garlinger Ranch in Monterey County, California. On 9 September 1975, the Board conducted an election among Respondent's "northern" unit agricultural employees pursuant to this petition. Respondent thereafter filed objections to the election and in J. R. Norton Co. (1975) 1 ALRB No. 11, the Board dismissed these objections and certified the UFW as the bargaining representative of Respondent's "northern" unit employees effective 24 November 1975.

On 10 August 1977, the UFW was certified as the exclusive

collective bargaining representative of Respondent's agricultural employees in the Imperial and Palos Verdes Valleys ("southern" unit). J. R. Norton (1977) 3 ALRB Mo. 66. Thereafter, the UFW requested that Respondent commence negotations. Respondent refused to bargain with the union in order to obtain judicial review of this certification and the election on which it was based. J. R. Norton Co. (June 22, 1978) 4 ALRB No. 39, enf. den., J. R. Norton Co. v. Agricultural Labor Relations Bd., 26 Cal. 3d 1 (1980). On remand, the Board concluded that Respondent did not have a "reasonable good-faith belief" in the invalidity of the certification, and consequently reinstated a make-whole remedy. (J.R. Norton Co. (May 30, 1980) 6 ALRB No. 26, review de by Ct.App.,4th Dist., Div. 1,Jan. 7,1981,hg. den. March 4,1981).

The failure to reach a collective bargaining agreement culminated in a series of Salinas work stoppages, in late-August and early-September 1979. Respondent replaced the work-stoppage participants on or about 14 September 1979, but reinstated for the balance of the season those who desired to return and who signed a written list promising "to work under the foreman's orders, and stop (only) when ordered to do so". (See General Counsel Exhibit 2). These stoppages and the subsequent pattern of hiring Respondent's work force in the Imperial Valley and Blythe were the subject "of unfair labor practice proceedings commencing January 1980 in El Centro, California. (J.R. Norton Co., case #79-CE-78-EC, et al)[2]

[2]As of the date of this writing, no decision has been rendered in those cases. Consequently, in the absence of stipulation by the parties, and with the exception of those matters discussed infra, I decline to take administrative notice of the prior 1980 proceedings. See ALRB Regulations Section 20286.

The subject matter of the instant case focused upon the activities at Respondent's Salinas operations at the commencement of the 1980 harvest season in April. For clarity, I shall discuss the various incidents in chronological order, considering the Section 1153(a), (c), and/or (d) implications of each in seriatim. As the bargaining issues underlie all other allege violations, I will discuss the potential Section 1153(e) violations in the latter portion of the decision.

IV. Failure to Rehire Work-Stoppage" Participants for the 1980 Salinas Harvest.

A.) Facts:

In early August 1979, the Salinas harvesters commenced a series of intermittent work stoppages which were geared toward encouraging the commencement of negotiations for a collective bargaining agreement. The ground crews were the most active participants in the stoppages, often times encouraging the wrap machine crews to join the protest. The stoppages ranged from days when the workers would not board the buses in the morning at camp, to days when the workers boarded the buses, reached the fields, and refused to start work. On occasion, the workers would board the buses, go out to the fields, work for a set period of time, and then stop -- some two-to-four hours after they had started. At other times, they would cut a particular field and then refuse to move to another field even though work had been scheduled.

Although nonviolent in nature, the stoppages were pre-planned by the workers and caused serious dislocations for Respondent. The company would not know from day-to-day how many boxes of lettuce it would be able to cut. As a result, over three hundred (300) acres of lettuce were lost during this period. At a growing cost of some $1100.00 per acre, Vice President Peter Orr estimated a financial loss in excess of $300,000.00. (R.T., Vol. XVI, p. 147, 11. 4-10). As Respondent could not continue to operate in this fashion, the decision was made to replace the protesting crews on 14 September 1979. At then urging of an ALRB agent, Respondent arranged a format whereby all of the replaced workers could return to work if they promised to follow their supervisors' orders and work as instructed. A very high percentage of the replaced workers consented to this arrangement and thus signed General Counsel Exhibit #2 returning to work on September 17 or 18. Upon their return, Respondent suffered no further problems through the end of the Salinas harvest in early October.

The gravamen of General Counsel's allegations relate to Respondent's conduct following the 1979 Salinas harvest. Some twenty-six (26) workers testified to the sundry difficulties they encountered in seeking reemployment with Respondent from October 1979 to the spring of 1980.

Ranch committee treasurer and negotiating committee member Ramon Diaz had worked for Respondent as early as 1971 cutting and packing lettuce at the various three-state operations. He

traveled from site to site on company buses or in his own car, and at times relied on his foremen to tell him at his Mexicali home when the next season would start. In 1979, he participated in the Salinas work stoppages, was replaced, and returned to work after pledging to work as per his foreman's orders. He completed the Salinas harvest -- working until October 5. Two days before the end of the season, he inquired of production supervisor Al Pena as to whether or not there would be work in the upcoming New Mexico harvest. Mr. Pena responded that "he didn't know anything". (R.T., Vol. I, p. 115, 11. 14-15). On October 5, the identical question elicited a similar response from foreman Pedro Juarez.

The question and answer were repeated when worker Diaz located foreman Juarez in the mechanic's shop in Mexicali. On the suggestion of co-worker Filimon Lozano, Mr. Diaz went to the Standard gasoline station in Calexico the following morning. The foreman there advised Mr. Diaz that he was not going to promise any work, and that he had orders from Celestino (Nunez) not to give work to any of the troublemakers in Salinas. When Ramon Diaz "reapplied" for work in Blythe, foreman Juarez and pusher Raul Ramirez stated that they had orders from above not to give work to any of the people who had been in Salinas. (R.T., Vol. I, p. 126, 11. 10-13; p. 128, 11. 10-20). In the Imperial Valley, worker Diaz was told by foremen Pedro Flores and Pedro Juarez that their crews were already complete. Discouraged, Mr. Diaz did not actively seek work for either the

Arizona or 1980 Salinas harvests with Respondent.

Minerva Cabrera worked at Respondent's Salinas operations in 1977, 1978, and 1979. She participated in all of the 1979 work stoppages, and served as the machine representative coordinating the stoppages. Prior to the labor unrest, worker Cabrera had been promised by forewoman Maria Sagrario Perez that there would be a job if she chose to go to New Mexico. After the stoppages, however, on the day prior to Perez' departure for New Mexico, worker Cabrera and her sister were informed by the forewoman that she had received orders from above that she wasn't supposed to hire people who had participated in the stoppages. (R.T., Vol. II, p. 79, 11. 5-7). In April 1980, Ms. Cabrera called Respondent's office on a daily basis for approximately two weeks but was unable to obtain work or even ascertain a precise starting date. Forewoman Perez also stated by telephone that her crew was complete and "[t]hat she was very sorry in her heart, but she couldn't give me my job back." (R.T., Vol. II, p. 80, 11. 26-27).

Workers Mirtha and Maria Garcia (daughter and mother) worked in Salinas in 1978 and 1979. They were informed at the start of the season by notification from the foreman who would visit the workers' houses. Additionally, during the harvest, the foreman (Antonio Ramon Pasillas) picked up the two women in the company bus at their house or at the corner nearby. Both actively participated in the work stoppages. In 1980, no one informed either of them of the Salinas harvest starting date.

Rather, they called the company office on numerous occasions, but were unable to secure work.

Manuel Ramirez Vasquez worked for foreman Pedro Juarez in 1979, participated in the work stoppages, and was a member of the UFW negotiating committee. Prior to the work stoppages, foreman Juarez invited Mr. Vasquez to work in New Mexico; when the worker discussed the issue with his foreman in Calexico after the Salinas season however, Juarez directed the worker to speak with pusher Abel Luna. The latter informed Mr. Vasquez that "[t]hey had been ordered by the company not to take agitators". (R.T., Vol. II, p. 125, 11. 4-5). In late April 1980, Vasquez went to Respondent's Salinas camp and spoke with Mr. Luna who stated that they were full and that they weren't giving work to the people who had participated in the stoppages of 1979. (R.T., Vol. II, p. 129, 11. 24-28).

Jose Farias worked in Salinas in 1979 for Respondent as a lettuce cutter and then as a cook, but did not participate in the work stoppages as he was working in the kitchen at the time. He did, however, sign his name to the list of workers who pledged to obey their foremen. (General Counsel Exhibit #2). He was unable to obtain work with Respondent in either Blythe or the Imperial Valley -- being among the group- of workers who sought work with Ramon Diaz, the Lozano family, the Chairez family, and Juan Quintero. He spoke only to co-workers in an effort to obtain work in Salinas in 1930 because of his fruitless efforts earlier in Blythe and the Imperial Valley. He

was unsuccessful.

Maria Estela Mendoza commenced working for Respondent in New Mexico in 1978 on the wrap machine. She followed the season to Arizona, Blythe, Imperial Valley, Blythe, Arizona, and then to Salinas for the 1979 harvest, utilizing company buses for transportation except for the New Mexico - Salinas trip. With one interruption, she completed the 1979 Salinas harvest and spoke to her foreman Jose Casimiro Lopez about working in New Mexico. Receiving an affirmative reply, Ms. Mendoza was told to show up on Monday, October 8, 1979, at Respondent's shop in New Mexico, but that she would have to rely on her own transporation as there would not be company buses to take the workers. Foreman Lopez related that he wasn't sure when the harvest would start, but he thought Wednesday or Thursday (October 10 or 11). Ms. Mendoza arrived at Respondent's New Mexico shop on Monday, October 8th at 8:00 a.m. with co-workers (and participants in the Salinas work stoppages), Magdalena Cardoza, Luz Montiel, Maria de Jesus Montiel, Elisa Covarrubias, and Jose Angel Covarrubias. Finally locating foreman Lopez in the field, they were informed that the machine was full, and that Mr. Lopez had to start earlier than planned that day "as an emergency". Discussions with foreman Francisco Limon, supervisor Obdulio Magdaleno, and general supervisor Celestino Nunez proved similarly fruitless, and the discouraged workers returned to their homes in the Mexicali-Calexico area. Meeting Mr. Mendoza's brother Arturo Hoyos en route, they

directed him to return to Mexicali because work was not being given to the work-stoppage participants. Ms. Mendoza's subsequent efforts to obtain work for Respondent in Blythe and the Imperial Valley were also unsuccessful.

To obtain work in Salinas in 1980, Ms. Mendoza telephoned Respondent's office and spoke to General Supervisor Aldaberto Pena to ascertain the first week of the harvest. On two occasions thereafter, Ms. Mendoza, Magdalena Cardoza, and Arturo Hoyos went to forewoman Sara Favila's house to ask for work, but were informed that the machine was full (with seniority people from New Mexico and Arizona).

Ms. Mendoza had been elected UFW crew representative for her machine during the 1979 stoppages, and was a member of the UFW negotiating committee (along with Ramon Diaz, Diego de la Fuente, Maria de Jesus Montiel, Manuel Ramirez Vasquez, and Minerva Cabrera).

Juan Reyna worked for Respondent in Salinas in 1973 and 1979, engaged in the work stoppages, and signed General Counsel's Exhibit #2. In May, 1980, Mr. Reyna approached his former foreman Pedro Juarez and asked for work, but was told to check back. He did so on- at least three separate occasions, but was unable to obtain work.

Fernando Saldana worked for Respondent in Salinas in 1979 under then foremen Obdulio Magdaleno and Pedro Flores. He participated in the work stoppages and signed the pledge to follow his foreman's orders. (General Counsel Exhibit #2). In

May of 1980, he approached foreman Pedro Flores for work and was told there was none available.

Jose Villasenor worked for Respondent in Salinas in 1979 under foreman Pedro Juarez. He was a crew representative, participated in the work stoppages, and signed the pledge to follow his foreman's orders. Before the work stoppages, the foreman had told the worker that the season would be good in New Mexico and that the company would provide transporation there. After the stoppages, Mr. Villasenor had difficulty in obtaining information about the New Mexico starting date. When co-workers Filimon Lozano and Ernesto Montiel returned and recited to him their problems in obtaining work in New Mexico, Mr. Villasenor decided not to travel to Respondent's next operation. In spring 1980, Mr. Villasenor applied for work, but was told by Pedro Juarez that the latter had orders not to get people from Salinas, and that he had his own people (R.T., Vol. VI, p. 19, 11. 24-26). This statement was made to fellow applicants Filimon Lozano, Carlos Aguirre, Ladislao Miranda, and Diego de la Fuente.

Rosendo Rios Casillas first Worked for Respondent in late 1978/early 1979. He worked in the Imperial Valley, Blythe, Arizona, and Salinas under foremen Rodolfo Galindo, Obdulio Magdalene, and Pedro Flores. Mr. Casillas participated actively in the work stoppages, serving as president of the ranch committee. On the last day of the 1979 Salinas season, Casillas asked Flores for work in New Mexico. He was told that there was no guarantee, which statement was repeated by Flores when the

latter brought Casillas' check to the worker in Mexicali. Upon asking "second" Abelardo Velasquez for work in Blythe, Mr. Casillas was informed that there were orders not to hire any of the workers who had been in the stoppages. Requests of at least five foremen for work in Imperial Valley were similarly to no avail. Arriving early in Salinas in 1980 -- some two-three weeks before the commencement of the harvest-- Casillas asked Peter Orr for work and was told to see the foremen. He complied and left Pedro Flores his telephone number. Although the foreman had indicated that he would call when there was work, Mr. Casillas had received no telephone call through the date of the hearing.

Arturo Hoyos, and his two sisters Minerva Cabrera and Reina Rivera worked in Maria Sagrario Perez' wrap machine crew in 1979 and participated in the work stoppages. Although promised work by foreman Jose Casimiro Lopez, Mr. Hoyos did not obtain employment in New Mexico, having encountered the rebuffed group en route as discussed supra. He requested work from Sara Favila in Salinas in 1980, but was told that her machine was already full.

Jaime Cedillo had worked for Respondent in 1974, 1977, 1973, and 1979. He participated in the Salinas work stoppages and signed the pledge to follow his foreman's orders. Although Pedro Flores initially told Mr. Cedillo that there was work available in New Mexico, the worker did not travel to New Mexico on the basis of advice from friend Jose Villasenor, who

encountered the aforediscussed difficulties. In April 1980, Cedillo spoke first to the company office, and then with foreman Flores at the Salinas camp, but was told the crew was full and to keep on checking. When Cedillo "checked back" with Flores in a Salinas restaurant, he was told not to leave his phone number, as the foreman was looking only for the "cream of the crop". (R.T., Vol. VIII, p. 8, 11. 22-23). Foreman Pedro Juarez similarly informed Mr. Cedillo that there was no work available as his crew was complete.'

Ladislao Miranda cut and packed lettuce in Pedro Flores' crew in 1979, participated in the work stoppages, and signed the pledge to obey his foreman's orders. Before the stoppages, foreman Flores invited Miranda to work in Hew Mexico. After the stoppages, the foreman indicated that he hadn't planned on going to New Mexico. In 1980, Miranda spoke with Flores at the Salinas camp, but was told that he could not have work, because Flores already had his people from the (Imperial) Valley. Although the foreman took down the worker's telephone number and address, Mr. Miranda was never contacted for work. Foreman Pedro Juarez similarly informed Mr. Miranda that there was no work available as his crew was complete.

Diego de la Fuente first worked for Respondent in the 1979 Salinas harvest. He participated actively in the work stoppages, serving as vice president of the ranch committee, and president of the workers' negotiating committee. Pedro Flores informed Mr. de la Fuente that work would not be given in New Mexico for

the "trouble-makers". (R.T., Vol. VIII, p. 81, 11. 10-11). In January, 1980, Mr. de la Fuente, along with Rosendo Casillas, and Ramon Diaz presided over a meeting of approximately 50-100 workers from Respondent's operations to discuss the events in New Mexico, and subsequent difficulties in obtaining work. In April, 1980, Mr. de la Fuente telephoned the Salinas office to ask when the harvest would start. He then asked foreman Flores about the starting date, but was told the crew was already full. He was unsuccessful in obtaining work during the 1980 Salinas harvest.

Agustin Roldan worked for Pedro Flores in Salinas 1979, participated in the work stoppages, and signed the pledge to obey his foreman's orders. On April 16, 1980, Mr. Roldan spoke to foreman Flores at Respondent's Salinas camp, but was told the crew was full. Mr. Roldan returned on April 17 and April 18, and was finally told by foreman Flores to leave his telephone number and that the foreman would call if he needed more workers. At the time of the hearing, Mr. Roldan had received no telephone call.

Elisa Covarrubias worked for Respondent in Blythe and Salinas in 1979. She and family members Jose Angel Covarrubias (husband) Luz Montiel (cousin), and Maria de Jesus Montiel (sister) all worked in Maria Sagrario Perez' machine crew. Her brother Ernesto Montiel worked in a ground crew. All participated in the work stoppages and her sister Maria de Jesus Montiel was elected as a crew representative. She joined the group which undertook

the unsuccessful trip to New Mexico described supra, and made no further efforts to secure work with Respondent because of her previous difficulties.

Eduardo Melgoza was a closer in the crew of Obdulio Magdaleno and then Pedro Flores in the 1979 Salinas harvest. He participated in the work stoppages, and signed the pledge to obey his foreman's orders. He attempted to obtain work in the Imperial Valley, but was informed by foreman Flores that the latter already had his people. He made no formal application for work in the 1980 Salinas season, stating that "I always wanted to work with them, but I don't need the company anymore. The company should just stay with its work. I don't need it anymore." (R.T., Vol. IX, p. 76, 11. 19-24).

Ernesto Montiel first worked for Respondent in 1976 in the Imperial Valley. He followed the circuit through the 1979 Salinas harvest, participated in the work stoppages, and signed the pledge to obey his foreman's orders. He asked foreman Pedro Juarez and pusher Abel Luna for work in New Mexico but was told the crew was full. Persisting, Mr. Montiel went to the Respondent's New Mexico office with companions Eduardo Gomez, and Jose Alonzo. Both Gomez and Montiel were hired, but were informed by foreman Juarez at the end of the day that there was no more work and that "there were orders from above". (R.T., Vol. IX, p. 89, 11. 17-24). In the Imperial Valley, Mr. Montiel unsuccessfully applied to various foremen, as well as to production foreman Mr. Pena, but was not given work. In May,

1980, Mr. Montiel, along with Filimon Lozano unsuccessfully sought work through foremen Flores and Juarez for a period of some two weeks.

Magdalena Cardoza was hired by Maria Sagrario Perez in New Mexico in 1978, and followed the circuit through the 1979 Salinas harvest. She participated in the work stoppages, was a crew representative, and signed the pledge to form her foreman orders. She was part of the unsuccessful expedition to New; Mexico discussed supra, and encountered similar difficulties in Blythe and the Imperial Valley. In 1980, Ms. Cardoza went forewoman Sara Favila's house in search of employment but was; told that her machine was full.

Jose Refugio Camarillo was hired by Pedro Juarez as a cutter and packer in the 1979 Salinas harvest some two weeks after the season commenced. He engaged in the work stoppages, signed the pledge to obey his foreman's orders, and unsuccessfully sought work in Blythe and the Imperial Valley thereafter, with co-workers Ramon Diaz, Filimon Lozano, and Isaac Lozano. He went to the Salinas camp in 1980 but was told by foreman Juarez that the crew was already full.

Francisco Jimenez commenced cutting and packing for Respondent during the 1978 Blythe harvest. In 1979, he worked in Blythe, the Imperial Valley, and Salinas, participated in the work stoppages, and signed the pledge to obey his foreman's orders. He unsuccessfully sought work in New Mexico in 1979, and again in Salinas in 1980. In the latter attempt, Mr.

Jimenez was accompanied by his father Baldomero Jimenez -- who had also signed General Counsel Exhibit #2 -- and by his brother Genardo Jimenez. Pusher Abelardo Velasquez suggested to Mr. Jimenez in Ciudad Juarez, Mexico, in November 1979, that "... maybe they're not giving you work because of the stoppages in Salinas". (R.T., Vol. X, p. 72, 11. 17-18).

Pedro Naranjo worked for Respondent during the 1979 Salinas harvest (and previously), participated in the work stoppages, and signed the pledge to obey his foreman's orders. He did not go to New Mexico because foreman Flores would not guarantee him a job when the two discussed the matter during the last days of the Salinas season. He asked Pedro Flores, Pedro Juarez, and Roberto Santa Maria for work in Blythe in 1979 but to no avail. In the Imperial Valley, foreman Flores told Mr. Naranjo that the crew had already been completed. He again spoke to foreman Flores at Respondent's Salinas camp in the spring of 1980, but the response was identical.

Antonio Maldonado cut and packed lettuce in Pedro Flores' crew during the 1979 Salinas harvest. He participated in the work stoppages, and signed the pledge to obey his foreman's orders. Before the stoppages, foreman Flores invited him to work in New Mexico. After the labor unrest, the foreman left without notification to the worker. Mr. Maldonado applied for work at the Salinas labor camp in spring I960. The foreman took down his phone number and that of co-worker Guadalupe Berlanga. Two days later, Messrs. Maldonado and Berlanga returned to the camp,

but were told that the foreman would telephone them if there was work.

Jose Rubio worked for Respondent during the latter part of the 1979 Salinas harvest, participated in the work stoppages, and signed the pledge to follow his foreman's orders. He unsuccessfully sought work with Respondent in the Imperial Valley in February, 1980, and again in Salinas in May, 198O.

Eduardo Gomez first worked for Respondent in 1976, followed the circuit for two years and participated in the 1979 Salinas work stoppages, serving as a member of the ranch committee. He signed the list to return to work. He asked Pedro Juarez and Abel Luna for work in New Mexico but was rebuffed at the Standard gasoline station in Calexico. He persisted, however, and worked for one day with Ernesto Montiel as discussed above.

Respondent has denied any scheme to exclude the 1979 Salinas work-stoppage participants from further work at its various operations. Rather, Respondent has produced documentation that there were numerous (approximately 70) workers who successfully obtained work following the 1979 Salinas season, but who had also worked during the period of the stoppages, although not necessarily signatories to General Counsel Exhibit #2. Records produced by Respondent at the hearing reflect a general decline in the movement of workers "around the circuit" over the past few years. (Respondent's Exhibits #28, 29, and 30).

Further, Respondent's witnesses denied any formal seniority system, characterizing the hiring practices as "first-come,

first-serve". All supervisory personnel who testified with the exception of Maria Sagrario Perez, discussed hereinafter, vigorously denied any efforts to select workers on the basis of UFW activity or connection with the Salinas labor disturbances of 1979.

B.) Analysis and Conclusions of the Alleged §1153(a) and (c) Violations:

General Counsel essentially contends that in the spring of 1980, Respondent discriminatorily failed to rehire for its Salinas harvest operations the entire class of participants of the 1979 Salinas work stoppages in violation of Sections 1153(a) and (c) of the Act. In support of this theory, General Counsel has relied extensively on the individual testimony of some 26 workers who encountered difficulties in obtaining work at various operations of Respondent from the fall of 1979 to spring of 1980. Additionally, General Counsel has offered direct and circumstantial evidence of Respondent's anti-union animus and discriminatory motivation, including Respondent's conceded knowledge of the participants of the 1979 work stoppages and preservation of a list of said participants. Many of the alleged discriminatees, however, made no formal application for rehire to those with authority to hire for the 1980 Salinas season, and others did not testify, or were not referred to at the hearing except for their status as work stoppage participants i.e., as listed in General Counsel's Exhibit Number 2. For resolution then, are the issues of (1) whether Respondent

discriminatorily failed to rehire the participants in the 1979 work stoppages, (2) whether this discriminatory policy, if any, violates Sections (a) and (c) of the Act; and (3) the number of workers included in the group of alleged discriminatees entitled to relief, if any.

(1.) The Discriminatory Policy:

In discriminatory refusal to rehire cases, the General Counsel normally has the burden of proving, as to each discriminatee, that (1) a proper application for employment was made; (2) the applicant was qualified; (3) work was available at the time of application; (4) the refusal to rehire was motivated by the applicant's union affiliation and/or other protected activity. The NLRB has, however, distinguished between refusals to hire aimed at particular individuals, and refusals directed at an entire class of employees. In the latter situation, "an employee need not follow the letter of an employer's hiring procedure where the circumstances make it clear that a rebuff would result." Sterling Aluminum Co. v. NLRB, 391 F. 2d 713 (8th Cir. 1968); Piasecki Aircraft Corp. v. NLRB. 280 F. 2d 575 (3rd Cir. 1960). Nor were applicants required "to go through the useless procedure of reapplying for employment at a later time when jobs were actually available in order to establish that they were victims of the discriminatory hiring policy." NLRB v. Anchor Rome Hills, 228 F. 2d 775, 780 (5th Cir. 1956).

Thus, this Board has held that "[W]here the alleged

discrimination is not directed at individuals, but at a group, the burden as to each named discriminatee may be met by a showing that the group was treated discriminatorily and that the named discriminatee is a member of the group Kawano, Inc. (December 26, 1978) 4 ALRB No. 104, enf'd; Kawano, Inc. v. Agricultural Labor Relations Bd. (1930) 106 Cal. App. 3d 937, hg. den. September 17, 1980 (Board Decision, p. 6), citing NLRB v. Hoosier-Veneer, 120 F. 2d 574, 8 LRRM 723 (7th Cir. 1941). The rule was there made applicable, where the most active union support came from a clearly distinguishable group of employees which the employer could easily eliminate from its work force by changing its hiring system. Here, the 1979 Salinas work-stoppage participants were readily cognizable to Respondent, and indeed memorialized in the document required to be signed by all those who desired to return to work to complete the 1979 harvest.[3] They were visibly pro-UFW and indeed, the purpose of their activity -- as was known to Respondent -- was to encourage the UFW – employer bargaining process which had' languished since the 1975 certification.

In the face of Respondent's denial of any policy to exclude the work-stoppage participants from future employ, General Counsel introduced evidence of numerous employees who had at first been invited to New Mexico, traveled to the site of upcoming operations, and then were unsuccessful in obtaining work. Some gave up their efforts to seek work rather than risk the costs of the trip from Salinas to New Mexico. Others ventured to New Mexico without success even though arriving as instructed by their

foremen.

Respondent's agents repeatedly told workers that there would not be work for the work-stoppage participants. Although these statements were denied by foremen Pedro Juarez, Pedro Flores, Sara Favila de Figueroa, and supervisors Aldaberto Pena, Roberto Santa Maria, and Celestino Nunez, statements attributable o pushers Abel Luna, Avelardo Velasquez, and Raul Ramirez were uncontradicted. Since the pushers, as well as the foreman, hired and fired, the statements of each are admissible as admissions against Respondent's interest. See Perry's Plants, Inc., 5 ALRB No. 17 (1979). Similar admissions attributable to foremen Antonio Ramon Pasillas, Francisco Limon, Jose Casimiro Lopez, and supervisor Obdulino Magdeleno were also uncontroverted. I have reviewed the declarations of former supervisor Obdulio Magdaleno (General Counsel Exhibit No. 13 and Respondent Exhibit No. 26), who did not testify at the hearing. General Counsel No. 13 recites Mr. Magdaleno's former position with the company, and relates management policy with respect to the 1979 Salinas work-stoppages.: To wit, Mr. Magdaleno avers that he was "under orders" to refuse work to the work-stoppage participants, that job applicants were given a variety of ruses for not being

[3]I do not find it critical to General Counsel's case that the document containing the list of names may not be complete. At the very least, those names listed pertain to workers who engaged in the stoppages, and consequently supported the effort to spur collective bargaining negotiations.

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rehired, and that this company conduct was aimed at discouraging UFW activity and organization and ultimately undermining the collective bargaining process. Respondent's Exhibit No. 26 contains essentially a recantation by Mr. Magdaleno of the earlier written declaration -- denying that the statement was the one Mr. Magdaleno had given the UFW, and suggesting that he was offered work for providing favorable UFW testimony.

Although under subpoena, Mr. Magdaleno did not appear for the hearing. The General Counsel successfully obtained an order from the Superior Court for Monterey County enforcing the subpoena but was not able to secure his presence as a witness. (R.T., Vol. XXVI, p. 21, 11. 23-28). While I do not condone Mr. Magdalene's absence, because of the conflict in the written declarations, (one effectively nullifies the other), the difficulty in ascertaining the reliability, if any, of each, and the unavailability of the (witness to determine credibility, I decline to rely upon either in reaching these factual conclusions. Thus, admissions attributable to Mr. Magdaleno (e.g., R.T., Vol. I, p. 90, 11. 18-21; Vol. X, p. 26, 11. 6-10; Vol. IX, p. 120, 11. 6-9) remain uncontroverted.

I reach a different result, however, with respect to the admissibility of General Counsel Exhibit No. 27 -- foreman Pedro Juarez' notebook. Contrary to Respondent's contentions, I believe the document is relevant, and admissible as an admission against 25 Respondent's interest in light of Mr. Juarez' conceded status as I a foreman. See Sam Andrews' Sons (August 15, 1980) 6 ALRB No. 44.

review den.by Ct.App.2nd Dist.,Div.1, Feb. 17,1981. Furthermore, I find Chat Respondent waived any objection to the foundation and/or authenticity of the document at the hearing. (R.T. Vol. XXVI, pp. 8-11). While not essential to the record, I find that the notebook tends to corroborate General Counsel's theory with respect to the seniority preferences of the company herein described. Ample independent evidence of this system of seniority preferences has been introduced in the form of testimony by Ramon Diaz (R.T., Vol. I, p. 52, 11.,4-20), Maria Estela Mendoza II R.T., Vol. V, p. 8, 1. 12) and supervisor Roberto Santa Maria (R.T., Vol. XI, p. 31, 11. 9-11), by the acknowledgment of the three-day rule by foremen Roberto Santa Maria and Pedro Juarez (R.T., Vol. XXI, p. 29, 1. 15; Vol. XXIV, p. 44, 11. 9-10), and by the Respondent's annual award dinner it sponsored to honor long-term employees (Respondent's Exhibit #31). Mr. Juarez testified that he kept this book, at the company's request -- making an alphabetical list of workers' names indexed by the first name -- recorded in order of their respective dates of hire. Said dates of hire are reflected £n front of each workers' name for all of those hired prior to September 18, 1979 -- the precise date of rehire of the work stoppage participants.

The statistical evidence in the case reflected that Respondent hired far fewer workers in New Mexico in 1979 from the Salinas work force (49) than it had in 1978 (78), or in 1977 (93). (See (Respondent's Exhibit No. 27). Some of those workers who participated in the Salinas work stoppages and were later rehired -- e.g. Juan

Quintero, Ernesto Montiel, and Eduardo Gomez, failed to finish the 1980 Salinas season. Montiel and Gomez, on the one hand, were offered work for one day in New Mexico; Mr. Quintero was discharged for the reasons described infra.

Under the NLRB, cases in which there are statistical showings of disproportionate impact upon a group have required no showing of complete or absolute exclusion of the group from the work force. NLRB v. Shedd-Brown Mfg. Co., 213 F. 2d 163, 34 LRRM 2278 (7th Cir. 1954); NLRB vs. Hoosier-Veneer, 120 F. 2d 574, 3 LRRM 723 (7th Cir. 1941); Borg-Warner Controls, 128 NLRB 1035, 46 LRRM 1459 (1960). Thus, Respondent's contention (Respondent's Brief, pp. 14-16) that a large number of workers who participated in the Salinas work stoppages were later rehired at one or another of Respondent's operations is not determinative of the factual conclusions herein. Some of the returnees were related to foremen (e.g., Belen Perea, Carlos Figueroa, Rosalva Lopez) or were only marginally involved in the protests (Jose Trujillo). Rather, the statistical decline in the movement of the work force tends to support General Counsel’s thesis that Respondent did seek to exclude the 1979 Salinas harvesters from future work.

The employment pattern herein is particularly suspicious when considering the UFW leadership structure at Respondent's 1979 Salinas operations. The union ranch committee consisted of Ramon Diaz, treasurer; Rosendo Rios Casillas, president; and Eduardo Gomez, vice president. Only Gomez was re-employed, and for one day. The union's 1979 bargaining committee was no more

successful. Although some were long-term employees (e.g. Mr. Diaz and Ms. Cabrera), all were unsuccessful in their efforts to obtain employment with Respondent between fall 1979 and spring 1980 : Diego de la Fuente, president; Ramon Diaz, Maria Estela; Mendoza; Maria de Jesus Montiel; Minerva Cabrera.

There was ample evidence of Respondent's animus: In addition, to the admissions heretofore cited, Peter Orr conceded that he had wanted to fire the work-stoppage participants in the fall of 1979, but agreed to "reinstate" them on the condition that they promised to discontinue the stoppages. Other supervisory personnel expressed the view that the bargaining sessions were futile and that the company's intent was not to enter into a contract with the UFW. (R.T., Vol. VIII, p. 51, 11. 22-28). The policy to exclude the Chavista leadership meshed precisely with the bargaining strategy discussed infra. Indeed, the presence of the excluded class of workers was raised as a negotiating tact by attorney Thornton when the talks resumed in June 1980. (R.T., Vol. XV, p. 42, 11. 13-15). Foremen Juarez, Sagrario Perez, and Flores all articulated anti-union sentiments related to Respondent's hiring practices. (R.T., Vol. Ill, p. 18, 11. 1-12; Vol. VII, p. 49, 11. 8-14; Vol. VIII, p. 81, 11. 9-11).

Respondent contends, similar to the Employer's position in Kawano, supra, that the system of hiring did not change following the 1979 Salinas work stoppages, but that, as in the past, workers had to apply for work when work was available. The alleged discriminatees simply did not timely apply, and therefore were

not rehired.

Although the evidence was largely conflicting in this regard, it appears that no formal seniority policy -- involving lists, specific dates of recall, etc. -- was in effect at any of Respondent's operations during the period in question. However, a system of "preferences" was followed by the foremen responsible for hiring and firing the harvest work force. That is, workers who completed a particular harvest season were generally invited en masse by the foremen to the next harvest location, Thus workers were encouraged to "follow the circuit" with particular foremen, and longevity awards were given to all employees at a yearly dinner held in Salinas. For those invited to the next season, a three-day grace period was permitted -- during which their jobs would be held open so long as they had confirmed with the foremen that they would be following the circuit. While the precise commencement date of a particular harvest season might not have been known by the very last day of the preceding harvest, the foremen were generally informed some 2-7 days in advance as to when they (and their crews) would be needed in the next location (R.T. , Vol. XV, pp. 96, 11. 3-21).

Thus, these "informal" hiring practices often necessitated efforts by the foremen to call workers known to them through past work experience at their homes in between seasons, to make home visits, or look for people in certain areas -- e.g. the labor camp in Salinas, the Standard and Shell gasoline stations in Calexico, and the mechanic's shop in Mexicali.

Respondent urges that many former workers changed their customary methods of seeking work only because the union told them to do so, not because they actually wanted to work for J. R. Norton. I find no evidence in the record, however, that the UFW encouraged people to seek work in violation of Section 1154.6 of the Act, or that any of the applicants was less than sincere in his or her efforts to obtain work. I find it highly incredulous that all twenty-six former employees would either deliberately or mistakenly apply for work when none was available. As the harvest was their likelihood, it seems plausible that the workers would know when jobs were available at various localities. Since there was no evidence of any previous difficulties in obtaining work with Respondent, and no evidence that they applied to the wrong people, or at the wrong places, I reject this explanation of Respondent, and find that timely applications were made by the twenty-six testifying witnesses. Indeed Pedro Juarez' journal indicates company policy of adding crew members throughout the duration of a particular season. (General Counsel Exhibit No. 27). Thus, the 20 need for replacements could be anticipated for any given harvest. (R.T., Vol. I, p. 142, 11. 13-16). Some of the 1979 work-stoppage participants indicated that they had been offered work in mid-season. In Salinas 1980, however, promises to communicate with the former work-stoppage participants, or to telephone them when work became available were unfulfilled. In such circumstances, their failure to be rehired is suggestive of

discriminatory motivation. See Sam Andrews' Sons (August 15, 1980) 6 ALRB No. 44, review den. by Ct. App., 2nd Dist., Div. 1, February 17, 1981.

I further find it incredible that this entire group of employees would abandon a method of application by which they had been hired for several years, and persist for 5 harvest seasons in a futile new method which availed them nothing. See Kawano, supra, p. 15, Board Decision. Rather, the work-stoppage participants were not hired in Salinas in the spring of 1980 because Respondent reverted to its former (pre-1979 Salinas) hiring practice: Once the activist core was excluded from the New Mexico, Blythe, and Imperial Valley operations, Respondent could and did conveniently reinstitute the former system of "inviting" entire crews to continue the circuit. While the 1979 Salinas harvesters would not be offered work in I New Mexico because the foremen could not predetermine the starting date, those who applied in Salinas in April and May of 19SO would be informed that the crews were full (with Imperial Valley people). Thus, Pedro Juarez would bring a full contingent from the Imperial Valley to Salinas in 1980, and Maria Sagrario Perez would invite all of her people to continue the harvest in Salinas from the Southern California area.

Typical of the "new" (post-Salinas 1979) hiring policy was the hiring of Ana Alarcon. Although she had worked only in the southern operations in 1977, 1978, and 1979, and lived permanently in Blythe, forewoman Maria Sagrario Perez asked Ms. Alarcon if she

wanted to come to Salinas for the 1980 harvest. Her sisters, Lima and Maria Alarcon, were also invited to "follow the circuit" to the north. The request from the forewoman was made two days prior to the end of the Arizona harvest, and Maria Sagrario Perez telephoned the Alarcon sisters at their home in Blythe to Inform them of the approximate Salinas starting date. In this manner, there would be no 1980 Salinas jobs for the 1979 work-stoppage participants (previously excluded from New Mexico and other "southern" operations), because all of the crews were "complete" with workers recently hired from the other farming sites.

Finally, in considering the testimony of two key witnesses (Maria Sagrario Perez for the General Counsel and Aldaberto Pena for the Respondent), I make the following findings: Ms. Perez testified in a precise, detailed, and I thought straightforward manner. She explained the prior perjured testimony,[3a] the company, instructions under which she labored, and her desire to "set the [record straight" with candor', and great dignity. Two special [hearing sessions were arranged at night to accommodate Ms. Perez' work schedule, and I was struck by the drama and isolation of her plight and considered her testimony to be most sincere. She seemed particularly pained by the events -- although not uncontrolled emotionally -- and forthright in her disavowal of future interest in employment with Respondent. Only on two occasions -- during the second evening -- when she recited that supervisor Santa Maria had told protesting crew members that they

[3a] J.R. Norton, Case Nos. 79-CE-78-EC, et al.

were fired using two different verbs in Spanish (R.T., Vol. XII, p. 167, 11. 6-12) and when she attributed to Mr. Pena a disinterest in the quality of the product harvested and shipped by the Respondent (R.T., Vol. XIII, p. 74, 11. 4-7) did I feel that her testimony was "rehearsed" or perhaps geared to meeting previous testimony rather than to a wholly accurate recollection of events.

Mr. Pena specifically denied the allegations made by Ms. Perez and the numerous other witnesses who detailed their difficulties in obtaining work with Respondent following the 1979 work stoppages. However, his manner was at times obsequious, and I often felt that he was gearing his remarks to an audience --the hearing officer -- rather than responding directly or precisely to questions framed by the attorneys. Given his position with the company, Mr. Pena was more responsible for communicating company policy to lower supervisory personnel, rather than contributing to the formulation of said policy per se As such, he occasionally seemed apologetic for his role in the on-going labor disputes which had, been burdening the company.

In reviewing the entire context of the case, the possible bases for bias of Ms. Perez following her vehemently controverted termination, her educational background, and her prior concededly perjured testimony, I conclude that it is more likely than not that Ms. Perez' version of events is true. I also consider that the record evidence in its entirety -- excluding the testimony of Ms. Perez (and the conflicting declarations of Mr. Magdaleno) -- is sufficient to make a very strong prima facie

showing that Respondent engaged in a systematic plan to exclude the 1979 work-stoppage participants from further employment, thus dealing a critical blow to the UFW effort to achieve a collective bargaining agreement.

I therefore conclude that the General Counsel has set forth a substantial prima facie case that Respondent discriminatorily refused to rehire a large number of the 1979 work-stoppage participants for the 1980 Salinas harvest. The evidence belies Respondent's contentions that no change was made in hiring for the purpose of discriminating against the 1979 work-stoppage participants. Rather, the record indicates that Respondent undertook a deliberate effort to thereafter exclude the 1979 "trouble-makers" from its various operations.

(2) Respondent's Business Justifications for the Failure to Rehire the 1979 Salinas Work-Stoppage Participants:

Once the General Counsel has proved its prima facie case 17 by showing that the employer has engaged in discriminatory conduct which could have adversely affected employee rights, the burden shifts to the Respondent to establish that the latter was motivated by legitimate objectives. See Maggio-Tostado, 3 ALRB No. 38 (1977), citing NLRB vs. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967). Although Respondent denies that it purposefully intended to exclude the 1979 work-stoppage participants from future employment, it has proffered several reasons to explain their inability to obtain work.

I have already declined to accept the argument that the

workers simply did not timely apply between fall, 1979, and 2 spring, 1980, and thus were unable to regain employment. Respondent 2 further contends that many workers did not get jobs because their former foremen were no longer hiring workers for Salinas in 1980. (Respondent's brief, p. 11). Thus, Aldaberto Pena testified that he hired four (4) new foremen between September 1979 and the fall of 1980. Roberto Santa Maria -- former foreman of ground crew A in 1979--became a supervisor of the wrap machines in March 1930. Obdulio Magdalene was discharged before the 1980 Salinas season started. Maria Sagrario Perez was fired one week after the Salinas season began. Since the workers (particularly the ground crews) tended to follow the foremen around the circuit, it is suggested that the difficulties encountered by the alleged discriminatees was attributable to this high turnover in supervisory personnel.

However, the twenty-six witnesses who testified for General, Counsel clearly described hiring practices relating primarily to foremen Pedro Juarez, Pedro Flores, and to a lesser degree Maria Sagrario Perez, and Sara Favila de Figueroa, all of whom were present in Salinas for at least part of both the 1979 and 1930 harvests. The difficulties that workers faced when seeking work with Jose Casimiro Lopez occurred in New Mexico in 1979, and Obdulio Magdaleno was a supervisor rather than a foreman during the relevant periods herein. Pushers Raul Ramirez, Abel Luna, and Abelardo Velasquez maintained their critical roles throughout the duration. Many of the alleged discriminatees had

worked for various foremen over a period of many years in Respondent's employ, (e.g., Ramon Diaz, the Lozano family, the Chairez family, the Quinteros.) Others inquired of four or five different supervisory personnel in their search for employment, (e.g. Rosendo Rios Casillas, Elisa Montiel Cavarrubias, Ernesto Montiel.) And throughout the period of the alleged discriminatory conduct, the chief supervisory personnel of Respondent's operations -- Peter Orr, Al Pena, and Celestino Nunez -- contributed to the employees' difficulties. Thus, workers would be referred from pusher to foreman to general supervisor, and back to foreman in their fruitless quests for work. If one indicated there were "openings", the other would quickly recant. As in Kawano, supra, to assume that the foremen, all acting independently would decide not to hire the 1979 work-stoppage participants belies all credulity. Perhaps because; Respondent has denied any policy to discriminate against the 1979 work-stoppage participants, no further suggestions have been forthcoming to explain the difficulties encountered by the harvesters in obtaining work during the 19SO Salinas season.

Even if legitimate business considerations did enter into the decisions not to rehire particular workers on any giver, day, It I find that at least the twenty-six alleged discriminatees who testified would have been rehired but for Respondent's discriminatory motive. I conclude that Respondent has engaged in a policy of not rehiring former participants in the 1979, Salinas work stoppages because of their activities which have been

condoned by Respondent as discussed hereafter. Such conduct violates Sections 1153(a) and (c) of the Act, and I shall recommend the appropriate remedy.

(3) The Scope of the Class of Alleged Discriminatees:

General Counsel has suggested that the members of the class which has been discriminated against should include all participants in the 1979 Salinas work stoppages for whom Respondent has not offered evidence of reemployment. (General Counsel's Brief, pp. 32, 105). Relying upon the Kawano decision, General Counel contends that it should be relieved of the need to prove that each individual made a proper application, that work was available at the time of the application, and that the position was later filled. While I find that the reliance on the Kawano approach is appropriate in the instant case, that decision and other precedent suggest a more limited scope of the group of discriminatees.

The named discriminatees in the Kawano decision reflected those persons who desired and were available to work for the I employer and would have been rehired but for the employer's unlawful discrimination. Kawano, supra, ALO decision, p. 52. As suggested in the Board decision, the discriminatees in Kawano were not required to prove that a proper application was made where part of the discriminatory scheme was to prevent such applications from being made, or where the employer changed the method of application without notice to the employees. Kawano, supra, Board decision, pp. 4-5, citing Piasecki Aircraft Corp.

v. NLRB, 280 F. 2d 575, 46 LRRM 2469 (3rd Cir. 1960); Ron Nunn Farms (June 1, 1978) 4 ALRB No. 34, review den. by Ct. App., 1st Dist., Div. 4, July 23, 1979, hg. den. September 12, 1979. Thus, the Board found that the discriminatees -- by speaking with various foremen, a former "raitero", and asking for work at the employer's office -- demonstrated; as best they could, their desire and availability for work with the employer. As suggested by the United States Supreme Court in International Brotherhood of Teamsters v. U.S. 431, U.S. 324, '97 S. Ct. 1843 (1977), a showing must still be made, as to each non-applicant, that he or she would have applied but for the employer's discriminatory practices. There, the U. S. Supreme-Court has suggested that this requirement might be met by "evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire. . . ." 97 S. Ct. at 1873, n. 58.

In the instant case, General Counsel has amply demonstrated the desire and availability for work of the following individuals: Jaime Cedillo, Ladislao Miranda, Ernesto Montiel, Agustin Roldan, Rosendo Rios Casillas, Carlos Aguirre, Fernando Saldana, Francisco Jimenez, Eduardo Melgoza, Guadalupe Berlanga, Pedro Naranjo, Jose Villasenor, Manuel R. Vasquez, Filimon Lozano, Jose R. Camarillo, Ramon Diaz, Jose Rubio, Jose Farias, Antonio Maldonado, Diego de la Fuente, Arturo Hoyos, Elisa M. Covarrubias, Magdalena Cardoza, Minerva Cabrera, Maria Estela Mendoza, Mirtha Garcia, Maria Garcia, and Juan Reyna. The record reflects that each of the aforesaid made efforts to seek work during the 1980

Salinas harvest or declined to do so because of the futility of previous applications at the "southern" operations. Although some did not testify in person (e.g. Guadalupe Berlanga, Filmon Lozano, and Carlos Aguirre), I find that there is sufficient evidence to conclude that they also were available for and interested in working the 1930 Salinas harvest, and would have been rehired but for Respondent's discriminatory policy.

I further find that the General Counsel has not met its burden or proving that the other participants of the 1979 Salinas work stoppages (signatories to General Counsel's Exhibit No. 2) were victims of Respondent's discriminatory plan. None of these persons testified. There is evidence only of their participation in the work stoppages, and in some cases futile efforts in seeking; work in otherareas of Respondent's operations, but no indication as to whether or not any one of them possessed “Unexpressed" desires to work in Salinas during the 1980 Salinas harvest or were even available for such work. I shall therefore recommend that they not be included in the Section entitled The Remedy hereinafter referred.

The International Brotherhood of Teamsters decision refers to a two-step procedure by which the government has the burden of first establishing the existence of a discriminatory policy, and then at a separate hearing, of proving that individuals j would have applied for the job had it not been for these discriminatory practices. Here, however, as in Kawano, this was not a "class action" in the strict procedural sense, and "no

formal class certification was either necessary or possible". (Kawano, supra, Board decision, pp. 7-8.) There, as here, it is clear that all parties have been aware throughout the proceeding that a major issue was whether Respondent's failure and refusal to rehire the 1979 Salinas work stoppage participants constituted a violation of Sections 1153(a) and (c) of the Act. In the absence; of evidence that the individuals were available for work in Salinas and desired to obtain same -- albeit in an unarticulated manner -- I recommend the aforesaid limitation of the group of discriminatees.

(4) Although Arguably Unprotected, the Activity of the Work-Stoppage Participants Was Condoned by Respondent's Subsequent Conduct:

Respondent has contended that certain types of concerted conduct are not protected activity, thus rendering disciplinary measures taken by the employer because of such activity not violative of employee rights under the ALRA. (Respondent's Brief, P. 20). Some concerted activities may be carried on in conflict with an employer's right to operate its plant (farm) and direct its forces, or at a time and in a manner inappropriate to the situation. "It is a, question of degree, and if employees go too far, they lose the protections of Sections 7 and 8(a)(3)" [of the NLRA]. Morris, The Developing Labor Law (1971), p. 125.

Thus, a number of decisions under the NLRB have sustained the right of employers to discharge employees who engage in "partial, intermittent or recurrent" work stoppages. NLRB v.

Blades Mfg. Corp.. 344 F. 2d 998, 59 LRRM 2210 (8th Cir. 1965); NLRB v. Montgomery Ward & Co., 157 F. 2d 486, 19 LRRM 2008 (8th Cir. 1946). Honolulu Rapid Transit Co., 110 NLRB 1806, 35 LRRM 1305 (1954). The rationale for these cases has been that dissatisfied employees cannot strike and maintain their pay 5 status at the same time. Where the stoppage is part of a plan 7 or pattern of intermittent action which is inconsistent with the genuine strike or genuine performance by employees of the work normally expected of them by an employer, the employer's discrimination against the employees for this unprotected conduct does not violate the NLRA. Valley City Furniture Co., 110 NLRB 1589,35 LRRM 1265 (1954) enforced, 230 F. 2d 947, 37 LRRM 2740 (6th Cir. 1956); Pacific Tel. & Tel. Co., 107 NLRB 1547, 33 LRRM 1433 (1954).

In the instant case, the 1979 Salinas work stoppages seemingly presented a prototype of intermittent unprotected activity. The series of stoppages were planned by the workers, with the knowledge and consent of the union, but not as an officially sanctioned strike. The' employer was not notified of the workers' intent on any given day, and the result was nearly one month of economic chaos at Respondent's Salinas operations. Applying the NLRB' s balancing test (see Morris, The Developing Labor Law, Cumulative Supp. 1971-1975, p. 11)-- the employees right to engage in concerted activity against the employer's right to control the conduct of its employees in the plant (field the work-stoppage participants had a legitimate and (urgent)

interest in the resumption of collective bargaining negotiations. The UFW had been certified for over three years with little tangible result. Respondent, on the other hand, presented very compelling evidence that the stoppages were inimical to its enterprise. Over 1000 acres of lettuce were ruined and the employer suffered a significant financial loss therefor. While there was no contract herein providing for any grievance machinery through which the employees might make their position known to the company (see Bob Henry Dodge, Inc., 203 NLRB 78 (1973)1, I find the work stoppages to be highly destructive of the Respondent's economic interests because of the lack of advance notice, the perishable condition of the crop, and the variegated methods and durations of concerted activity. In weighing the interests involved, I conclude that Respondent properly acted to replace the workers in mid-September. It is the subsequent treatment of the replaced workers following their reinstatement three days later, however, which is central to the ultimate resolution of the controvery herein.

(5) The Condonation Theory

General Counsel has contended, and Respondent has denied, that the subsequent reinstatement of the work-stoppage participants on September 17, and 18, 1979, effectively constituted a "condonation" of any (formerly unprotected) activity on the part I of the workers. As explained by the Second Circuit, "Condonation requires a demonstrated willingness to forgive the improper aspect of concerted activities, to 'wipe the slate clean'. After

a condonation, the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise discriminate against them." NLRB v. E.A. Laboratories, 183 F. 2d 885, 28 LRRM 2043 (2nd Circuit 1951), cert. denied 342 U.S. 871, 29 LRRM 2002.

In the instant case, all of the work-stoppage participants who signed the pledge to obey their foreman's orders were reinstated to their jobs. Peter Orr admitted that there were no further difficulties for the Salinas harvest, and in his words, there was "no further use" for the document containing the (implied) promise not to engage in future work stoppages.[3b] I find this testimony to be clear and convincing evidence that the Respondent in fact agreed (1) to forgive the misconduct and "wipe the slate clean", and (2) to resume the former employment relationship with the employee. Such evidence clearly surpasses the statement from a foreman that "striking employees' jobs were all right", or mere silence in permitting workers to return to work, or the invitation to confer. Cf. NLRB v. Marshall Car and Wheel Foundry Co., 35 LRRM 2320 C5th Cir. 1955); Packers Hide Assn. v. NLRB, 62 LRRM 2115 (8th Cir. 1966); NLRB v. Colonial Press, Inc. 509 F. 2d 850, 83 LRRM 2337 (8th Cir. 1975). As Respondent candidly conceded, the company's reinstatement of the strikers in September of 1979 "was impelled by the need to get its crops harvested". (Respondent's Brief, p. 24). It therefore suited Respondent's purposes to "wipe the slate clean and resume the former employment relationship". It cannot now

[3b] R.T., Vol. XV, p. 157, 11. 3-7.

IIIII

credibly contend that that was not its real intent. At the very least, all those employees who signed General Counsel Exhibit No. 2, and fulfilled the pledges contained therein through the end of the Salinas harvest, were entitled to the protections of the condonation doctrine. To hold otherwise would permit Respondent a "double standard" of dealing with its employees when such effort suited .its purposes. This the Act cannot tolerate.[4]

Nor do I find persuasive Respondent's analogy to the decision in McKay Radio & Telegraph Co. (1951) 28 LRRM 1579, wherein the activities of the employees--demand for an unlawful security clause in the contract -- were unlawful from their inception. Respondent's Brief, p. 23). Although the intermittent stoppages herein may have been arguably unprotected activity, their goal-- to achieve a collective bargaining agreement -- cannot be said to be unlawful ab initio.

Lest the thought arise that Respondent would have better suited its own purposes by summarily discharging or replacing, and subsequently refusing immediate reinstatement to the work-stoppage participants, it should be noted that Respondent's actual conduct caused far more difficulty to the workers. By the "appearance of condonation" many were led to make fruitless journeys to the various sites of Respondent's tri-state

[4]The ALRB has recognized the doctrine of condonation in a dissimilar factual setting. Cf. Martori Brothers Distributing, 5 ALRB No. 47 (1979).

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operations in search of work.[5] I thus reject Respondent's proffered justification of the subsequent refusals to rehire on the basis that the underlying work-stoppage activity was unprotected, and will recommend the appropriate remedy for the aforementioned discriminatees.

V. Failure to Rehire Marcelino Quintero and Pablo Quintero

A.) Facts:

Pablo Quintero -- the brother of Juan Quintero -- worked for Respondent in Salinas, Blythe, New Mexico, Imperial Valley, and Arizona from 1977 to April 1980. The usual custom was for then-pusher Pedro Juarez to go to Mr. Quintero's house in Mexicali to inform him of the commencement of a particular season. Additionally, supervisory personnel would sometimes inform the workers in a mechanic's shop in Mexicali, or prior to the termination of operations in one particular area of the commencement of the next harvest season. The notice given was usually two to three days in advance.

Marcelino Quintero -- the son of Juan Quintero -- worked for Respondent since 1976 when he was' employed in the Imperial Valley

[5] Indeed, former forewoman Maria Sagrario Perez suggested that subsequent "invitations" to the work-stoppage participants co work at other locations was a part of Respondent's scheme to deceive the workers and make them "shed tears of blood". (R.T., Vol. XII, p. 127, 11. 13-14). Because I have considered the record evidence independently of the testimony of Ms. Perez, I decline to impute such a nefarious scheme to Respondent's management personnel. However, the condonation and subsequent refusal to rehire the workers effectively excluded many harvesters from the labor market for some seven (7) months.

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and Blythe. In 1977, he worked for Respondent in the Imperial Valley and Blythe. In 1977, he worked for Respondent in the Imperial Valley, Blythe, Arizona and Salinas. In 1978, he was employed in the Imperial Valley, Blythe, and Salinas, and in 1979 in Blythe, Arizona, and the Imperial Valley.

As neither of the Quinteros worked in the 1979 Salinas harvest, neither was involved in the work stoppages and thus they were not signatories to the list of workers who engaged in the labor disturbances which marked the 1979 Salinas operations. Marcelino Quintero, however, was a UFW activist who passed out leaflets in the Imperial Valley on two occasions in 1979 in the presence of foreman Pedro Juarez and Raul Ramirez.

Both Quinteros worked in Pedro Juarez[1] crew in Arizona in the spring of 1980. Pablo Quintero testified that foreman Juarez asked him in Arizona whether he would be going to Salinas. Quintero answered that he hadn't been to Salinas in several years and felt like doing so this year. The foreman made no response. When Marcelino Quintero asked the foreman when the Salinas season would start, the foreman answered that he did not know.

Because of an "emergency" at home in Mexicali, Pablo Quintero did not work the final day of harvest in Arizona (Saturday, April 20). Although Marcelino Quintero did work the that foreman Juarez had already left for Salinas. Early Wednesday morning (April 23) the three Quinteros left for

Salinas in Juan's pick-up truck arriving later that evening. Early the next morning, Pablo and Marcelino took the company bus to Respondent's field in Gilroy. Foreman Juarez told the Quinteros that he was "already full". Supervisor Pena then approached Juarez and asked "These people? What, Pedro?" The foreman responded, "l don't know". (R.T., Vol. IV, p. 17, 11. 11-14). When Pablo Quintero asked Mr. Pena about work, the supervisor denied that any system of seniority existed. Both Marcelino and Pablo Quintero testified that they saw many "new" workers -- who they didn't recognize -- in the Gilroy field on the day they showed up for work.

For the Respondent, foreman Pedro Juarez testified that he announced to his crew on Friday, April 19, 1980, that the next I day would be the last, but that he did not know when the Salinas harvest would commence. On Monday, April 22, he would tell them when the Salinas harvest would start. Supervisor Pena called him on Monday at around noon and told him that work would start in Salinas on the following Wednesday. On Tuesday morning, the foreman distributed -- as was his-' custom -- checks to his Arizona employees at the Popular Drug Store and Standard station in Calexico, California, and at the mechanic's shop in Mexicali. At that time, he told the workers when the Salinas harvest would start, and received assurances from various of the Arizona harvesters that they would follow the circuit to Salinas. As he was still seeking his required number of trios, Mr. Juarez subsequently hired in Calexico that day the balance of the work

force he would need in Salinas. Upon his arrival in Salinas, Mr. Juarez had his entire nine-ten trios, and thus was unable to offer work to either of the Quinteros who had not shown up for their checks in any of the three Southern California localities on Monday, April 21.

B. Analysis and Conclusions of the Alleged §1153 (a) and (c) Violations:

Since neither Marcelino Quintero nor Pablo Quintero participated in the 1979 Salinas work stoppages, General Counsel has suggested that their inability to obtain work in Salinas in 1980 was related; to their own union activities and to the more visible pro-UFW conduct of their relative Juan Quintero. Thus, the prima facie violation is alleged in the UFW sympathies of the workers, the anti-union animus of the Respondent, and the appropriate applications for work in Salinas in the spring of 1S80. The General Counsel's theories in this regard, however, must be juxtaposed against Respondent's explanation that (1) the Quinteros failed to appear on Monday, April 21 to collect their paychecks in Calexico, and thus were not notified of the Wednesday, April 23 Salinas starting day; and that (2) when the Quinteros did arrive in Salinas on Thursday, April 24, foreman Juarez had already hired his required 9-10 trios.

Indeed, Respondent's proffered business justification for the failure to rehire the Quinteros is consistent with General Counsel's theory of Respondent's practices with respect to the I pre-work stoppage hiring patterns: To wit, Respondent's foremen

would notify the workers in a particular location when the next season would commence. Where possible, workers were invited to "follow the circuit". A "three-day grace period" was recognized for those workers who communicated their desire to work the upcoming season. That the Quinteros were not rehired, and not notified of the starting date in Salinas was due, according to Respondent, solely to their failure to show up for and to receive their checks in Calexico/Mexicali on the day when foreman Juarez completed his hiring.

In rebuttal, General Counsel may point to the record evidence that work would have become available for the Quinteros during the early spring of 1980. As in the past, the foremen often had need to hire throughout the season. Indeed, the record reflects that because of the protest of Maria Sagrario Perez' crew discussed, infra, there were numerous vacancies in early May at least on one wrap machine. Additionally, the cryptic conversation between Mr. Pena and foreman Juarez, the early indication by Pablo Quintero that he intended to work in Salinas in 1980, and the ultimate treatment afforded Juan Quintero buttress the , conclusion that some discrimintory motivation' caused the Quinteros the difficulties they encountered in Salinas in April 1980. Since the foreman was aware of Mr. Quintero's interest in and desire to continue to work once the Salinas season started, it seems peculiar that Pedro Juarez did not observe the three-day grace period in this particular case. He apparently sought advice of his own superior -- Mr. Pena -- in this regard, but

failed to hire either on April 23.

On balance, I find that the General Counsel has established by a preponderance of the evidence that there was a connection or causal relationship between the Quinteros' union activities and their failure to be rehired on April 23. See Jackson & Perkins; Rose Co., 5 ALRB No. 20 (1979). They would not have been refused work during the spring 1980 Salinas season had it not been for their UFW activities and relationship to Juan Quintero, rather than because of the "unavailability" of work upon their arrival in Salinas.

I do not view the Act as giving the Board a license to dictate the method by which an employer chooses to hire its work force, so long as the method selected is not taken for prohibited purposes. See Maggio-Tostado (1977), 3 ALRB No. 38, citing NLRB v." Midwest Hanger Co. (8th Cir. 1973) 82 LRRM 2693. Past practices of Respondent show a pattern of hiring which spreads over the first few days of a particular season, and often calls for replacement workers throughout the duration of any one harvest. (See General Counsel Exhibit #27)'. Uniquely in 1980, the foremen hired "all nine-ten" trios in the Calexico-Mexicali area for the upcoming Salinas season. However, foreman Juarez knew for a fact that at least Pablo Quintero desired to work in Salinas from his previous conversations, and he could readily infer same from Marcelino's questions in that regard. Relying upon the three-day rule, the Quinteros arrived in Salinas well within their specified "grace period". Further, the conversation between

foreman Juarez and supervisor Pena suggested that some independent judgment was exercised by these management personnel in determining the employability of the two Quinteros. The events surrounding Juan Quinteros' termination, and the anti-union conduct which is the subject of this case, as well as a previous unfair labor practice hearing (see J. R. Norton Co. (June 22, 1978) 4 ALRB No. 39, enf'd in part, J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal. 3d 1.) suggest strongly that the abrupt departure of the foreman from Calexico, and the immediate filling of his crew was more than fortuitous.

Lest Respondent contend that it is guilty of unlawful conduct, on the one hand, for failing to notify its workers in one location of the starting date for the next season, and, at the same time, equally violative of the Act for making such notification, some commentary on the instant case is in order. The prohibited conduct here is the abandonment by Respondent of its "seniority" preferences in hiring which formerly encouraged long-term employees to follow the circuit. As discussed, supra, this abandonment followed the 1979 work stoppages in Salinas which were geared to effectuate a collective bargaining agreement between the UFW and Respondent. That Respondent would then resume its former practices -- after the work-stoppage participants had been excluded from the various seasonal operations -- does not exonerate the conduct. Rather, the resumption of the former practice serves only to continue the exclusion of the original work-stoppage participants. That is,

the newly hired (and "non-paroista") workers from New Mexico, Arizona, and the Imperial and Palos Verdes Valleys would "replace" the former Salinas harvesters during the 1980 season. The Quinteros -- although non-participants in the 1979 work stoppages -- were "victims" of these hiring practices. Had they not been related to Mr. Juan Quintero, had Pablo Quintero not engaged in union activities on his own, they would have been rehired for the 1980 Salinas season. While foreman Juarez may not have been under a duty to specifically notify the Quinteros of the start of the Salinas harvest, at minimum, they reasonably expected to resume working once they had notified their foreman of their desire and interest in working in Salinas. That they were not permitted to do so was at least in part due to prohibited discrimination and I will recommend the appropriate remedy. See Sam Andrews' Sons (August 15, 1980) 6 ALRB 44 review den. Ct. App., 2nd Dist., Div. 1. February 17, 1931. Having determined that Respondent's business justification fails to refute the inference of discrimination which may be drawn from the circumstances, then, I find that Respondent violated Sections 1153 (a) and (c) of the Act by refusing to rehire Marcelino Quintero and Pablo Quintero on or about April 23, 1980.

VI. Work Stoppage of Maria Sagrario Perez ' Crew of May 9 1980.

Forewoman Maria Sagrario Perez commenced working for Respondent cutting and wrapping in 1976. She became a forewoman for a machine crew in 1977 -- in charge of some 31 people, driving

them to and from work in the company bus, and generally supervising their employment. She followed the circuit at Respondent's New Mexico, Arizona, Blythe, Imperial Valley, and Salinas operations from 1977 to 1979. As discussed, supra, Ms. Perez was responsible for the hiring of the crew, some of whom followed the circuit of Respondent's various operations.

Ms. Perez' crew commenced the harvest season in Salinas on May 5, 1980. On Friday, May 9, her crew worked uneventfully until the 9:00-9:30 a.m. break. At that time, the forewoman approached the coffee truck stationed at the edge of the field to purchase a taco. As Ms. Peres was returning, forewoman Sara Favila de Figueroa was approaching the coffee truck, speaking with worker Aurelia Macias. Ms. Perez overheard the following conversation between Sara Favila and Aurelia Macias: "Look, you 're watching your figure to be beautiful, and here you are eating a barbecued taco". (R.T., Vol. XII, p. 161, 11. 19-22). Taking the reference to be directed at her, forewoman Perez approached forewoman Favila and an angry confrontation ensued. Perez conceded to having pinched Favila. Favila conceded to having raised a milk carton in a threatening manner. Both admitted to a heated exchange of earthy epithets before returning to their irrespective machines.[6] Both forewomen were called over to supervisor Roberto Santa Maria, and the latter told Ms. Perez

[6] A history of ill-will between the two forewomen preceded this incident. Both had been previously warned that the continuance of the hostilities could result in the termination of either (or both).

that she was fired for having started a fight. When Ms. Perez protested to head supervisor Pena that the firing was unfair and that she had a "whole machine of witnesses", the latter responded "I don't know anything". (R.T., Vol. XII, p. 165, 11. 12-13).

Ms. Perez returned to her machine to gather her equipment, lunch, and notebooks. She announced to her crew that she had been, fired, and thanked them for their work. As she headed for the road to obtain transporation back to Respondent's office, many of the workers left the machine and joined Ms. Perez in protest. The supervisor announced that those workers who wanted to return to the machines could so so. Those who did not were fired.

Approximately twenty-one (21) workers remained with their forewoman at the edge of the field until a company bus drove then; to their cars where they then proceeded to the J. R. Norton office. The forewoman and worker Angelita Medrano -- serving as interpreter -- entered the office and spoke with Peter Orr and Art Carroll, as the other workers remained outside the office. Ms. Perez was informed that Respondent did not wish to lose such good forewoman, and that she would receive a telephone call at her house as to the ultimate resolution. The forewoman and her supporters returned to the former's house and awaited the telephone call. No call was made from the company, and supervisor Santa Maria brought the forewoman's termination check to her house later that evening.

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B.) Analysis and Conclusions

1.) The Discharge of the Protesters* from Maria Sagrario Perez' Crew:

I find that the members of forewoman Perez' crew who left the machine on May 9 were fired, rather than voluntarily quit as alleged by Respondent. In doing so, I have considered the following factors:

General Counsel witness Ana Alarcon testified that supervisor Santa Maria offered an option to the workers who had left the machine in sympathy for the terminated forewoman. Those who wanted to could keep on working. Those who stayed (in protest) were fired and could pick up their checks on the following Monday. The precise language recalled by witness Alarcon was "Ustedes estan despedidos" (R.T., Vol. V, p. 101, 11. 7-13)'. ("You are fired"). This statement was corroborated by worker Belen Perea -- mother of the fired forewoman -- who testified that the supervisor announced to the protesters that "Ya no tienen trabajo" (R.T., Vol. V, p. 130, 11. 9-12). ("You have no more jobs".) Worker Guadalupe Martinet recollected that supervisor Santa Maria threatened that if the workers stopped working that day, he would not hire" them again. (R. T., Vol. XII, 5-6). Jose Luis Trujillo testified that Santa Maria said that those who went to testify on Ms. Perez' behalf were out of (jobs. (R.T., Vol. XII, p. 49, 11. 17-20). The supervisor reconfirmed the termination the following Saturday (May 10) when Mr. Trujillo went to the shop for his final check.

While Respondent contends that the workers "voluntarily resigned", none of its witnesses could recall precisely the dialogue between the protesters and supervisor Santa Maria as they awaited the arrival of the bus to take Ms. Perez back to the company office. Indeed, Respondent's own witness, Felicitas Rosas, testified that she feared she would lose her job if she left the machine and joined the other protestors. (R.T., Vol. XVIII, p. 123, 11. 3-8). Supervisor Santa Maria's testimony of the incident was somewhat less than fully credible in that he denied firing the foreman -- recalling only that he "was thinking about letting her go from the company". (R.T., Vol. XI, p. 48, 11. 6-8). I thus credit the testimony of General Counsel's witnesses in this regard and find that the protesters were in fact 14-fired for leaving their jobs on May 9. Whether the discharge of these twenty-one members of the Perez crew was a violation of Section 1153 (a) of the Act, then, becomes central to the analysis .

(2) The Section 1153 (a) Charge

Since it undisputed that the reason for the termination of, the twenty-one workers was the work stoppage of May 9 , the only further question for resolution is whether the Perez crew was involved in protected concerted activity.

Section 1152 of the Act provides in pertinent part that "[E]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...." It is designed to assure employees the fundamental right to present grievances to their employer to secure better terms and conditions of employment, recognizing that employees have a legitimate interest in acting concertedly to make their views known to management without being discharged for that interest. (See Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979), citing Hugh H. 'Wilson Corp. v. NLRB, 414 F. 2d 1345, 1347-50 (3d Cir. 1969), cert, denied 397 U.S. 935 (1970)).

Under the NLRB, the discharge of a supervisor may be a "matter of legitimate interest to the employees" and "... [have] a substantial impact upon their own working conditions" and employees may therefore be engaged in protected concerted activity if they strike to protest a supervisor's discharge. Morris , The Developing Labor Law (1971-75 Supplement) p. 56, citing Kelso Mariner, Inc. (1972) 199 NLRB 7, 13, 81 LRRM 1184. Not all forms of employee protest over supervisory changes, however, are per se protected. Two basic criteria must be satisfied: (1) The protest must in fact be a protest over the actual conditions of their employment. Mere sympathy, for example, for the economic well-being of the foremen would not qualify. (2) The means of protest must be reasonable. Puerto Rico Food Products v. NLRB (1st Cir. 1980) 104 LRRM 2304. Traditionally, protected activities have been found where the supervisor was linked to an underlying employment concern of the workers. (NLRB v. Guernsev-

Muskingum Electric Co-op. Inc., (6th Cir. 1960) 285 F. 2d 8, 47 LRRM 2260; NLRB v. Phoenix Mutual Life Insurance Co., (1948) 167 F. 2d 983, 22 LRRM 2089 (7th Cir.) cert, denied, 335 U.S. 845, 22 LRRM 2590; Dobbs Houses, Inc., v. NLRB, 325 F. 2d 531, 54 LRRM 2726 (5th Cir. 1963). However, the NLRB has maintained an historic concern for the ability of management to select supervisory personnel while limiting the circumstances in which employee work stoppages to influence supervisory selection are protected. Plastilite Corporation, (1965) 153 NLRB 180, 182 enf'd in pertinent part 375 F. 2d 243 (8th Cir. 1967).

The ultimate question is thus whether the protest is in fact a protest over the actual conditions of the workers' own employment. The focus is upon the subjective state of mind of the protesting employees. In Puerto Rico Food Products, supra, the Court of Appeals refused to enforce an NLRB order in the absence of evidence that the foremen's assistance to the workers' unionization efforts motivated their protest. Since there was substantial evidence of a nexus between the protest over the foreman's firing and the employee's' legitimate interests, the Court of Appeals found the activity unprotected. The Board, in a majority decision, however, had found that the employees had a genuine interest in the continued employment of a supervisor who had exhibited concern about their welfare as employees and counseled them on matters having a direct bearing on their employment relationship. The spontaneous reaction of the employees to the news of the supervisor's discharge evidenced

the genuiness and reasonableness of the employees' beliefs.

In reviewing the instant case, I am mindful of applicable NLRB precedent in the absence of reversal by the United States Supreme Court or the Board itself. (Roberts Electric Co., (1977) 227 NLRB No. 194; Ford Motor Co., (1977) 230 NLRB No. 101, citing Iowa Beef Packers, Inc. (1963) 144 NLRB 615, 616; Novak Logging Company (1958) 119 NLRB 1573; The Prudential Insurance Company of America (1957) 119 NLRB 768, 773. Applying the principles of Puerto Food Products, supra, as formulated by the Board, it is apparent that the workers' relationship to forewoman Perez was somewhat more remote than in the NLRB decision. Although Maria Sagrario Perez hired her workers, General Counsel has contended that long-term relationships were destroyed by the Respondent's conduct following the 1979 work stoppages. Thus, only her mother (Belen Perea) and father (Carols Perea) had worker with the forewoman over any length of time. In Puerto Rico Food Products. the supervisor counselled the workers with respect to future strike movements and the distribution of propaganda. Here, forewoman Perez was firmly entrenched in management's efforts to discourage unionization until the date of her discharge There, evidence suggested that the supervisor exhibited concern about the workers' welfare as employees. Here, many witnesses testified that the firing decision was "unfair", but no one suggested any unique qualifications of Ms. Perez.

While it may be contended that in the agricultural sphere--where forepersons customarily hire and fire employees, drive them

to work, and often times oversee the work of their immediate and distant relatives -- a general presumption of protected activity is appropriate, such has certainly not been the precedent, of the NLRB. See particularly, member Murphy's dissent in I Puerto Rico Board Products, supra, Board decision, 101 LRRM at 1310. It is likely that the workers were genuinely concerned about the unfairness of the decision to terminate Ms. Perez in 8 the absence of input from her witnesses, both because of their sympathy for the forewoman, as well as their reasonable concern for the security of their own jobs. However, the termination of supervisory personnel management has traditionally been decided by management, rather than by the rank-and-file. The stability of the work environment might be threatened by extension of this protection. And such an extension to activities which involve neither the conditions of employment nor a labor dispute" would surely exceed the scope of the statutory language.

Under the ALRB, the discharge of a supervisor which has the natural tendency to interfere with, and restrain employees in the exercise of their rights may constitute an unfair labor practice. Dave Walsh (October 27, 1978) 4 ALRB No. 34, review den. by Ct. App., 2nd Dist., iv. 4, January 9, 1979. Thus, where the supervisor’s discharge is part or a general campaign to give unlawful aid and assistance to a favored union, it is a violation of the Act. Inferentially, at least, employee protest over such action -- assuming that it might be appropriate under the circumstances -- could constitute protected concerted activity.

Similarly, the discharge of a pro-UFW crew boss, and the employees in his/her pro-UFW crew have been found to violate Labor Code Section 1153 (c) where the employer replaced the crew in a manner demonstrating a desire to avoid rehiring the union activists. Kaplan Fruit & Produce Co., Inc. (May 24, 1979) 5 ALRB No. 40, review den. by Ct. App., 5th Dist., March 24, 1980, hg. den. May 14, 1980.

On the other hand, where this Board has found insufficient record evidence to show that the discharge of a supervisor created an impact on other employees which would tend to restrain and coerce them in the exercise of their Section 1152 rights, no violation of the Act has occurred. Sam Andrews' Sons (1979) 5 ALRB No. 68. In M. Caratan (October 26, 1978) 4 ALRB No. 83; 6 ALRB No. 14 (March 12, 1980) review den. by Ct . App., 5th Dist., May 27, 19SO, the discharge of an assistant foreman was upheld in the absence of known pro-union activists of the supervisor. Nor did the Board find therein any plan by the employer to interfere with the union activities of nonsupervisory employees.

In the instant case, General Counsel has withdrawn its charges with respect to forewoman Maria Sagrario Perz (supra). It may be noted, however, that no evidence as introduced regarding any pro-UFW sympathies that Ms. Perez might have entertained while employed with Respondent and which were well known to the employees Nor was the contention ever made that her discharge tended to intimidate the exercise of the employees' own rights, or that the employer was engaging in a plan to interfere with any pro-

union activities of her crew.

On balance then, I find the relationship between the employees' exercise of their own rights and the decision to terminate forewoman Perez to be tenuous at best. Certainly, there is some logical gap between the workers' concern for their own job security, and the apprehension (albeit a sincerely held one that a supervisor has been unfairly treated. Although concluding that Respondent discharged the twenty-one (21) members of the Perez' crew because of the work stoppages in protest of the forewoman's discharge, I find that this protest was not protected activity. I thus will recommend that the allegations of paragraph 5(d) of the amended and consolidated complaints be dismissed with the following exception:

(3) Failure to Rehire Guadalupe Martinez:

At the hearing, worker Guadalupe Martinez testified that 15 she reapplied for work with Respondent at the end of the Salinas harvest in early September 1960. At the suggestion of Celestino Nunez' wife (Lucy), worker Martinez went to the Respondent's shop and asked foreman Ignacio Lopez (Maria Sagrario Perez' replacement) if he needed any wrappers for the machine. He replied that he needed three, and then proceeded to speak with Sara Favila. He returned and informed Ms. Martinez that he already had the three wrappers and that she (Ms. Martinez) was not needed.

Since I consider Respondent's offer to reinstate the May 9 protesters upon proper application (R.T., Vol. I, p. 15, 11. 10-13)

to be comparable to the condonation of the work-stoppage participants in 1979 (see discussion, supra), the failure to rehire Ms. Martinez constitutes a violation of §1153(a) absent some legitimate business justification for the Respondent's decision.

I find foreman Ignacio Gonzales' testimony in this regard, however, particularly troublesome. He did not recall the name of worker Martinez, and denied receiving assistance in hiring from any other foremen. However, he did admit to having hired one or two people on one occasion in September, but not three. Because witness Martinez' testimony was reasonably precise, direct, and sincere, I credit her recollection of events rather than that of foreman Gonzales. Although forewoman Favila also denied helping Mr. Gonzales hire people in the fall of 1980, the denial was less than absolute (R.T., Vol. XIX, p. 33, 11. p.6-20). She also did not recollect worker Martinez. Weighing; the totality of the evidence, I find it more likely than not that Guadalupe Martinez' participation in condoned activities caused foreman Gonzales to "reconsider" his employment needs in September 1980, and thus deny the worker rehire. Such conduct is violative of §1153 (a) of the Act, and I will recommend the appropriate remedy.

VII. The Discharge of Juan Quintero of May 28, 1980

A.) Facts:

Juan Quintero worked as a cutter and packer for Respondent since early 1976. A resident of Mexicali, Mr. Quintero worked seasonally for Respondent in Salinas, Imperial Valley, Blythe,

and Arizona, and also traveled the entire circuit, including New Mexico, in 1977 and 1978. As discussed, typically the foremen would come to Mr. Quintero's house a few days before the harvest would commence at the next location, and advise him of the proximate starting date. Mr. Quintero participated in the 1979 work stoppages in Salinas, and signed the list which permitted the replaced workers to return and complete the harvest. Because he had heard from friends that the Respondent was not going-to hire the Salinas work-stoppage participants in New Mexico, Mr. Quintero returned to Mexicali and did not reapply for work until the Blythe harvest season. In the latter regard, Mr. Quintero approached "pushers" Raul Ramirez and Abel Luna but was informed that Respondent wouldn't hire those from Salinas. Only after he traveled from Mexicali to Blythe in a panel truck with Ramon Diaz and the Lozano family, was he offered work by Pedro Juarez.

On one occasion during the 1979 (first) Blythe season, foremen Pedro Juarez and Juan Quintero were involved in a heated dispute regarding the merits of the union. The discussion took place en route from Calexico to Blythe in Pedro Juarez' true Mr. Quintero opined that since Juarez' job was secure and his wasn't, that is why the workers favored the union. The foreman retorted obscenely in an angry manner. (R.T., Vol. III, p. 17, 11. 22-28; p. 18, 11. 1-11).

Juan Quintero further displayed his UFW sympathies by being Member of the union bargaining committee in El Centro during the 1979 Blythe harvest season. Because hewas employed in Blythe,

he continued on the circuit to Imperial Valley, and then Arizona. He testified against Respondent concerning the 1979 Salinas work stoppages and events thereafter in case Nos. 79-CE-78-EC, et al. on January 29, 1980. (General Counsel Exhibit No. 3G). In April 14, 1980, Mr. Quintero served charge number 80-CE-38-SAL foreman Pedro Juarez in the fields in Marana, Arizona. (General Counsel Exhibit No. 6), aggrieving, inter alia, alleged “pressure" on union-activist seniority workers.' On April 20, 1980, Mr. Quintero requested and received a leave of absence which could permit him to return to work for the Salinas harvest on 5 May, 1980.

Mr. Quintero resumed his employment in Pedro Juarez' crew until his termination on May 28. On that day, pusher Abelardo Velasquez, displeased with the lettuce cut by the worker, "threw some lettuce" at Mr. Quintero, which struck the latter's feet. Quintero warned the pusher not to throw the lettuce or there could be "Putazos" --"trouble", or physical violence. Velasquez retorted that he was going to fire Quintero. Foreman Pedro Juarez was approximately fifteen feet away from this encounter, and approved the termination as Mr. Velasquez related the sequence of events. Abelardo Velasquez returned to inform Juan Quintero that he had been fired and that Pedro Juarez would do the-paper work. The foreman drove the discharged employee back to the office in the foreman's pick-up. Juarez commented that "he was just getting things fixed up" and now he had to fire Quintero. (R.T., Vol. III, 65, 11. 9-13). Although invited to file a complaint against

Respondent, Mr. Quintero declined to inform his foreman of any intention he may have had to do so.

For the Respondent, Abelardo Velasquez testified that he warned Juan Quintero about packing "underweight" lettuce on May 20, and that the worker responded vulgarly, suggesting that he would "pack the pusher (Mr. Velasquez) into the box with the lettuce". (R.T., Vol. XXIV, p. 88, 11. 8-28. Mr. Quintero repeated the vulgar language on the company bus that day in-the presence of other crew members, referring to Mr. Velasquez as a "kiss-ass" Again, on May 28, pusher Velasquez noticed that Mr. Quintero was cutting lettuce that was too "loose" or "soft". The pusher threw the loose heads of lettuce down into the dirt and told Mr. Quintero that the Respondent did not want so many loose heads of lettuce. Quintero responded with the aforementioned threat of "putazos" and then repeated the threat in a louder tone of voice. The pusher asked for the reason why the threat had been made and told Quintero to stop working because he could not have an enemy at work. "You have arms and a knife and I do too". (R.T., Vol. JXXIV, p. 93, 11. 5-9). Quintero agreed to stop working if he would be paid right away. The termination was approved by foreman Juarez as well as production supervisor Celestino Nunez.

B. Analysis and Conclusions of the Alleged §1153(a), (c),and (d) Violations:

Section 1153(c) of the Act makes it an unfair labor practice [for an employer "[b]y discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to

encourage or discourage membership in any labor organization". The General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the discharge. Maggio-Tostado, 3 ALRB No. 38 (1977), citing NLRB v. Winter Garden Citrus Products Co-Operative, 260 F. 2d 193 (5th Cir. 1958). The test is whether the evidence, which in many instances is largely circumstantial, establishes by its preponderance that the employee was discharged for his or her views, activities, or support for the union. Sunnyside Nurseries, Inc. (May 20, 1977) 3 ALRB No. 42, enf. den. in part; Sunnyside Nurseries, Inc., v. Agricultural Labor Relations Ed. (1979) 93 Cal. App. 3d 922[7] Among the factors to weigh in determining General Counsel's prima facie case are the extent of the employer's knowledge, the timing the alleged unlawful conduct, and the Respondent's anti-union animus.

In the instant case, Juan Quintero openly and in the presence of foremen discussed the merits of unionization. He participated In the work stoppages in Salinas in 1979, and was signatory to the list which Respondent mandated for the workers to return to complete the Salinas harvest. Mr. Quintero was a member of the

[7]Analogously, Section 1153 (d) of the Act makes it an unfair labor practice for an agricultural employer "to discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony" under the Act. This language closely parallels Section 8(a)(4) of the NLRA, and has been interpreted broadly in order to facilitate the policy of encouraging the free flow of communications to the Board. See NLRB v. Scrivener (1972), 405 U.S. 117, 79 LRRM 2507; Bacchus Farms (1978), 4 ALRB No. 26; C. Mondavi & Sons dba Charles Krug Winery (August 14, 1979) 5 ALRB No. 53, review "den. by Ct. App., 1st Disc., Div. 2, June 18, 1980, hg. den. July 16, 1980.

"Southern" unit negotiating team for the union, testified against ! Respondent at the El Centro hearings in the winter of 1980, and served an unfair labor practice charge upon foreman Pedro Juarez during the Arizona harvest in spring 1980. I thus do not credit Pedro Juarez[1] and Abelardo Velasquez' denials of knowledge of the union activities of worker Quintero.

The timing of the discharge -- some three weeks after the commencement of the 1980 Salinas harvest, and thus, three weeks after the expiration of the "immunity" afforded by the leave of absence granted on April 20 -- is also somewhat indicative that the discharge was discriminatorily directed at discouraging membership in the UFW.[8]

The record is replete with instances of Respondent's anti-union animus. Specifically, foreman Pedro Juarez' obscene suggestion to Mr. Quintero in the panel truck on the way to the field in Blythe, contemporaneous violations of the Act discussed supra, and the previous unfair labor practice findings J R. Norton Co. (June 22, 1978) 4 ALRB No. 39, enf'd in part; J.R. Norton Co. v. Agricultural 1,Labor Relations 3d. (1979) 26 Cal. 3d 1 all provide ample indicia of Respondent's discriminatory

[8]Although ultimately rehired in Blythe following the 1979 Salinas work stoppages, Mr. Quintero narrated the difficulties he I encountered in obtaining such employment. He mentioned that en two occasions he was informed by Respondent's supervisory personnel that he would not be rehired because he was a striker from Salinas (R.T., Vol. III, p. 14, 11. 20-24- p. 15, 11. 12-19). The difficulties encountered by Mr. Quintero that were the subject of the instant charge occurred following his El Centro testimony, and the service and filing of charge number I 80-CE-38-SAL.

motivation.

Respondent contends, however, that Mr. Quintero was fired for the reasons listed on his termination slip: (1) Because he cut "loose" lettuce; and (2) because he did not pay attention to his foreman and threatened his supervisors with physical violence. With respect to the first rationale proffered, it is uncontroverted that Respondent maintained certain standards regarding the lettuce) that it harvested. A properly cut and packed box of lettuce could not weigh less than 48 ounces. Those that did, would be tossed aside. Mr. Quintero had been orally warned of his deficiencies in this regard on at least one occasion (May 20 prior to his discharge. The second reason for termination -- the potentially violent situation and Mr. Quintero's inability to follow his supervisor's instructions -- were critical to Respondent's ability to pursue its economic enterprise. If workers – after warning -- were to be allowed to insult and berate the supervisors in the presence of other employees, the status of management and its ability to oversee Respondent's operations would be seriously undermined. Since the employees regularly utilized sharp knives in the lettuce cutting, real or growing enmity could result in tragic consequences.

Given that Mr. Quintero's pro-UFW conduct, testimony at hearing, and filing of charges is protected activity. (See Bacchus Farms, supra; E.H., Ltd., dba Earringhouse Imports (1977) 227 NLRB No. 118 [94 LRRM 1494], the issue for resolution is Respondent's real motivation for discharging this employee.

Where the discharge is motivated in any part whatsoever by the purpose of discouraging legitimate activity, the existence of contemporaneous, legitimate grounds for such discharge affords no defense to a finding of an unfair labor practice on the part of the employee. Jack Brothers & McBurney, Inc. (February 25, 1980) 5 ALRB No. 12, review den. by Ct. App., 4th Dist., Div. 1, Nov. 7 13, I960, hg. den. 24 December, 1980, citing Oklahoma Allied Telephone Co., Inc., (1974) 210 NLRB 916, 920; Hugh H. Wilson Corp. (1968) 171 NLRB 1040. The ultimate question to be decided is whether or not there is substantial evidence to support the conclusion that the employee would not have been discharged but for his protected activities. (Royal Packing Company v. Agricultural Labor Relations Board (May 3, 1977) 5 ALRB No. 31, enf'd. (1980) 101 Cal. App. 3d 826, 885, citing Mt. Healthy City Board of Education v. Doyle (1977) 429 U.S. 274 [97 S. Ct. 568, 16 ,50 L. Ed. 2d 471].

Here, Respondent has contended that Juan Quintero was fired because he did not cut lettuce properly and he used profane language in referring to his supervisor. I find, however, that Mr. Quintero's pro-union activities, his prior testimony against Respondent in an unfair labor practice hearing, and his filing and service of an unfair labor practice charge played a (substantial role in the final decision to fire him. I base this finding on the following considerations:

(1) Mr. Quintero's alleged deficiencies as a lettuce cutter belie credibility. He had been a farm worker for some twenty-four

(24) years, and was a long-term employee who had "traveled the circuit" of Respondent's various farming operations in three different states. As suggested by the testimony of supervisor Roberto Santa Maria, the quality of an individual's work can be readily ascertained during the first few days of employment. Respondent had been historically satisfied with Mr. Quintero's work. It is highly incongruous that he would suddenly be unable to cut and pack lettuce because it was either too loose or did not satisfy "The Respondent's maximum weight requirements.

(2) Abelardo Velasquez' concession that Mr. Quintero was watched more closely than other workers because the supervisor knew that this worker did not properly cut lettuce suggests disparate treatment of the alleged discriminatee. Because of the latter's work experience, the absence of previous complaint regarding the quality of his work, and the relative inexperience of Mr. Velasquez as a supervisory employee of Respondent, the unequal treatment inferentially relates to some other rationale for the termination.

(3) Mr. Quintero's profane language and "threat" to Mr. Velasquez might well provide a reasonable business justification for the termination. However, the entire context suggests alternative (proscribed) reasons for the firing.

(a) Mr. Quintero's remarks seem no more hostile, threatening, or insubordinate, than foreman Pedro Juarez' earlier remarks to Quintero about the UFW. Although unpleasant even by Mr. Quintero's own admission, the remarks were certainly not unfamiliar to the

workers in the fields. Yet foreman Juarez conceded that he had never previously fired any worker during his tenure as foreman with Respondent.

(b) While the presence of others increased Mr. Velasquez' anger, there is some indication that the entire situation was "set up" by the pusher's singling out of worker Quintero in the first instance, and the former's request that the profane utterance be reiterated more loudly on this second occasion.

(c) The timing of the discharge -- immediately following the confrontation -- would naturally seem to suggest an appropriate business justification for the Respondent's conduct. Here, however, the analysis is little aided by defining the incident that "triggered" the firing. Pusher Velasquez' singling out of worker Quintero certainly served as a precursor to the final 15; event. And since there were no legitimate criticisms of Mr. Quintero' s work, the conclusion is ineluctable that protected activity -- pro-union support, filing and service of the unfair labor practice charge, and testimony at an unfair labor practice hearing -- played a not insignificant role in the employer's conduct.

(4) The ultimate inquiry is not whether Mr. Quintero used profane language, and whether that fact, in the abstract, justified his firing, but whether Respondent would have discharged the worker but for his union activities. Cf. Harry Carian. Sales, 6 ALRB No. 55 (1980). Where a discharge is motivated by an employer's anti-union purposes, it may violate 1153(a), (c)

and (d) even though additional reasons, even of a legitimate nature may exist for the discharge. Abatti Farms, Inc. (May 9, 1979) 5 ALRB No. 34, enf'd in part; Abatti Farms v. ALRB (1980) 107 Cal. App. 3d 317 hg. den. August 28, 1980. Thus, as this Board has approved Judge Goldberg's language in NLRB v. Whitfield Pickle Co. (5th Cir. 1967) 374 F. 2d 576 [64 LRRI-1 2656]:

> "A company can have dominant motives, mixed motives, equal motives, concurrent motives, and bewildering combinations of these, but 'It must be remembered that the statute prohibits discrimination, and that the focus on dominant [or any other like adjective] motivation is only a test to reveal whether discrimination had occurred, [citation omitted] To invoke Section 8(a)(3), the anti-union motive need not be dominant (i.e., larger in size than other motives), in some cases it may be so small as the last straw which breaks the camel's back. We reiterate that all that need be shown by the Board is that the employee would not have been fired but for the anti-union animus of the employer. 374 F. 2d at 582."
> Harry Carian Sales, supra, at p. 13.

Illustrative to this case is the Board's decision in Giannini & Del Chiaro Co. (1980) 6 ALRB No. 38. There, the worker's conduct during the protest of a supervisor's abusive treatment of a fellow worker was considered not so egregious as to warrant loss of the Act's protection. In Giannini, as here, the worker became embroiled in an argument with his immediate supervisor. There as here, the supervisor's conduct was instrumental in escalating the situation. There, as here, the worker was a long-term employee with a satisfactory record and no history of outbursts. Although the language herein may have been brutal, and although the situation could possibly have become violent, I do not perceive the instant exchange to constitute intimidation

or a real threat of violence by employee Quintero. Such activity which the misconduct is so violent or of such a serious nature as should lose its mantel of protection only in flagrant cases in 3 to render the employee unfit for further service. Firch Baking Co. (1977) 232 NLRB 772 [97 LRRM 1192]; American Telephone & Telegraph Co. v. NLRB (2d Cir. 1975) 521 F. 2d 1159 [89 LRRM the instant context, I find that his pro-UFW activity should not be deprived of protection. Hugh H. Wilson Corporation v. NLRB (3d Cir. 1969) 414 F. 2d 1345 [71 LRRM 2827], cert. den. (1970) 3140]. Since I do not find Mr. Quintero's conduct indefensible in 11397 U.S. 935 [73 LRRM 2600].

I find that, in view of the numerous other unfair labor practices committed by Respondent during this time, particularly the policy of excluding the leaders of the 1979 Salinas work stoppages from future employment, and the peculiar circumstances surrounding this discharge, Respondent would not have terminated Juan Quintero but for its anti-union animus. I therefore conclude that Respondent violated Sections 1153(a), (c) and (d) by this conduct, and will recommend the appropriate remedy therefor.

VIII. Discharge of Jose Amador of June 6, 1980

A.) Facts:

Jose Amador was hired as an irrigator for Respondent in April 1976. The following year he worked as a tractor driver, and served in that capacity under three foremen through June 1980. Mr. Amador was a seasonal employee during his first two years as

a tractor driver with the Respondent, and worked full time during the last year.

During the 1979 Salinas harvest, Mr. Amador participated in one work stoppage for "less than one hour", while the ground crews were stopped (R.T., Vol. XV, p. 31, 22-27). He was paid a full-day salary on that day, and apparently no person from company management observed Mr. Amador's limited participation in the concerted activities.

Mr. Amador's employment with Respondent was otherwise uneventful until late-April, early-May 1960, when a scraper fell off his tractor while he was hauling cars to the river. No damage had been caused, but two months later, as Mr. Amador was driving from the field to park the land plane[9] his tractor was pulling, the cylinder broke as he traversed a steep hill. When Mr. Amador revealed the information to foreman Carlos Jimenez, the latter retorted angrily, and then went to speak with supervisor "Jimmie" Izumizaki. The foreman returned and informed Mr. Amador that he had been fired. Jose Amador proceeded to the shop for his check are offered to pay Respondent for the damaged cyclinder. The supervisor refused, saying that he had been advised by the foreman that Mr. Amador "had broken a lot of equipment". (R.T., Vol. XV, p. 13, 11. 12-19).

Jose Amador testified that the land plane was damaged even though he had been cautiously traversing the same road that he always used when driving from the field to the parking lot. He further suggested that other drivers had similar mishaps –

[9] Equipment hauled by the tractor for "planing" the fields.

Rogelio Senate and "Roberto"—-but that they managed to keep their jobs.

For the Respondent, foreman Carlos Jimenez denied anti-union animus in the termination decision. Rather, he indicated that Mr. Amador had been fired because "he'd been making mistakes for two and a half years, and it seemed to me that that was the last." (R.T., Vol. XI, p. 64, 11. 21-23). He further testified that Mr. Amador had always used a less steep road in moving equipment, and knew, or should have known, that he utilized the wrong road on June 6.

B. Analysis and Conclusions:

General Counsel has suggested that "[Respondent's] defense to the charge that Jose Amador was discriminatorily discharged was shown by the evidence to be meritorious". (General Counsel's Brief, p. 107). I agree. Even though there was some indicia of disparate treatment, and a lack of prior warning, there was no evidence that any of Respondent's supervisory personnel had any knowledge of Mr. Amador's limited union activity. Said participation consisted in a less than-one-hour work stoppage outside the presence of supervisory personnel. Nor does the timing of the discharge -- some nine months following the stoppages -- suggest any anti-union motivation in the termination, The employment termination slip lists the reason for the discharge as "Damage [to] land plain (sic) for not paying proper attention., Proper use." (General Counsel Exhibit No. 15). The reasons articulated to Mr. Amador by supervisor Izumizaki confirmed

he written explanation, and were made contemporaneous with Respondent's awareness of the damaged cylinder.

While the demeanor of witnesses Jimenez and Amador suggested that a certain amount of ill-will existed between the foreman and the employee, and I entertain a genuine doubt as to whether Mr. Amador knowingly traversed the "wrong" road on his final day of work, I find that General Counsel has failed to establish by a preponderance of the evidence that there was a connection or causal relationship between Mr. Amador's union activities and the June 6, 1980 discharge. See Jackson & Perkins Rose Co. 1979.) 5 ALRB No. 20. The termination would have occurred regardless of Mr. Amador's participation in the previous harvest work stoppages. I therefore find that Respondent did not violate Section 1153 (a) or (c) of the Act by the termination of Jose Amador and recommend that that portion of the amended and consolidated complaints be dismissed. The potential §1153 (e) aspects of this charge will be discussed infra in the section entitled Bargaining Issues.

IX. The Bargaining Issues

A.) Facts:

(1) Preliminary Contacts:

As noted above, the U7W was certified as" the exclusive bargaining representative of Respondent's "Northern" unit employees on 24 November 1975. Negotiation sessions were held on May 26, June 1, July 21, September 2, and September 30, 1976, with attorney Richard Thornton serving as Respondent's negotiator

for the Salinas-Watsonville area, and Robert Garcia as negotiator for the UFW. When the Salinas-Watsonville season terminated in late September or early October, the workers left the area, and the UFW made no request for further meetings that year.

Negotiation sessions recommenced on July 14, 1977, and the UFW canceled a meeting tentatively scheduled for August 2. Two meetings were held on August 15 and August 16, 1977, with the UFW arriving 45 minutes and one hour late respectively. On September 28, 1977, the UFW submitted a written proposal to negotiator Thornton. It was during this year that Marion Steeg assumed the duties of UFW negotiator for the J. R. Norton Company, and also during this period that wide areas of agreement existed between the union and the company with respect to the master contract language which was in existence in the Sun Harvest agreement.[10]

On May 16, 1978, Ms. Steeg telephoned Mr. Thornton to arrange a meeting date. On 26 May 1978, Mr. Thornton called Ms.

[10]As described in the Administrative Law Officer (ALC) decision Murphy Produce (October 26, 1979) 5 ALRB No. 63, p. 4, review den. by Ct. App., 1st Dist., Div. 4, Nov. 10, 1980, hg. den. Dec."10, 1980, UFW contracts typically have a tripartite format, consisting of "language" proposals. "economic" proposals, and "local issues". The first of these categories relates to the basic conditions of work, and includes such items as recognition, union security, grievance and arbitration, maintenance of standards, "union label, and health and safety, and have widespread applications throughout the agricultural industry whenever the UFW represents employees. "Economic" proposals concern wages and fringe benefits. "Local issues" include items with a particular application to a specific employer at a specific location. O. P._Murphy, supra, note 4.

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Steeg to advise her that the last contact between the UFW and Respondent was the delivery of the written proposal of 28 September, 1977, which was drafted along the basic lines of the master contract previously negotiated at Sun Harvest and other companies, and that Respondent was available "at the union's convenience". (General Counsel Exhibit 3H, p. 61, 11. 19-23). A meeting was finally arranged for 21 August 1978 at which time the UFW suggested a contract for the remainder of the season. Respondent suggested that such a resolution was not viable in that the Salinas-Watsonville area season would terminate in four-to-five weeks. No further negotiations were held that year, with the UFW suggesting state-wide negotiations following the Court of Appeal decision re the "Southern" certification. J.R. Norton Company (June 22, 1978) 4 ALRB No. 39, enf. den. J.R. Norton Co. v. Agricultural Relations Board, 26 Cal. 3d 1 (1980)[11] The Respondent demurred in light of the "legal entanglement" of the Southern" unit (unresolved until 1930), are no further meetings were held until the incidents which triggered the events underlying this hearing.

(2) The 1979 Bargaining Sessions:

Following the first day of the work stoppages in Salinas

[11]On 10 August 1977, the UFW was certified as the exclusive collective bargaining representative of Respondent's agricultural employees in the Imperial and Palos Verdes Valleys. ("Southern" unit) J. R. Norton (1977) 3 ALRB No. 66.

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(August 20), Diego de la Fuente, president of the UFW negotiating committee, asked field supervisor Aldaberto Pena whether the company would start negotiating with the union. Mr. Pena responded affirmatively, and that he would call "the home phone number of John Norton III, and "have an answer for the workers in an hour". (R.T., Vol. VIII, p. 53, 11. 5-6). That same day, Mr. de la Fuente spoke with Peter Orr who blamed the union for not negotiating, and gave the worker his telephone number so that the union would contact him. The workers gathered at the UFW office that morning and related Mr. Orr's position to negotiator Marion Steeg who indicated that the union had been waiting to hear from the company since they (the UFW) had made the last proposal in 1978. She proceeded to call Peter Orr and proposed to meet on Thursday (August 23). Mr. Orr stated that he would speak with 15 I; Art Carroll in New Mexico that morning and would call Steeg back. The earliest day that Respondent could meet was the following Tuesday (August 28) which date the UFW reluctantly approved.

On August 28, in attendance for the Respondent were negotiator Thornton, Mr. Carroll, Mr. Orr, and Mr. Pena. For the UFW were negotiator Steeg and a committee of 8-10 workers. The company opened the meeting by reiterating its position that this negotiation related only to the "Northern" unit and that the company was appealing the certification of the "Southern" operations to the Supreme Court of California. Mr. Thornton then presented: a lengthy written proposal (General Counsel Exhibit 9F.) which was

based upon the industry proposal made to the UFW in the master negotiations of June 8,1979, differing only in holidays and wages. The back page of the proposal contained a scale of wages to be effective on that date, with the date of subsequent increases to be determined according to the signing of the contract. The company further advised the UFW that Labor Day would be a paid holiday even in absence of a contract. The union caucused for approximately ten minutes. When Mr. Thornton asked if the UFW understood that the proposed wage rates were interim rates subject to further negotiation, the UFW responded affirmatively, but did not wish to bargain over just wages, but rather a full economic package. Further, negotiator Steeg and committee president de la Fuente opined that the wage proposals were low, in comparison with wages elsewhere, and the comment made by the UFW that the interim wage adjustment effort to prepare for strikebreakers (i.e., attract "scabs"). The UFW voiced the feeling that the company was attempting to insure themselves against economic, activity by pushing for an immediate wage increase without bargaining for the remainder of the contract: At the end of the meeting, the UFW said that it needed time to review the lengthy proposal, formulate a position, and contact The duration of the August 28 meeting was approximately one to one-and-a-half hours.

The UFW negotiator and the workers' negotiating committee met at the UFW office on September 5. The first item for

discussion was a telegram to Ms. Steeg indicating Respondent's intent to offer a higher wage proposal than the one offered on August 28, which was to be put into effect the payroll week. ending September 10 unless the UFW responded prior thereto. The following day, the UFW telegraphed its rejection of the immediate implementation of the wage proposal. Steeg called Peter Orr proposing to meet the next day (Friday, September 7). "r. Orr later confirmed a meeting for September 12. Ms. Steeg received another telegram informing her of the Respondent's displeasure with the UFW s failure to accept the immediate wage increase.

The meeting of September 12 started late as facilities at the office of the Grower-Shipper Vegetable Association of Central California could not accommodate the large number of workers in attendance. A hastily arranged room was reserved at Hartnell College and the meeting, less approximately one-third of the workers who became misrouted, commenced at 11:00 a.m. In attendance for the UFW were Ms. Steeg, Jerry Cohen, Tom Dalzell, Jose Renteria, and a large number of workers. Mssrs. Thornton. Carroll, Orr, and Pena represented the company.

The UFW proposed as "a fully negotiable bargaining position" the UFW's industry proposal of June 8, 1979 to be applied to all Respondent's operations in California, as well as Arizona, and New Mexico, and 100°i retroactivity to January 1, 1979. Alternative the UFW offered a "settlement package" -- the Sun Harvest contract reached a few days previously, with minor or "local" issues negotiable. This option, too, was applicable for all of the

company's operations, with retroactivity based on a previous agreement between the UFW and Mann Packing Company ($.75 per hour for hourly workers; $1.50 per hour for piece rate workers, retroactive to January 1, 1979). The UFW reiterated its objection to the interim wage increase. The company caucused and returned, requesting the UFW proposal in writing. Ms. Steeg responded that he (Mr. Thornton) already had the UFW proposal in writing -- he had a copy of the June 8, 1979, UFW proposal because he was at the industry-wide bargaining table, and he also had a copy of Sun Harvest. Mr. Thornton responded that the company would need time to review the documents and that they could contact the union as soon as they were prepared to respond or further discuss the UFW proposals. The meeting lasted approximately 15 minutes.

(3) Preliminary Contacts in 1980:

Negotiations for the "Southern" certification unit commenced On 6 February 1980 in Calexico, California, with negotiator Ann Smith representing the UFW and attorney Charles Stoll for the company. At the outset of the meeting. Ann Smith reiterated the fact that the UFW had made a proposal to the Norton Company-- both for the Northern and Southern certifications -- to which no response had ever been made. Mr. Stoll replied that he was represent ins the company for purposes of the Southern certification only, and that he was not prepared or willing to comment on the Northern certification. Art Carroll queried as to whether or not Richard Thornton had ever responded to the September 1979 UFW

proposals. Ann Smith replied "no". Mr. Carroll then suggested that he thought Mr. Thornton was waiting to get a copy of the Sun Harvest contract.

At the next Southern certification meeting of February 27, 1980, Ann Smith asked whether the Respondent would supply certain information regarding the company's Salinas operations. Negotiator Stoll replied that he did not intend to, as he did not represent the company for its Northern certification, and that any request for such information should be addressed to Richard Thornton.

In March, 1980, Ann Smith was assigned by the UFW to bargain for the Northern certification of J. R. Norton. By letter of 7 March 1980, Mr. Thornton formally rejected the UFW proposals of 12 September 1979, and reiterated the company's August 28, 1979 proposal for the Northern unit. Ms. Smith replied by letter of 14 March 1980 reiterating the UFW's request for "coordinated and joint" bargaining sessions for both the Salinas-Watsonville and the Imperial Valley-Palo Verde Valley certifications. Mr. Thornton responded by letter of 3 April 1980 questioning the feasibility of joint negotiations, and indicating a willingness to meet re the Salinas-Watsonville certification only.

On 18 April 1980, various UFW representatives -- including Jerry Cohen, Marshall Ganz, and Ann Smith -- met with Mr. Thornton and other employer representatives regarding the implementation of the cost-of-living allowance adjustments in the collective bargaining agreements with various employers (not including Respondent). As the meeting was breaking up, Ms. Smith explained

to Mr. Thornton that the UFW was interested in "getting something moving with Norton negotiations". (R.T., Vol. XIV, p. 31, 1. 5-12 She requested that he present to the company a new UFW proposal--a settlement-on the terms of the Sun Harvest contract for the Northern unit only. While Mr. Thornton does not recall this specific proposal, I credit Ann Smith's testimony as her recitation of the details of this particular meeting were far superior to the recollection of Mr. Thornton in this regard. As an example, the latter testified on cross-examination to having relayed the UFW proposal to the company, but at the next Norton negotiations session, Peter Orr mentioned aloud that he had never heard of the proposal previously. Additionally, if Mr. Thornton's recollection were accurate in that the UFW was asking only for reconsideration of the previous September 12, 1979 offer, Mr. Thornton's testimony that he forwarded the communication to the company becomes somewhat incongruous particularly since no written or oral response was related to the UFW prior to the next session. Finally, Mr. Thornton kept notes of salient aspects of the negotiating sessions. He had no notes of the April 18 proposal, which tends to confirm his own analysis that he treated the conversation as a casual one, rather than as a "real" proposal for negotiation. On May 21 or 22, Ms. Smith telephoned Mr. Thornton to ascertain the company's response to the April IS proposal. Mr. Thornton suggested a meeting arid requested that it be set for after Memorial Day.

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(4) The Meeting of June 4, 1980:

For the UFW, in attendance were Ann Smith and several members-of the employees' bargaining committee -- including Diego de la Fuente, Ramon Diaz, Juan Quintero, Maria Montiel, and Maria Mendoza. For the Respondent were Messrs. Thornton, Carroll, Orr and Pena. After introductions, Mr. Thornton asked if everybody on the bargaining committee was employed by the company. Ann 8 Smith answered affirmatively. Mr. Thornton pressed the question and asked if they were all working for, or currently in the employ of J. R. Norton Company. Ms. Smith replied that "they should be" (R.T., Vol. XVI, p. 42, 11. 17-19), but that some had been fired by the company for their activities the previous season.

Mr. Thornton stated that the company's proposal of August 28, 1979, as amended for wages remained its bargaining position. When Ann Smith asked for a specific response to the April 18 offer, the company representatives caucused for ten minutes and then responded that the Sun Harvest contract was not acceptable. The UFW indicated that they would proceed with the bargaining on the basis of mutual proposals and would submit to the company a complete proposal in writing.

(5) The Meeting of July 9, 1980:

As Ms. Smith had a conflict involving negotiations with another company, a tentatively set meeting for June 25 was postponed until July 9.[12] The company was "anxious" to meet

[12]Mr. Thornton testified that Ann Smith also canceled a tentatively scheduled meeting for June 17. Ms. Smith testified that Mr. Thornton had indicated at the June 4 meeting that June 25 or 26th was his next available date. Because of this conflict, I do not attribute the three-week delay (June 4-June 25) to either the company or the union.

quickly as the UFW wage rates were going to change on July 15th, and the company wished to propose an interim wage adjustment to remain competitive. Mr. Thornton thus called Ann Smith "five or six" times following June 25, and sent correspondence of June 30 and July 1 proposing interim wage adjustments, an amended Health & Welfare Plan, and proposed vacation eligibility guidelines.

The meeting was held July 9. In attendance for the company were Mssrs. Thornton, Carroll, Orr and Pena. In attendance for the UFW were Ann Smith, Jerry Cohen, and an employee bargaining committee which also included people currently employed for the company at the time, as well as those no longer employed.

The union submitted a lengthly written proposal, and indicated it was unanimously opposed to the implementation of any interim wage increase, but rather wished to bargain about and reach a contract on all issues. The UFW suggested that the company could remain competitive by agreeing to pay the eventually agreed upon wage rate retroactively to 15 July -- the date when other companies were increasing their wages. The basic wage rate of the UFW proposal was $6.25 per hour, and the detailed proposal contained the Robert F. Kennedy Medical Plan, the Juana de la Cruz Farm Workers'Pension Plan, language regarding recognition, union security, hiring, seniority, grievances, access, no-strike clause, management rights, etc. The meeting lasted approximately one hour, and with the exception of a request for the benefit schedule under the new Robert F. Kennedy Plan, the company requested no further information on any of the provisions. Rather,

the employers' negotiators indicated that they would review the document and get back to the UFW. Ann Smith pressed to set a meeting date for the near future, even suggesting "round-the-clock" negotiations in light of the company concern about the July 15 wage adjustment date. Richard Thornton, however, said that he would be unusually busy with other negotiations and was unable to set any further meeting dates.

Ms. Smith sent a mailgram to Mr. Thornton later that day (July 9) reiterating the UFW rejection of the interim wage increase and the desire to reach a settlement of all issues. On 10 July, Mr. Thornton sent Ms. Smith a message reiterating the interim wage increase proposal. On 10 July, Ms. Smith unsuccessfully attempted to contact Mr. Thornton by telephone to ascertain the status of the UFW proposal. Mr. Thornton returned the call on Monday, July 21. Mr. Thornton said he would contact the company representatives to see "how far along" they were, and would get back to Ms. Smith as to an appropriate date for the next negotiation session. (R.T., Vol. XIV, p. 71, 11. 1-4). In the interim, by mailgram received 19 July 1980, the company announced the implementation of the interim wage increases, effective July 15. On 24 July, Mr. Thornton telephoned Ms. Smith to relate that the company wished to meet the following week, but that he was unable to and suggested a meeting for the first week in August. August 6 was the agreed upon date. In the interim, the company sent the UFW a reiterated proposal to amend the medical plan.

(6) The Meeting of August 6, 1980:

Present for the company were Thornton, Orr, and Carroll. For the UFW, were Ann Smith, Jerry Cohen, and the employee bargaining committee. The company presented a written proposal, prepared by Mr. Orr and Mr. Carroll, but not by Mr. Thornton, which according to Mr. Thornton, demonstrated company-union agreement on approximately 15-20 articles. The major areas of difference were the hiring hall, Robert F. Kennedy Fund, Martin Luther King Fund, union security, mechanization, and wages. According to Ann Smith, the August 6 proposal adhered to the interim wage adjustments implemented in September 1979, and July 1980, with an indication of unspecified increases on July 15,, 1981 and July 15, 1982. The August 6, 1980 proposal provided for 15-minute rest periods; the August 28, 1979 proposal for 10-minute rest breaks. The August 6, 1930 proposal eliminated provisions proposed in August 1979 which had called for an extension of all contract terms to any workers that might be additionally certified by the ALRB during that term of the contract. Union dues would be submitted on a monthly basis under the August 6, 1980 proposal; on a weekly basis under the August 28, 1979 proposal. The August 6, 1980 proposal required workers to cross picket lines in certain situations, whereas the August 28, 1979 proposal did not. The 1980 proposal also had changes in vacations and health plan.

The union caucused for 30-45 minutes, and returned to indicate agreement on approximately 11 articles: Right of access, discrimination, management rights, credit union withholding, union

label, new or changed operations, location of company operations, savings clause, ranch housing, modification, bulletin boards, and pension plan contributions. The union modified their wage proposal of 9 July by $.05 an hour "across the board". The major differences were thus recognition, union security, hiring, seniority, grievance and arbitration procedure, discipline and discharge, various money matters, including fringe benefits, wages, subcontracting, successor clause, maintenance of standards some health and safety issues and mechanization.

The company then took a brief caucus and decided to review the proposals and decide upon a response for the next meeting. Both sides exchanged their disappointments -- the company at the UFW's "slight" movement on wages; the UFW on the fact that the company seemingly had made the August 6, 1980 proposal "worse" than the August 28, 1979 proposal. Before adjournment, the next available date on Mr. Thornton's schedule-- August 14-- was scheduled, despite the UFW's suggestion to meet on Friday (August 8). Mr. Thornton canceled the meeting because of some scheduling difficulties of Mr. Carroll and reset the meeting for August 18. Mr. Thornton subsequently canceled the August 18 meeting, because of Mr. Orr' s (or Mr. Carroll's) unavailability, and his next available date -- August 26 -- was agreed upon by Ms. Smith for the subsequent meeting. In the interim, on August 1980, the company notified the UFW of the interim adjustment to the medical plan, as well as the new vacation plan.

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(7) The Meeting of August 26, 1980:

Ann Smith, Jerry Cohen, and the employee bargaining committee attended on behalf of the UFW; Mr. Thornton, Mr. Carroll, and Mr. Orr were in attendance for the company. At the commencement of the meeting, the company presented changes in the wage rates and pension plan contributions, as its response to the UFW counter-proposal of 6 August. Mr. Thornton also asked for printed pamphlets of the union's new RFK Medical Plan. Ms. Smith responded that as soon as the new pamphlets had been printed, the} would be made available (the membership had just voted on which plan was to be implemented). She then asked why the August 6, 1980 proposal was worse than the August 28, 1979 proposal, pointing out, e.g., the retraction of the company's contribution to the Martin Luther King Fund. There was further discussion of the parties' relative positions regarding the paid representative system, mechanization, and union security. The company then caucused briefly and requested another meeting which was set for September 3.

(8) The Meeting of September 3, 1980:

Mssrs. Thornton, Orr, and Carroll attended for the company; Ms. Smith, and the employee bargaining committee for the UFW. Mr. Thornton requested information regarding the Martin Luther King Fund. Ms. Smith queried the reason for the need for information on this program since the company had previously agreed to make contributions thereto in an earlier (August 28, 1979) proposal. The company had no changes to make from the

meeting of 26 August. The UFW caucused and proposed acceptance of the company's previous offer to contribute $.06 per hour to the Martin Luther King Fund. An adjustment to the July 9 proposal cost-of-living allowance was also proposed. Mr. Thornton stated that the company had been involved in other activities during the period that had elapsed since the 26 August meeting and "hadn't had time to give to our [the UFW's] proposals". 8 (R.T., Vol. XIV, p. 112, 11. 21-24). The meeting lasted approximately 1 1/2 hours. Although the UFW requested an earlier date, the next meeting was scheduled for September 17.

(9) The Meeting of September 17, 1980;

Present for the UFW were Ann Smith, Jerry Cohen, and the employee bargaining committee. For the company were Richard Thornton, Peter Orr, and Art Carroll. Mr. Thornton asked for the information he had earlier requested on the Martin Luther King Fund. Ann Smith replied that she had made efforts to obtain the information, but had not received same yet, but would make it available upon receipt. The company made a proposal with respect to vacations. The UFW countered with the vacation proposal of the Sun Harvest contract -- similar to the company proposal, differing, inter alia, by reference to calendar, rather than fiscal year. No further proposals were made by either side in this one hour meeting, with the UFW requesting the company to review its positions, and the company requesting the Martin Luther King Fund information. Upon receiving this information, the company would contact the UFW re further meetings. The

requested documentation was forwarded to Mr. Thornton on 29 September 1980. Both sides concluded with the "hope" that a contract could be signed.

B. Analysis and Conclusions:

The General Counsel has alleged that Respondent has failed to bargain in good faith with the UFW since September 12, 1979 by (1) its failure to respond to UFW proposals and/or to meet in bargaining sessions, and by (2) its engagement in surface bargaining with the intent not to reach a collective bargaining agreement with the UFW for the Northern unit. Respondent denies any violation of the Act, contending, rather, that the union's bargaining conduct constituted bad faith.

Labor Code Section 1153 (e), patterned after Section 8 (a)(5) of the NLRA, requires the employer "to bargain collectively in good faith". Good faith bargaining is defined in Labor Code Section 1155.2 as:

> "The performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees-to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

The U. S. Supreme Court has described the employer's duty to bargain in good faith under the NLRA as follows:

> "Collective bargaining is something more than mere meeting of an employer with the representative of his employees: the essential thing is rather the serious intent to adjust differences and to reach a common ground .... Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor while each maintains an attitude of 'take it or leave it'; it presupposes a desire to

> reach ultimate agreement, to enter into a collective bargaining contract. ..." NLRB v Crompton-Highland Mills, Inc. (1949)337 U.S. 217 [24 LRRM 2088].

The duty to bargain in good faith requires the parties" to participate actively in the deliberations so as to indicate a present intention to find the basis of agreement...." NLRB v. Montgomery Ward & Co. (9th Cir. 1943) 133 F. 2d 676, 686, 12 LRRM 508. Mere talk is not enough. "The parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective bargaining negotiations as they display in other business affairs of importance." A.H. Belo Corporation (WFAA-TV), (1968) 170 NLRB 1558, 1565, 69 LRRM 1239, modified, 411 F. 2d 959 (5th Cir. 1969). As this Board has indicated, the Act requires a sincere effort to resolve differences, rather than the actual reaching of an agreement. O.P. Murphy Produce (October 26, 1979) 5 ALRB No. 63, review den. by Ct. App., 1st Dist., Div. 4, Nov. 10, 1980, hg. den. Dec. 10, 1980.

"[B]ad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or co sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than the mere 'surface bargaining: or 'shadow boxing to a draw', or 'giving the union a runaround while purporting to be meeting with the union for the purpose of collective bargaining'" (footnotes omitted) NLRR v Herman Sausage

Co. (5th Cir. 1960) 275 F. 2d 229, 232 45 LRRM 2829.

Because there are rarely uncontroverted admissions of intent to obstruct agreement, Respondent's intent is to be ascertained from the totality of its conduct. 0. P. Murphy, supra, p. 4, citing NLRB v. Reed & Prince Mfg. Co., 205 F. 2d 131, 32 LRRM 2225 (1st Cir.), cert. denied 346 U.S. 837 (1953); B. F. Diamond Construction Co., 163 NLRB 161, 64 LRRM 1333, (1967), enforced 410 F. 2d 462 (5th Cir.), cert. denied 396 U.S. 835 (1969); McCulloch Corp., 13 NLRB 201, 48 LRRM 1344 (1961).

(1) Conduct in the Course of Bargaining:

In the instant case, the UFW submitted two alternative proposals to the company during the September 12, 1979, bargaining sessions. First, the union's offer in industry-wide bargaining on 8 June, 1979, with full retroactivity to 1 January, 1979, for all of Respondent's agricultural operations; second, the Sun Harvest contract plus retroactivity according to the Mann Packing formula for all of Respondent's agricultural operations. At the end of the meeting, Respondent agreed to respond to the union's proposals; but did not communicate with the UFW until Richard Thornton' s letter of 7 March 1980.

a.) Respondent's Delaying Tactics

The company's failure to respond thus resulted in a delay of nearly six months in the bargaining process. While Respondent has suggested that the historic pattern of J. R. Norton negotiations for the Northern certification unit was characterized by seasonal lulls because the harvest employees traveled to other

areas, I find certain differences in the 1979 Salinas harvest to be critical: (1) Richard Thornton specifically promised to respond to the UFW proposals. I do not consider six months to be a timely response if the standard is one of "business affairs importance". (2) Ann Smith had discussed with company representatives at the Southern certification bargaining session of 6 February 1980 that the UFW was awaiting a response to the 12 September 1979 proposal. Although Mr. Stoll restated the company's position that Northern certification issues had to be addressed to Mr. Thornton, all other company representatives were identical-- Mssrs. Carroll, Pena, and Thornton. (3) Mr. Carroll's suggestion at the February 6, 1930 meeting that Mr. Thornton was waiting to get a copy of the Sun Harvest contract contradicts Thornton's own admission that he was knowledgeable of this agreement and obtained a copy of same at his office soon after the 12 September 1979 meeting. (4) The urgency of the UFW's interest in reaching an agreement was made apparent to all concerned by the work-stoppage activity which paralyzed the company's operations during the fall of 1979. (5) Mr. Thornton' s response to the 2 September 12, 1979, proposals, although delayed for some six months, was mailed precisely on the date that, charge number SO-CE-12-SAL (General Counsel's Exhibit dumber 1,) alleging the company's bad faith failure to bargain was tiled and served upon Respondent.

Further delay was caused by Richard Thornton's failure to

convey the 18 April 1980 change in the UFW posture to the company representatives. As discussed, supra, because of the clarity and precision of her recollection in this regard, her specific commentary to the employee bargaining committee when realizing that the company representatives were not aware of the new proposal, and Mr. Thornton's own recollection of the substance, albeit not the details of the April 18, 1980, encounter, I credit Ann Smith's testimony in this regard. I find it rather doubtful that the UFW broached only the subject of reconsideration of the old union offer on that day, as was suggested by Mr. Thornton. Indeed, the latter conceded that he had not related any of the conversation to the company representatives prior to the June 4 meeting. Thus, an additional six weeks -- from April 18 to June 4-- elapsed at the commencement of the Northern unit harvest, and the only progress was the company's rejection of the union offer to reach an agreement along the lines of Sun Harvest specifically for the Northern certification.

While delays between the June 4 and July 9 meeting seemed to have been occasioned both by the company and by the union, with the Union primarily responsible for the June 25-July 9 hiatus (see discussion, supra), Respondent's further dilatory conduct was exemplified by the events following the submission of the July 9, 1930 UFW proposal. Although particularly anxious to reach an interim agreement re wages by 15 July, the company was unable to reschedule the next session until 6 August. UFW negotiator Smith suggested "round-the-clock" sessions to

effectuate an agreement before the July 15 "deadline", but Mr. Thornton declined due to his unusually busy schedule.

In many significant aspects, the company's August 6 proposal was less acceptable to the UFW than the previous (August 28, 1979) proposal. Workers would be required to cross picket lines; vacation pay would be compensated at a lesser rate; the company rescinded its proposal of the UFW Robert F. Kennedy Medical Plan, substituting the Western Growers Association Plan Number 30; payments to the union Martin Luther King Fund were also rescinded. Although agreement was reached on several articles in the Respondent's proposal of 6 August 1980, many of these issues had not actually been in conflict for the past four years. The UFW suggested meeting the following Friday, 8 August, but the company was reluctant to do so, and further canceled tentative meetings of August 14 and August 18, thus occasioning another delay, of some 20 days until the next bargaining session. The last meetings on record -- August 26, September 3, and September 17 -- occurred as the 1980 Salinas harvest was coming to termination. Little substantively was accomplished at these last meetings, and an entire season had massed with no real progress achieved. Indeed, as suggested by company vice president Peter Orr, the closest the parties had come to an agreement had been as early as 1978.

In review, the record reflects delays of approximately 170 days in the company's response to the "UFW proposals of September 12, 1979; 47 days in the company's response to the UFW's change

of position at the April 18, 1980 industry cost-of-living adjustment sessions; 28 days from the UFW proposal of July 9 to the August 6 session. The UFW, on the other hand, would be responsible for the "gaps" between the March 7, 1980 company rejection of the 12 September 1979 proposals, and the 18 April encounter -- 42 days and two (2) days from the 6 August company proposal to the 8 August date for negotiations suggested by the 8 UFW. Because the Union did not anticipate Richard Thornton's failure to communicate the April 18 proposal, and was subsequently unable to present a counter-proposal at the June 4, 1980, meeting, it is difficult to hold either party responsible for the three-week hiatus between June 4 and June 25 -- the tentative date of the next meeting. Since UFW negotiator Smith canceled the June 25 session and requested the July 9, 1980 meeting, there is an additional 14-day delay attributable to the UFW. Thus, some 245 days of delay are attributable to the Respondent, with some 58 days to the UFW.

While the number of cancellations of meetings by either party does not seem particularly significant (two by the Respondent at least one by the UFW),the large periods of time between responses, largely attributable to the company, the difficulty encountered by the UFW in setting meeting dates at the preceding sessions, and the lack of progress with respect to the major substantive issues -- with the exception of interim wage adjustments -- all tend to suggest that the company was less than eager to reach a fully negotiated agreement. When considered in

light of the time pressure of the five-six month Salinas harvest season, the pace hardly seems indicative of a real desire to reach an agreement.

(b) The Company's Interjection Between the Union and the Employees:

Vice president Peter Orr explained the company's position to the union's proposal concerning union security, fearing the "potential for abuse" in giving the union the sole discretion for determining a worker's good standing with the union. (R.T., Vol. XIV, p. 103, 11. 15-19). The employer's similar rejection of the union security provision has been found to be indicative of bad faith:

> "Respondent's . . . desire to protect the employees from arbitrary action on the part of the UFW is equally infirm. It demonstrates a failure to accept a basic principle of the Agricultural Relations Act; the certified collective bargaining representative is the exclusive representative of the employees, and the employer may not assume that role." Montebello Rose (1979) 5 ALRB No. 64, pp. 24-25, citing Akron Novelty Mfg. Co. 224 NLRB 998, 93 LRRM 1106 (1976).

In isolation, the company's position might reflect merely a bargaining strategem to be negotiated along with other issues. In the instant case, however, Respondent's reason for opposing the UFW's union security proposal -- considering the entirety of Respondent's conduct -- suggests its rejection of the UFW role in collective bargaining, and provides some indication of the absence of a genuine desire to reach agreement as mandated by the Act.

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(c) The Company's Failure to Explain Its Proposals and Retraction of Proposals:

While I do not view the Board's function to "sit in judgment upon the substantative terms of collective bargaining proposals", (see NLRB v American National Ins. Co. (1952) 343 U.S. 395, 30 LRRM 2147) ,the painfully slow pace of negotiations in conjunction with the numerous delays discussed supra -- hints at bad faith. I do not find that the alleged "regressions" of the August 6, 1980 company proposal sufficiently egregious to suggest unlawful purposes -- since indeed that proposal evoked agreement on some 11 articles that very day --but I find particular troublesome the company's failure to explain its positions with respect to this proposal, and the subsequent inability of the parties to make meaningful progress as the 1980 Salinas season terminated. There may have been legitimate strategical concerns for the employer's failure to reveal those items it considered most important. However, the rejection of a proposal without explanation supports a refusal to bargain charge. See AS-H-NE Farms, Inc. (February 8, 1980) 6''ALRB No. 9, p. 12, review den. by Ct. App., 5th Dist., October 16, 1980, hg. den. Nov. 12, 1980. While neither side nay be required to make concessions, the Respondent's failure to explain its bargaining position in the context of the other significant indicia of bad faith may tend to confirm the parties' bad faith posture. Particularly, the withdrawal of contributions to the Martin Luther King Fund, the replacement of the Robert F. Kennedy Medical Plan, the

requirement for workers to cross picket lines, the reduction of vacation benefits, predictably met with displeasure from the union. "Good faith" bargaining would have at least called for some explanation of the company's rationale for these changes, Since negotiator Thornton conceded to not having participated in the compilation of this proposal (R.T., Vol. XVI, pp. 88, 11. 3-8), the lack of subsequent progress could not be unexpected. The explanation that "times had changed" (R.T., Vol. XIV, p. 100, 11. 15-26) hardly evidences a good faith effort to settle the parties' differences. I find such conduct to be probative of the company's ultimate purpose not to enter into a collective bargaining agreement.

(2) Asserted Bad Faith Bargaining By The Union:

Respondent contends that the UFW demonstrated bad faith in negotiations by changing negotiators, failing to provide relevant information, demanding bargaining over an uncertified and inappropriate bargaining unit, and otherwise refusing to bargain in good faith. I shall deal with each alleged indication of union bad faith in seriatim.

(a) The Change of Negotiators and Other Dilatory Conduct:

Richard Thornton has been the sole negotiator for the company since 1976. The UFW has been represented primarily by Marion Steeg (1977-1979), and Ann Smith. Robert Garcia and Gilbert Padilla played early roles as UFW negotiators immediately following the Northern certification. Jerry Cohen and Marshall Ganz have been in attendance at many of the negotiating sessions. I do not find,

however, that this representation signified a "constant shuffling" of negotiators, or even caused delays in negotiations. Contrary to Respondent's contentions (see Respondent's Brief, p. 66), Richard Thornton clearly knew or should have known that Ann Smith was the UFW's negotiator for the Northern unit by virtue of the letter of March 16, 1980. Mr. Thornton's testimony that this "revolving door of UFW negotiators invariably wasted time" was framed in generalities. There is no evidence of any one occasion when a meeting was either prolonged or delayed because Ann Smith was the negotiator rather than Marion Steeg. There are no facts on the record that Ms. Smith was either unprepared at any session, or incapable of negotiating all issues in controversy.

Nor do I find convincing Respondent's contention (Respondent's Brief, p. 66) that the UFW refused to bargain over the interim wage proposal until all other terms of the contract were agreed upon. On the contrary, the UFW position was that wages should be part of an entire package, and that the union was prepared to meet and bargain on a "round-the-clock" basis in order to reach such an overall agreement prior to the July 15 wage adjustment deadline. Indeed, the UFW's proposals with respect to retroactivity (to obviate the company's concern to remain competitive), as well as the employer's knowledge of the Sun Harvest wage rates that the UFW had previously found acceptable, suggest a real desire on the part of the UFW to reach agreement on all disputed issues.

Finally, I do not find that the September 12, 1979 proposals

constituted ultimatums by the UFW,. indicative of a "bad faith negotiation posture". Cf. Wheeling Pacific Co. (1965) 151 NLRB 1192, 58 LRRM 1580. Contrary to the company's suggestion, I find that the UFW did have an intention to negotiate a contract -- as evidenced by its February 1980 request for a company response to the 1979 proposal, its change of position on 18 April 1980, and the proposal actually formulated on 9 July 1980. While the Respondent may well have had legitimate reasons for rejecting the September 12, 1979, proposals, I find no evidence of UFW bad faith by the mere fact that the proposals were made.

(b) The UFW Demand for Bargaining Over All Company Operations:

Respondent has contended that the UFW's insistence that the company bargain for the New Mexico and Arizona operations, as well as all California areas, is indicative of the union's bad faith. (See Respondent's brief, p. 62, citing Section 1154(c) of the Act; Sperry Rand Corp. v. NLRB (2nd Cir. 1974) 35 LRRM 2521, cert. denied, 419 U.S. 831.)

Under NLRB precedent, the parties may redefine their bargaining unit by voluntary agreement, but the scope of the unit is not a mandatory subject of bargaining. Morris. The Developing Law (1978 Supplement), p. 124, citing Canteburg Gardens (1978) 238 NLRB No. 116, 99 LRRM 1279.

As explained by the Second Circuit, the difference between bargaining about mandatory subjects and determining the bargaining unit is as follows:

"The Statute imposes on labor and management alike a

> duty to bargain in good faith with respect to wages, hours and other conditions of employment in the expressed belief that such bargaining is the most effective way to settle differences without disrupting commerce. This duty does not compel either party to agree to a proposal, as Section 8(d) states, 'or require the making of a concession.[1] and the Board has no power to settle any of these questions. By way of contrast, it not only has the power, but is indeed directed, to decide what is the appropriate bargaining unit in each case."
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> Douds v. International Longshoremen's Ass'n., 241 F. 2d 278, 282, 39 LRRM 2388 (2nd Cir. 1957)

The general rule is that it is an unfair labor practice (and therefore indicative of bad faith) for either party to insist to impasse that employees be added or excluded from a certified unit. Salt Valley Water Users' Ass'n (1973) 204 NLRB 83, 83 LRRM 1536, enforced, 498 F. 2d 393, 86 LRRM 2873 (9th Cir. 1974); Sperry Rand Corp. v. NLRB (2nd Cir. 1974) 492 F. 2d 63, 85 LRRM 2521, cert. denied 419 U.S. 831, 87 LRRM 2397 (1974). In the instant case, the UFW certainly suggested bargaining for additional employees (the Southern certification as well as Arizona and New Mexico) by its alternative proposals of 12 September 1979. However, once the Company rejected this approach by letter of 6 March 1980, the UFW communicated its willingness to bargain for the Salinas-Watsonville unit alone. This "change" in the UFW posture was reiterated at the 4 June 1930 bargaining session as well as in its written proposal of 9 July 1980. Thus, it is difficult to perceive any indication that "impasse" had been reached by the UFW's September 12, 1979 posture. Unlike the Sperry Rand case, the union here cannot be said to have engaged in any sub rosa attempt to gain de facto

recognition as bargaining agent of employees that it had failed to achieve through an election. As in Newspaper Production Company v. NLRB, (5th Cir. 1974) 503 F. 2d 821, 87 LRRM 2650, enforcing 205 NLRB 738, 84 LRRM 1186 (1973), the present case involved neither interference with the representational rights of employees nor a jurisdictional dispute between two unions. At worst, the UFW's proposals involving the non-certified units occasioned delay of some six (6) weeks -- from the March 6, 1980 company rejection of the proposals to the April 18, 1980, UFW counter-proposal. As suggested above, while such delay may tend to ameliorate company dilatory conduct, I do not find it significant indicia of UFW bad faith and/or intent not to reach a collective bargaining agreement.

(c) The UFW Failure to Provide Relevant Information:

The union duty to furnish information relevant to the bargaining process parallels that of the employer (see Tool and Die Makers Lodge 78 (Square D Company) (1976) 224 XLRB 11, 92 LRRM 1202; Oakland Press Company (1977) 233 NLRB 144, 97 LRRM 1047. I do not, however, find that the periods of time between the company requests for certain information regarding the RFH Medical Plan and Martin Luther King Fund (made apparently in earnest on August 6 and August 26, 1980) and the union's provision of this information on 29 September 1980 to be a significant reason for delay in the negotiating process. Indeed, the company had offered to make these contributions in its earlier proposal of August 28, 1979. No discussion of the costs

involved with the various plans had been raised by the company, and there is no evidence that the negotiations had been hindered because of the UFW's inability to immediately obtain and transmit what Mr. Thornton had requested.

(d) The UFW's July 9, 1980 Proposal:

Similar to General Counsel's contentions with respect to the company proposal of August 6, Respondent has alleged that the July 9 UFW proposal was more acceptable to the company in many respects than the earlier June 4, 1980 proposal. (Respondent's Brief, pp. 67-75). In reviewing fifty-eight (58) proposals of the July 9, 1980 "package" which are more onerous than the union's June 4, 1980,proposal, Respondent concludes that "[o]ne can hardly imagine a contract proposal more destructive of the bargaining process or more derelict in the duty of good faith bargaining than the proposal made by the United Farm Workers Union to the Respondent on July 9, 1980." (Respondent's Brief, p. 75, 11. 11-14). However, the comparison of the two proposals necessitates closer scrutiny. The UFW had conceded that the June 4, 1980 "package" was an offer to settle along the lines of Sun Harvest -- to wit, a proposal that had already been fully bargained. Respondent having rejected this Sun Harvest prototype, the UFW presented, as indicated at the session of June 4, 1980, a proposal to be bargained in juxtaposition with the earlier company proposal of August 28, 1979. Following the company presentation of August 6, 1980, the UFW caucused and returned with agreement over some eleven Articles, thus modifying

its July 9, 1980 "package".

Considering the same reluctance of the Board to "sit in judgment upon the substantive terms of collective bargaining proposals" discussed supra, I do not find indicia of bad faith in the UFW's July 9, 1980 position. See NLRB v. American National Ins. Co., (1952) 343 U.S. "395, 30 LRRM 2147. While the wage levels were high ($6.25/hour as opposed to $5.40/hour on June 4) and other Articles may have proven distasteful to the company, I do not find in the instant case that the UFW's submission was "predictably unacceptable" or lacked "any reasonable effort to compose its differences with the employer." O.P. Murphy, supra, at pp. 10-11, citing Stuart Radiator Core Mfg. Co. (1968) 173 NLRB 125, 69 LRRM 1243; NLRB v. Reed & Prince Mfg. Co., 205 F. 2d 131, 135, 32 LRRM 225 (1st Cir.), cert. denied (1958), 346 U. S. 887, 33 LRRM 2133. Indeed, the company response on 6 August 1960 resulted in agreement on eleven articles by that date. The UFW promptly modified its July 9, 1980 posture following the company's submission of August 6, accepted several of the company proposals, thus conceding some portions of the July 9, 1980 package. Since the UFW clearly indicated its willingness to negotiate the July 9, 1980, posture and actually did so following the company response, I decline to '"second guess" the good faith in these efforts.

(3) Per Se Violations:

Some type of conduct constitute per se violations of the duty to bargain without regard to good or bad faith. Morris. The

Developing Labor Law, p. 322.Such conduct will not only constitute independent violations of the Act, but also may support an inference of bad faith. See 0. P. Murphy, supra, p. 12.

The unilateral wage increases of July, 1980, the changes in seniority "preferences", and hiring practices, the discharges of Juan Quintero, Jose Amador, and the members of Maria Sagrario Perez' crew all constitute typical per se violations of §1153 (e) insofar as the UFW, as the certified collective bargaining representative of Respondent's Northern unit employees, was not notified or consulted prior thereto. Hemet Wholesale Company (1978) 4 ALRB No. 75; Adam Dairy dba Ranches Dos Rios (April 26, 1978) 4 ALRB No. 24, review den. by Ct. App., 2nd Dist., Div. 3, March 19, 1980; NLRB v. Exchange Parts Co. (5th Cir. 1965; 339 F. 2d 829; NLRB v Katz (1962) 369 U.S. 736 [82 S. Ct. 1107]. Unilateral action of this type violates the duty to bargain since the possibility of meaningful union input is foreclosed. Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36, citing 0. P. Murphy Produce (supra); Masaji Eto (1980) 6 ALRB No. 20. As this Board indicated in 0. P. Murphy, supra:

"Unilateral implementation of a wage increase constitutes a change in a significant term of employment without regard to the union's role as representative of the employees, and has been considered by far the most important 'unilateral act'. NLRB v Fitzgerald Mills Corp. (1963) 313 F. 2d 260 (2nd Cir.) cert. den., 375 U. S. 334. It is also a per se violation of the Act. NLRB v Katz, supra. NLRB v Burlington Rendering Co., 366 F. 2d 699 (2nd Cir. 1967)."

The devastating impact of the "interim wage adjustment" is clear. The UFW is placed in an untenable bind: If it refuses the

wage increase, the employees will be unhappy. If it agrees to the plan, it will lose a powerful bargaining tool in obtaining other (non-economic) benefits for the employees. See Hemet Wholesale, supra, ALO Dec., p. 86.

Respondent contends that the wage increases were not unilateral -- and hence not violative of the Act -- because the union was given notice of the proposed increases, and an opportunity to bargain over same. (Respondent's Brief, p. 76). In viewing the record, I find that the history of the negotiations did not afford the union an ample opportunity to negotiate the issue, nor could the wage raise reasonably be based on the company's good faith belief that impasse had been reached. McFarland Rose Production Co., Inc. (1930) 6 ALRB No. 18. In the instant case, although the UFW had been requesting negotiations since April, 1980, no meetings were scheduled until June 4. On June 30, the company submitted its proposal for the interim wage hike, which the union rejected by its proposal to bargain an entire package on 9, July 1980. The company declined not only to engage in "round-the clock" discussions until the July 15 "deadline", but further made no response to any part of the UFW proposal until August 6. In the interim, the wage increases were unilaterally implemented, effective July 15, 1980. Certainly, there was much room for negotiation (some eleven areas of agreement were in fact reached on 6 August)

In the context of company disinterest in Northern unit bargaining. between September 1979, and June, 1980, the sudden urgency to

negotiate the issue of wage rates from June 30 to July 9 seems particularly anomalous. Since the UFW had committed itself to submitting a full written proposal between June 4 and July 9, and since the company did not choose to respond to this proposal until 6 August, it can hardly be said that the July 9 meeting of approximately one hour constituted a real "opportunity to meet and consult" over the increase. Unlike the situation in Bradley Wash Fountain Co., v NLRB (7th Cir. 1951) 192 F. 2d 144, 29 LRRM 2064, the increases here interfered with the bargaining agent and the rights of the employees to negotiate a full package.

Similarly unpersuasive is Respondent's contention that the wage increases were appropriate because "Norton had an established practice of instituting wage increases when the industry as a whole went up". (Respondent's Brief, p. 80). Only in very limited situations, when wage increases have been traditionally granted automatically, and fixed in amount and. timing, as opposed to discretionary, have exemptions to the rule prohibiting unilateral wage increases been recognized. NLRB v Katz, (1962) 369 U.S. 736. In the instant case, the union had previosly (1976, 1977 and 1978) agreed to interim wage adjustments, and the proposed raise was identical to the wage increases called for in the Sun Harvest contract. However, no raise was given in 1979 on the July 15 date which the company had contended was automatic. Respondent's own documented wage summary (Respondent's Exhibit No. 27) reflect wage adjustments in July 1977, and July 1978, but April and

September increases during 1979. The unilateral increase of the 1979 season (September 4) was peculiarly coincidental with the work stoppages and the two bargaining sessions aforedescribed.[13] And the adjustment proposed in the 1980 season also seemed suspiciously timed to coincide with the resumption of the summer bargaining sessions. In neither instance were the amounts involved fixed or automatic. Although Respondent indicated that its true purpose was to remain competitive with the prevailing wages in the industry, it rejected the UFW's suggestion that retroactivity would maintain this competitive level. Under the circumstances, I find that the interim wage adjustment was discretionary. As such, the Respondent's conduct in this regard constitutes a per se violation of §1153 (e).

It is uncontested that unilateral changes in working conditions also constitute per se violations of the duty to bargain. See Montebello Rose Co. (1979) 5 ALRB No. 64. I have already found ample evidence that Respondent had changed its informal seniority and hiring practices commencing in Salinas 1979. Such unilateral decisions on the part of the Respondent are similarly violative of §1153 (a) and (e). Nebraska Bulk Transport, Inc. (1979) 10C LRRM 1340; Hamilton Electronics Co. (1973) 203 NLRB No. 206. The same conclusions apply with respect to the discharges or Jose Amador, Juan Quintero, and the members of Maria Sagrario Perez' crew who left work in protest or the

[13]The 1979 unilateral wage increase was the subject of the E1 Centro unfair labor practice hearing discussed supra. (Cease Nos. 79-CE-78-EC, et al)

forewoman's termination. See Walker Co. (1970) 74 LRRM 1409. As such, they constitute some evidence of Respondent's rejection of the UFW status as exclusive bargaining representative, and overall bad-faith refusal to bargain. Cf. Montebello Rose Co., supra; Central Cartage, Inc. (1973) 236 NLRB No. 163, 98 LRRM 1554.

(4) Conduct Away From the Table:

The employer's anti-union conduct away from the bargaining table may also support a finding that it has negotiated in bad faith. AS-H-NE, supra, pp. 16-19; Kaplan' s Fruit and Produce Company, supra, pp. 14-15. I have previously found that Respondent discriminatorily discharged pro-UFW-crew leader and bargaining representative Juan Quintero immediately prior to the summer 1980 negotiations. Other indicia of bad faith include the discriminatory failure to rehire the work-stoppage participants between October 1979 and the date of the hearing;

discriminator

failure to rehire Marcelino Quintero and Pablo Quintero in April 1980. As in Kaplan's Fruit and Produce Company, supra, p. 14, these actions all tended to undermine the union's authority as collective bargaining representative , making the union appear ineffectual. Moreover, the peripheral incidents tend to illuminate the company's overall attitude toward bargaining. Company negotiator Richard Thornton even pressed the point of the status of the former Salinas workers during the opening moments of the June 4, 1980 session. For the company to question the status of

its former employees -- who fruitlessly sought reemployment with Respondent over a period of nine months--is the epitome of bad faith and I so find.

There is also ample direct evidence in the admissions of various supervisory personnel. Diego de la Fuente quoted Aldaberto Pena as advising the workers to continue as if nothing had happened, because the company was not going to sign any contract with the union. (R.T., Vol. VIII, p. 51, 11. 22-28). Obdulio Magdaleno informed the wrap machine employees during the Salinas work stoppages that the company was not going to sign a collective bargaining agreement. Forewoman Maria Sagrario Perez quoted Mr. Pena's explanation for the September 1979 negotiations

> "[W]e're going to raise the wages of these people,-- well, the people to shut them up so they won't cause any more trouble, so 'they won't bring in the union. Don't expect them to negotiate because they won't. We're just going to do this as a smokescreen to kill time, but we don't plan to negotiate. (R.T., Vol. XII, P. 121, 11. 18-24).

Although Mr. Pena specifically denied the commentary as well as his authority to even make such statements. Mr. Magdaleno's remarks remain uncontroverted. For the reasons discussed supra, I find sufficient record evidence of Respondent's real (unlawful) motivation in this regard independent of the testimony of Ms Perez.

(5) Conclusion:

I find that Respondent's conduct both at the bargaining table and elsewhere presents substantial evidence of a bad-faith approach to collective bargaining. While the union was not totally

blameless for the lack of progress in the negotiations when viewed in the entirety, I find that Respondent's conduct amounted to a refusal to bargain in violation of Labor Code Section 1153(e) and will accordingly recommend the appropriate remedy.

SUMMARY

I find that Respondent violated Sections 1153(a), (c) and (d) of the Act by the discharge of Juan Quintero. Respondent violated Sections 1153(a) and (c) of the Act by its refusal to rehire the 28 employees listed in Exhibit A attached hereto, as well as Marcelino Quintero, and Pablo Quintero, because of their participation in the 1979 work stoppages and/or their support for the UFW. Respondent violated Section 1153(a) of the Act by its refusal to rehire Guadalupe Martinez in September, 1980, following its offer to reinstate the protesters from Maria Sagrario Perez' crew. Respondent has further violated §1153 (e) of the Act by its failure to bargain in good faith with the UFW, as well as by certain per se violations (unilateral wage adjustments, failure to notify the UFW re changes in hiring and seniority practices, discharges of Jose Amador, Juan Quintero, and the members of Maria Sagrario Perez' crew who protested their supervisor's termination). I recommend dismissal of all other fully litigated allegations raised during the hearing. Because of the importance of preserving stability in California agriculture, and the need for assuring that ballot box outcomes are not nullified by subsequent unlawful conduct, I find the violations to be very serious, and recommend the following:

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153(a), (c), (d), and (e) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Juan Quintero, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job if it has not already done so without prejudice to his seniority, or other rights and privileges. I shall further recommend that Respondent make Juan Quintero whole for any losses he may have suffered as a result of its unlawful discriminatory action by payment to him of a sum of money equal to the wages and other benefits he would have earned from May 28, 1980, to the date on which he is reinstated, or offered reinstatement, less his respective earnings and benefits, together with interest at the rate of seven percent per annum, such back pay and benefits to be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries. Inc. Clay 20, 1977) 3 ALRB No. 42, enf. den. in part; Sunnyside-Nurseries , Inc. v. Agricultural Labor Relations Bd (1979) 93 Cal. App. 3d 92.

Having found that Respondent unlawfully refused to rehire various employees because of their participation in protected activities and/or their support for the UFW, I shall recommend that Respondent be ordered to offer reinstatement to their former.

or equivalent jobs with Respondent's Salinas operations to each of the persons named in Exhibit A, as well as Pablo Quintero, Marcelino Quintero, and Guadalupe Martinez, without prejudice to their seniority or other rights and privileges, beginning with the earliest date following issuance of this proposed Order.[14]

I further recommend that the Respondent make whole each of the persons listed in Exhibit A, as well as Marcelino Quintero, Pablo Quintero, Guadalupe Martinez, .and Eduardo Melgoza by payment to them of a sum of money equal to the wages they each would have earned but for Respondent's unlawful refusal to rehire them, less their respective net earnings, together with interest at the rate of seven percent per annum. Back pay shall be computed in accordance with the formula established by the Board in Sunnyside Nurseries, Inc. , supra. Because of the uncertainty created by the fact that the discriminatees were precluded from applying and being hired in their accustomed manner, I recommend the establishment of a rebuttable presumption that each of the 28 discriminatees listed in Exhibit A would have worked the same number of hours in Salinas during 1980 as he or she worked in 1979 in Salinas. See Kawano, Inc., supra; Board Decision, pp. 18-20.

Having found that Respondent violated Labor Code Section

[14]Because Eduardo Melgoza specifically declined future employment with Respondent (R.T.,Vol. IX, p. 76, 11. 19-24), I do not recommend reinstatement in his case.

///

1153(e) by failing and refusing to bargain in good faith, and by its conduct was responsible for the parties' failure to reach an agreement, I shall recommend that Respondent be ordered to meet and bargain collectively with regard to wages, hours, and other terms and conditions of employment in good faith with the UFW and to make its employees whole for the loss of wages and other economic losses they incurred as a result of Respondent's refusal to bargain, plus interest in accordance with the make-whole formula set forth in Adam Dairy, dba Rancho Dos Rios (April 26, 1978) 4 ALRB No. 24, review den. by Ct. App. , 2nd Dist., Div. 3, March 17, 1980. Because of the difficulty in identifying precisely the date for the beginning of illegal "surface bargaining", and the previous history of the Respondent and the UFW in discontinuing negotiations during the winter in Salinas -- I will recommend, along the lines of 0. P. Murphy, supra, p. 26, that the make-whole remedy be applied from June 4, 1980 -- the first bargaining session of the 1980 season. I decline to recommend application of this remedy retroactively to the September 12, 1979, negotiating session in light of the UFW position through 18 April 1980, that it wished to bargain for all the company's operations, as well as the past practice of discontinuing negotiations at the termination of the Salinas harvest. It was at the June 4, 1980, session that Respondent unmistakeably demonstrated its intention not to bargain in good faith with respect to the Northern certification unit, by summarily and without explanation rejecting the union's proposal, and not

having been prepared for the session.

I further recommend that the make-whole remedy should continue until such time as Respondent commences to bargain in good faith with the UFW, and thereafter bargains to a contract or bona fide impasse.

Having found that Respondent's dilatory conduct at the bargaining table significantly interfered with the progress of negotiations, I shall further recommend that the certification of the UFW as exclusive collective bargaining representative for Respondent's Northern certification unit agricultural employees be extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

I shall further recommend that the Respondent shall be ordered to preserve and upon request to make available to the Board and its agents for examination and copying, all of its foremen's notebooks containing employee numbers and dates of hire, as well as the personnel files at Respondent's Phoenix offices so that employees' back pay due them and seniority may be ascertained.

In order to further effectuate the purposes of the Act and to insure to the employees the enjoyment of the rights guaranteed to them in Section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act, and it has been ordered not to engage in future violations of the Act. M. Caratan, Inc. (October 26, 1978) 4 ALRB No. 83; 6 ALRB No. 14 (March 12, 1980) review

den. by Ct. App., 5th Dist., May 27, 1980.

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

ORDER

Respondent, J. R. NORTON COMPANY, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2 (a), with the UFW, as the certified exclusive collective bargaining representative of Respondent's Salinas-Watsonville unit agricultural employees; and in particular by unilaterally changing employees' wages or terms or conditions of work.

(b) Discouraging membership of employees in the UFW or any other labor organization by discharging or failing to rehire any of its agricultural employees for participating in concerted activities, supporting the UFW, or because they filed charges or testified at unfair labor practice hearings under the Act.

(c) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed then by Section 1152.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective

bargaining representative of its Northern certification unit agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole those employees employed by the Respondent in the appropriate bargaining unit at any time before June 4, 1980, to the date Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, as such losses have been defined in Adam Dairy, dba Rancho Dos Rios, supra.

(c) Make whole each of the agricultural employees discriminatorily discharged, or failed to be rehired for any losses he or she suffered as a result of his or her discharge or failure to be rehired, by payment to each of them a sum of money equal to the wages they lost, less their respective net interim earnings, together with interest thereon at the rate of seven percent per annum. Back pay shall be computed in accordance with the formula established by the Board in Sunnyside Nurseries, Inc., supra, as modified by the considerations in Kawano, Inc., supra.

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(e) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent

shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(f) Post copies of the attached Notice in conspicuous places at its Salinas-Watsonville property for a 90-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of this decision.

(h) Mail copies of the attached Notice in all appropriate languages within 30 days of the date of issuance of the Order to all employees employed by Respondent in the Salinas-Watsonville area in 1979 and 1980 and any other employees as specified in paragraph 2 (c) above.

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost

at this reading and the question-and-answer period.

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

(k) Offer to JUAN QUINTERO, PABLO QUINTERO, MARCELINO QUINTERO, GUADALUPE MARTINEZ, and each of the employees listed in Exhibit A attached hereto -immediate and full reinstatement to his or her former job at Respondent's Salinas operations without prejudice to his or her seniority or other rights and privileges (excluding Eduardo Melgoza).

It is further ordered that the certification of the UFW as the exclusive collective bargaining representative for Respondent's Northern certification unit agricultural employees be extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

It is further recommended that the remaining allegations in the complaints as amended be dismissed.

DATED: April 24, 1981.

STUART A. WEIN
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

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

1. To organize themselves;

2. To form, join, or help any union;

3. To bargain as a group and to choose anyone they want to speak for them;

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

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

Because this is true, we promise you that:

WE WILL NOT discharge, fail to rehire, or otherwise discriminate against any employee, because he or she has exercised any of these rights.

WE WILL offer JUAN QUTNTERO, PABLO QUINTERC, MARCELINO QUINTERO, GUADALUPE MARTINEZ, JAIME CEDILLO, LADISLAO MIRANDA, ERNESTO MONTIEL, AGUSTIN ROLDAN, ROSENDO RIOS CASILLAS, CARLOS AGUIRRE, FERNANDO SALDANA, FRANCISCO JIMENEZ , GUADALUPE BERLANGA, PEDRO NARANJO, JOSE VILLASENOR. MANUEL R. VASQUEZ, FILIXON LOZANO, JOSE R. CAMARILLO, RAMON DIAZ, JOSE RUBIO, JOSE FARIAS, ANTONIO MALDONADO, DIEGO DE LA FUENTE, ARTURO HOYOS, ELISA M. COVARRUBIAS, MARIA GARCIA,

MAGDALENA CARDOZA, MINERVA CABRERA, MARIA ESTELA MENDOZA, MIRTHA GARCIA, and JUAN REYNA their old jobs back if they want them, and will pay them any money they lost because we discharged them or failed to rehire them unlawfully.

WE WILL meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL NOT change your wage rates, or other terms or conditions of your work without first meeting and bargaining with the UFW about such matters because it is the representative chosen by our employees.

WE WILL NOT deal directly or indirectly with our employees concerning their wages or other working conditions, but will conduct such negotiations with the UFW because it was chosen by our employees as their representative.

DATED:

Signed:

J. R. NORTON COMPANY

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.

EXHIBIT A

JAIME CEDILLO

LADISLAO MIRANDA

ERNESTO MONTIEL

AGUSTIN ROLDAN

ROSENDO RIOS CASILLAS

CARLOS AGUIRRE

FERNANDO SALDANA

FRANCISCO JIMENEZ

GUADALUPE BERLANGA

PEDRO NARANJO

JOSE VILLASENOR

MANUEL R. VASQUEZ

FILIMON LOZANO

JOSE R. CAMARILLO

RAMON DIAZ

JOSE RUBIO

JOSE FARIAS

ANTONIO MALDONADO

DIEGO DE LA FUENTE

ARTURO HOYOS

ELISA H. COVARRUBIAS

MAGDALENA CARDOZA

MINERVA CABRERA

MARIA ZSTELA MENDOZA

MIRTHA GARCIA

MARIA GARCIA

JUAN REYNA

EDUARDO MELGOZA