Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS,	)	Case Nos.
	)	80-CE-20-D 80-CE-83-D
Respondent,	)	80-CE-34-D 80-CE-83-D-1
	)	80-CE-39-D 80-CE-84-D
and	)	80-CE-40-D 80-CE-87-D
	)	80-CE-41-D 80-CE-90-D
UNITED FARM WORKERS	)	80-CE-42-D 80-CE-95-D
OF AMERICA, AFL-CIO,	)	80-CE-58-D 80-CE-96-D
LEODEGARIO ALVAREZ AND	)	80-CE-61-D 80-CE-103-D
FLORENCIO PEREZ,	)	80-CE-62-D 80-CE-106-D
	)	80-CE-72-D 80-CE-111-D
Charging Parties.	)	80-CE-113-D
	)	9 ALRB No. 21

DECISION AND ORDER

On July 27, 1981, Administrative Law Judge (ALJ)[1/] Ron Greenberg issued the attached Decision in this proceeding. Thereafter, Respondent and General Counsel each timely filed exceptions with a supporting brief and a reply brief.

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

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[2/] of the ALJ and to adopt his recommended Order, only to the extent consistent

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[1/] At the time of the issuance of the ALJ's Decision all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] As no exceptions have been filed to the ALJ's conclusions regarding Respondent's layoff of the eleven tractor drivers on July 5, 1980, and its interrogation of Ramon Navarro on July 8, 1980, we hereby affirm those conclusions.

herewith.

The ALJ found that Respondent discharged employees Francisco Luevano, Felipe Pulido, Margarito Alvarez, and Placido Lopez and laid off employees Esteban Villanueva and Leodegario Alvarez on various dates between February and July 1980 because they participated in union-led work stoppages in October 1979 and because of their other union activities. The ALJ therefore concluded that those discharges and layoffs violated Labor Code section 1153(c) and (a).[3/] We find merit in Respondent's exceptions to those conclusions.

The ALJ, in our view, has drawn unwarranted inferences from supervisor Jessie Terrazas' testimony that the company policy regarding day-to-day absenteeism was "tightened up" after the October 1979 strikes. It does not appear that Terrazas or personnel manager Bob Garcia significantly changed the policy requiring employees to return promptly from leaves of absence. That company policy was applied to Francisco Luevano and Placido Lopez in accordance with provisions set forth in the company handbook and there is insufficient evidence that the policy had been

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[3/] Section 1153(c) and (a) provide, in pertinent part, that:

> It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.
>
> * * *
>
> (c) By 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.

applied differently to non-union employees. As we find no causal connection between the union activities of these employees and their subsequent discharge, we conclude that their discharge did not constitute a violation of the Act. (See Central Freight Lines, Inc. (1981) 254 NLRB 1177 [106 LRRM 1284].)

As to Leodegario Alvarez and Esteban Villanueva, we find nothing in Respondent's efforts to correct its seniority lists which would tend to discourage employees from either union activity or other protected concerted activity. First, neither Alvarez nor Villanueva was a particularly active union supporter, other than as a participant in the October 1979 work stoppages. Second, it seems clear that Respondent's corrections in their seniority dates were legitimate changes that simply moved the employees down on the list. Third, since virtually all Respondent's employees showed support for the Union by participating in the October 1979 stoppages, it is likely that reducing the seniority of Alvarez and Villanueva caused a gain to less senior employees on the list, who also went on strike. We find that Respondent's reduction of their seniority did not tend to discourage any employee from supporting the union, and we conclude that Respondent's action did not thereby violate the Act.

In the case of Margarito Alvarez, the testimony of supervisor Jessie Terrazas indicates that Alvarez, a vocal union activist, was discharged because "he just did not care" about the company rules on absenteeism. An employer's concern over a pro-union employee's "attitude" sometimes evidences a desire to get rid of a troublemaker who is causing discontent among

other employees. (See NLRB v. Jack LaLanne Mfg. Corp. (2nd Cir. 1976) 539 F.2d 292 [92 LRRM 3601].) However, despite Respondent's knowledge of Alvarez' union activity, we are persuaded that it discharged him because of his destruction of Respondent's irrigation pipe several weeks before his discharge. Bob Garcia's testimony indicates that Respondent believed Alvarez had intentionally sabotaged the pipe and that his absence without leave on July 22, 1980, although not serious in itself, was simply the straw that broke the camel's back. We therefore find that Alvarez would have been fired even absent his union activity and that his discharge was not a violation of the Act. (See Royal Packing Co. (1982) 8 ALRB No. 74.)

Finally, we find no causal connection between Felipe Pulido's union or strike activity and his subsequent discharge for insubordination on May 31, 1980. Pulido, a tractor driver with considerable experience, had a longstanding complaint about working on the backhoe. The evidence indicates that supervisor Jessie Terrazas gave Pulido a direct order to continue working the backhoe until several emergency jobs were completed and that Terrazas believed Pulido disobeyed that order. We are convinced that this perceived insubordination was the immediate reason for Pulido's discharge and not his somewhat remote union activity. Accordingly, we conclude that his discharge did not constitute a violation of the Act.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board

(Board) hereby orders that Respondent Sam Andrews' Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off, or otherwise discriminating against, any agricultural employee in regard to tenure of employment or any other term or condition of employment because he or she has engaged in any concerted activity protected by section 1152 of the Act;

(b) Interrogating any agricultural employee regarding his or her union activity or the protected concerted activity of any other agricultural employee(s) and;

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) 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 the eleven members of its tractor crew who Respondent discriminatorily laid off on or about July 5, 1980, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole each and all of the eleven tractor crew employees, referred to above in paragraph 2(a), for all losses of pay and other economic losses they have suffered as a result of Respondent's aforesaid discrimination against them, the makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance

with our Decision in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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

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

(e) Mail a copy of the attached Notice, in the appropriate language, within 30 days after the date of issuance of this Order, to each agricultural employee employed by Respondent at any time between July 1980 and July 1981.

(f) 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 promptly any Notice which has been altered, defaced, covered or removed during the posting period(s).

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languges, 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 and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

Dated: April 28, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

MEMBER McCARTHY, Concurring:

It is well settled that known union activities or other concerted activities of employees followed by their discharge or layoff are not sufficient by themselves to establish unlawful discrimination. To find unlawful discrimination, it must be determined that the concerted activity was a protected activity and that there is a causative connection between the activity and the employer's actions. (Randall P. Kane, Inc. (9th Cir. 1978) 581 F.2d 215 [99 LRRM 3022].)

It is undisputed that the work stoppages which are at issue herein were a form of concerted activity, and no party contends otherwise. However, General Counsel neither alleged, litigated, nor attempted to prove the essential element that the concerted activity was also a protected activity within the meaning of Labor Code section 1152. The Administrative Law Judge (ALJ) correctly ruled that, under Wright-Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169], the General Counsel, to establish a

prima facie case, must prove that protected concerted activity was a motivating basis for the layoffs or discharges. Absent the requisite conclusion that the activity, in addition to being concerted in nature, was also a protected activity within the meaning of section 1152 of the Act, Respondent's Wright-Line burden need never have been reached. Inexplicably, the ALJ failed to make any finding concerning that pivotal element of the prima facie case.

Assuming, for purposes of argument only, that the work stoppages, which General Counsel asserts were the basis for the layoffs or discharges, were a form of protected activity, the employees were not insulated from discharge for cause merely because they had engaged in the protected activity. (Rosso and Mastracco, Inc. (1977) 231 NLRB 945 [96 LRRM 1227].) Certainly any employee misconduct which would justify a discharge absent any protected activity will also justify a discharge following protected activity where the misconduct is the basis for the discharge. (Rosso and Mastracco, Inc., supra.) As explained by the NLRB in Klate Holt Co. (1966) 161 NLRB 1606 [63 LRRM 1481]:

> The mere fact that an employer may desire to terminate an employee because he engaged in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, the circumstance that the employer welcomes the opportunity to discharge does not make it discriminatory and therefore unlawful.

My independent review of the record in this proceeding compels me to conclude that all of the alleged discriminatees

for whom the ALJ found a violation[1/] would have been subjected to the same disciplinary measures, for cause, even absent their participation in the work stoppages, whether or not protected, or any union or other protected concerted activities.

Dated: April 28, 1983

JOHN P. McCARTHY, Member

[1/] I leave undisturbed the ALJ's finding that eleven tractor drivers were wrongfully laid off in July 5, 1980, because no party excepted to the finding, although the precise nature of the violation is not clear from his Decision.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by laying off eleven tractor drivers on or about July 5, 1980, because they had engaged in protected concerted activity, and by interrogating Ramon Navarro about his union activities.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

WE WILL NOT do anything in the future that interferes with your rights under the Act, or forces you to do, or stop doing, any of the things listed above.

WE WILL NOT lay off any agricultural employee for engaging in any protected concerted activity.

WE WILL NOT interrogate employees about their union activity.

WE WILL reinstate the eleven members of the tractor crew we laid off on or about July 5, 1980, to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for all pay and other money they have lost as a result of that layoff, plus interest.

Dated: SAM ANDREWS' SONS

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 627 Main Street, Delano, California 93215. The telephone number is (805) 725-2770.

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

Sam Andrews' Sons (UFW)

9 ALRB No. 21
Case Nos. 80-CE-20-D, et al.

ALJ DECISION

The ALJ found that Respondent, by discharging or laying off six employees, discriminated against these employees on the basis of their involvement in a union-led strike. He further found that Respondent interrogated an employee about his union activity and unlawfully laid off a crew of tractor drivers for engaging in a short work stoppage.

BOARD DECISION

The Board adopted the ALJ's findings and conclusions as to the surveillance and lay off of the tractor driver crew. However, as to the six discriminatory discharges and layoffs, the Board found either no causal connection between Respondent's actions and the employees' protected activity, or a legitimate business justification for the Respondent's action, and dismissed each of the allegations.

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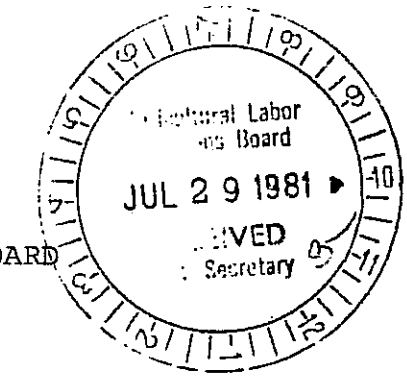

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
SAM ANDREWS AND SONS,	Case Nos.
Respondent,	80-CE-20-D
and	80-CE-34-D
UNITED FARM WORKERS OF AMERICA, AFL-CIO, LEODEGARIO ALVAREZ and FLORENCIO PEREZ,	80-CE-39-D
Charging Parties.	80-CE-40-D
	80-CE-41-D
	80-CE-42-D
	80-CE-58-D
	80-CE-61-D
	80-CE-62-D
	80-CE-83-D
	80-CE-83-1-D
	80-CE-84-D
	80-CE-90-D
	80-CE-96-D
	80-CE-106-D
	80-CE-103-D
	80-CE-111-D
	80-CE-113-D
	80-CE-95-D
	80-CE-72-D
	80-CE-87-D

John Patrick Moore, Manuel Malgosa, Nicolas Reyes, of Fresno, for the General Counsel

John Clark Brown, Cohen, Freeman & Broker, Los Angeles, for the Respondent

Javier Cadena of Salinas for the UFW.

DECISION OF ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

RON GREENBERG, Administrative Law Officer: This case was heard by me beginning on August 24, 1980, ending on December 12, 1980 in Delano, and Los Angeles, California. The complaint herein, which issued on April 28, 1980, based on charges filed by the United Farm Workers of America, AFL-CIO (hereinafter "UFW"), and Leodegario Alvarez and

Florencio Perez, and duly served on Respondent, Sam Andrews and Sons, on April 28, 1980. On July 8, 1980, an Order Consolidating Cases and First Amended Consolidated Complaint were issued by the Regional Director of the Fresno Region and duly served on the parties, alleging that Respondent committed various violations of the Agricultural Labor Relations Act (hereafter "ALRA" or "the Act"). Respondent filed its Answer on May 6, 1980, denying the commission of any unfair labor practices. On July 16, 1980, Respondent filed its Answer to the First Amended Consolidated Complaint, denying commission of any unfair labor practices and raising two affirmative defenses.[1/]

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

FINDINGS OF FACT

I. Jurisdiction

Respondent admitted in its answer, and I find, that it is an agricultural employer within the meaning of

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[1/] I find no merit in the affirmative defenses raised by Respondent that the Complaint and First Amended Complaint do not state a sufficient cause of action and fail to contain sufficient statement of facts as required by Section 20202 of the Board's regulations.

of Section 1140.4(c) of the Act, and that the United Farm Workers of America, AFL-CIO, is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint, as amended, alleged that Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed them by Section 1152 of the Act in violation of Section 1153(a) of the Act and discriminated in regard to hiring, tenure and terms or conditions of employment to discourage union membership in violation of Section 1153(c) of the Act by: 1) discharging Francisco Luevano on February 13, 1980; 2) laying off Esteban Villanueva during March and April, 1980; 3) laying off Leodegario Alvarez on March 12, 1980; 4) laying off Francisco Luevano and Carlos Heredia on April 28, 1980; 5) discharging Roberto Rosales on March 15, 1980; 6) discharging Felipe Pulido on June 2, 1980; 7) laying off Francisco Luevano and other tractor drivers on May 30, 1980; 8) discharging Margarito Alvarez on July 23, 1980 (also in violation of Section 1153(d) of the Act); 9) refusing to rehire Ramon Navarro's children; 10) laying off Placido Lopez on February 2, 1980; 11) laying off 11 tractor drivers on July 5, 1980; 12) discharging Jesus Ibarra on June 11, 1980; 13) laying off Jesus Ibarra from February 22, 1980 to May 15, 1980.[2/]

[2/] Paragraph 12 of the First Amended Complaint, alleging the discharge of Florencio Perez was dismissed at the hearing.

Respondent denies that it engaged in any unlawful activities.

III. Background

A. Respondent's Operations

Respondent grows cotton, vegetables and melons on its two Kern County ranches, Lakeview and Santiaga, which are the sites of the alleged unfair labor practices. They encompass 14,000 acres in the Bakersfield area, with a work force varying in size from 1800 during a harvest to a steady work force of 100.

B. History of UFW at Respondent

The UFW won an election at Respondent in 1977. However, to this date, the parties have not entered into a contract. Numerous unfair labor practice charges have been filed, and six cases have been decided by the Board (see later discussion in Analysis section).

Most all of the employees at Respondent support the UFW, and they participated in a work stoppage in October, 1979. General Counsel contends that the unfair labor practice charges contained in the complaint stem from worker participation in that work stoppage.

C. The Company Policy Concerning Unexplained Absences and Lateness

GCX 11, the company handbook, states that absence without notice is ground for immediate termination or suspension. However, unlike the harsh implementation of this rule (tempered only by the three-day grace period) with

regard to failing to return from leave or layoff on time, when it comes to everyday absenteeism, the company has had an exceedingly lax procedure. Jessie Terrazas stated his understanding of company policy to be that if an employee does not report in time, and if he has no excuse, those are grounds for issuing a warning notice. However, the foreman gives such a warning only if he feels that the unexcused absenteeism has become habitual and frequent. It was not Jessie's understanding that if a worker misses three times with no excuse he would be dismissed. When a tractor driver is absent without notice, Jessie testified that he will question him the next day to look for a reason why notice was not given. According to Jessie, issuing a warning is a matter of foreman discretion, and allowance is made until it becomes "regular." When three warnings are given, then a worker will be terminated.

Jessie testified that he had "tightened things up" over the last "7 or 8 months," which is his explanation for why there was such a disparate number of notices given after the October work stoppage. Frank Castro, irrigation foreman, denied there was any difference in the number he had given for comparable periods before and after the work stoppage.[3/]

Frank Castro's explanation for giving warnings for

[3/] However, the production of evidence by the Respondents falls far short in demonstrating this. Rather, the absence of pre-October, 1979 warnings and notices points to the accuracy of Jessie's "ship tightening" explanation.

absences without notice is similar to Jessie's. When a worker is either late or absent without notice, the foreman will write up a notice slip, which the workers often refuse to accept. After three or four such notice slips, the foreman may issue a warning. Three warnings lead to dismissal. Castro indicated that he thought this three warning discharge policy would be in the company handbook. It is not. Frank also indicated that the notices are kept on file and not given to the workers. It is basically a means for management to see if absences are becoming habitual.

The discretion in this warning procedure in Frank Castro's account differs from Jessie's. Jessie testified that he keeps informal track of such incidents whereas the irrigation foremen write them down. However, both do this for the same purpose, which is to see if a bad habit is developing, and if a warning will be issued.

IV. The Alleged Discharges and Layoffs

A. Francisco Luevano

Francisco Luevano went to work for Respndent as a tractor driver in 1976. He actively participated in work stoppages at the company beginning on August 15, 1979. On that day, workers left the fields. According to Luevano, the company shut its doors to workers on the following day, August 16. Luevano testified that owner Fred Andrews said that the workers had abandoned their labors.

Luevano, along with Margarito Alvarez and Felipe

Pulido, spoke to Fred Andrews on August 17. According to Luevano he told Andrews that he (Andrews) had been lying to him for a long time. Luevano told Andrews that the workers wanted a contract. Luevano testified that Andrews said that the union did not want to pay attention to the workers' problems.

Luevano was an elected delegate to the UFW Salinas Convention in 1979, and was a workers' representative in contract negotiations with the Company.

On January 29, 1980, Francisco Luevano called Jessie Terrazas, head foreman of the tractor drivers, and requested time off. Work was slow due to rain; and Jessie agreed. Francisco testified that he had earlier thought of a week-long vacation trip to Mexico, but rejected this as too short a time. So he waited, and when the rainy season occurred in late January-early February, and he had a week off for rainy weather, he also asked for his one week vacation plus a few days.

Jessie, however, testified that he only granted a week plus a few days. The Respondents introduced RX 10, purporting to be the leave notice filled out by Jessie at the time Francisco called him for the leave. It is company policy to give a worker a copy of such a leave notice, but this was not done in this case. Jessie claimed the reason for not giving it was that Francisco called on the phone and left immediately. Despite the subpoena requesting such

documents, the company never produced the leave notice until trial. Francisco never was informed of its existence, and it is unsigned by him. It indicates that Luevano was due to return by February 6, 1980.

Francisco testified that he called Jessie on February 12, 1980 while on his way back to work. Jessie informed him that he was fired for failing to return on time, and in response to Francisco's protests that he still had time left, told him to talk to Bob Garcia. Jessie explained that his decision was based on the company handbook, GCX 11 at p. 2, which states that failing to return from leave or layoff on time is grounds for termination. However, Jessie testified that he personally interprets this clause to allow a man a three day grace period before discharging him.

Although it is the company policy to give a man a discharge notice, Jessie claimed he did not do it in this case because he expected Francisco to go see Bob Garcia.

When Francisco called again after he returned, Jessie told him again that he was fired, but to talk to Bob. Francisco testified that when he went to pick up his check he asked Lionel Terrazas, another tractor foreman and Jessie's brother, for a discharge slip. Lionel refused, saying that it was Jessie's "problem."

Luevano testified that Lionel said he did not understand why Francisco was fired. Lionel said the company was hiring people. Francisco never got to talk to Bob until a

month later. In the meantime, Francisco filed an unfair labor practice charge against the company for discriminatory discharge.

Answering an ad on the radio placed by the State Unemployment Office on March 17, Francisco was referred by that office for a tractor driver opening at Sam Andrews. He testified that he went to Sam Andrews and first asked Lionel if there was work, not showing him the referral card from the unemployment office. Lionel indicated that there was presently no work, but there might be in the future, and he would let Francisco know that evening. Then Francisco confronted him with the card. Francisco testified that at that moment, Jessie came by, and said that the jobs had been filled by February 20, and he had to talk to Bob Garcia. They then went to Bob's office where it is undisputed that he was rehired with his seniority. Although Bob knew that charges had been filed, Jessie claimed not to have known. However Jessie testified that he had expected that a charge would be filed when he discharged Francisco. However, while Jessie testified that he was not usually notified about unfair labor practice charges filed against the company, Bob Garcia testified that it was his practice to notify the foreman concerned.

Jessie testified that he did not believe Francisco had misunderstood the amount of leave time given to him, and he was lying to cover up his being late.

B. Placido Lopez

Placido Lopez, a tractor driver for two years, was an active participant in the October work stoppage, demonstrating with union flags at the company office, and going out into the fields to encourage others to walk out. According to his testimony, while on layoff in December, he left on December 29, 1979 for Mexico on an urgent matter. Lopez testified that he was unable to reach either Lionel or Jessie by phone while he was in Mexico. He requested a good friend and coworker Jose Manuel Lopez to contact the company for him. Jose testified that he did so the following day, in January about 3 weeks after Placido had left.

Lionel testified that Jose had come to him and said that Placido's mother was sick in Mexico, and that he needed another week. Lionel agreed because of the rainy weather.

Jose Manuel Lopez testified that Placido called back 2 weeks later needing a few more days; and Lionel again agreed. Lionel corroborated this testimony, stating that it was still raining. However Lionel claimed that he later contacted both Jose and Placido's home requesting the latter's return. Contradicting his testimony, Jose claimed that he never talked to anyone in management again about it after the second phone call until Placido returned.

Meanwhile, Placido had called frequently, and Jose related what he had been told by the company. When Placido returned to work, he had lost his seniority and his job, and

he found it difficult to get a definitive ruling on his status. After a couple of weeks, Jessie told him there would be no work for him. He got work elsewhere, returning to work for Sam Andrews in April after filing an unfair labor practice charge against the company.

Lionel testified that he called Placido's home and talked to a "lady" who said Placido was "out." He asked Max Lopez, Placido's cousin, to contact Placido. Lionel was told the next day that Placido was still in Mexico.

Lionel testified that when Jose contacted him the second time, he gave no specific number of days before Placido's return. He considered Placido to have "quit." However, he did not fire him because he felt Placido had an excuse, leaving it for Bob Garcia to decide. According to Lionel, some excuses will excuse a worker for such an offense. Placido was asked for proof of the illness, and he provided none. Lionel stated that it has been the company policy to request such proof for two to three years, but he admitted that this policy was not in the handbook nor was it a company "rule." Furthermore, he could not remember how he learned about it. Lionel further testified that when a worker is laid off, he is supposed to leave a number and address where he can be contacted. However, Lionel testified that this too was not a "rule" or "company policy." He knew of no other such incidents where a worker, late from leave, did not contact the company. Lionel admitted that the Company allowed

workers to let the company notify them through a message from other workers.

Jessie Terrasas testified that it was management who initiated the contact with Jose Manuel Lopez concerning Placido. He indicated that family illness would be the type of emergency justification for overstaying leave, and he admitted that he commonly used Placido and Jose to get in touch with each other. Jessie filled out RX 18, discharging Placido because he had failed to return. This, however, was unsigned by Placido and was not given to him. It indicated Placido was last contacted through Jose on February 6, 1980, and that the company considered him "quit" as of February 13, 1980.

C. Jesus Ibarra

Jesus Ibarra worked as an irrigator. He testified that he carried flags to the company office during the October work stoppage, and walked off his job in the presence of his foreman. He further testified that he had never received a warning or had trouble with his foreman before. Bob Garcia corroborated that statement. While on layoff after the work stoppage, he asked for and received his vacation. Leave was given until December 21-22, 1979. He testified that he left his phone number in Mexico with Juan Perez, an irrigation foreman.

According to Ibarra, he got sick in Mexico on December 18, 1979, and tried five times to contact Juan

Perez by phone. Ibarra stated that he asked his sister to call and tell Juan that both Jesus and his mother-in-law were sick. Ibarra testified that she was unable to contact him.

On February 22, 1980, Jesus returned and was told by Juan Perez to go see Bob Garcia, who asked for proof of his illness. According to Ibarra, he returned later with papers proving both he and his mother-in-law were sick, but Bob Garcia said he stayed too long. Jesus lost his seniority. He tried several times to get back to work, and was told to return in May.

Ibarra testified that Cornelio Gayton, a foreman, told him that a worker named Romero had overstayed his leave and returned to work. On May 10, 1980 Cornelio Gayton came looking to hire seven workers, and Jesus testified that he went with Gayton without informing either Bob Garcia or Juan Perez. As of May 10, nobody had called him back to work. On May 14, 1980, he filed an unfair labor practice charge.

Mrs. Ibarra testified that when Juan Perez called them in Mexico, Jesus was in the hospital. She told Juan that they had meant to return earlier, but both Jesus and her mother were sick. Juan said work was slow. She asked him if proof would be necessary, and he said no. According to Mrs. Ibarra, Juan said Jesus would have work when he returned.

Juan Perez testified that he gave Jesus leave in November because his mother-in-law was ill, and that he was

to return in late December, 1979. The company sent a letter to all irrigators to be back by January 10, 1980 because they needed them. Juan called Jesus in Monterey, Mexico in February, 1980 because he was trying to contact another worker whose number he had been told Jesus had. He talked to Mrs. Ibarra who told him that Jesus had been sick and that they would return in a few days. Juan Perez testified that he told her that if Jesus wished to keep his seniority, he would have to bring medical proof. According to Perez, Jesus failed to bring proof with him.

Juan Perez testified that in October, 1978, Jesus was laid off, and he similarly left for Mexico, failing to return until sometime in 1979, when he returned and was unable to get work immediately. In that case he was neither discharged nor reprimanded, and all the seniority lists indicated that Jesus kept his seniority after the incident.

Juan Perez further stated that he had made no attempt to call Jesus back, and he did not send him one of the letters which were sent to the laid off irrigators. Perez testified that Jesus claimed he had not brought the papers with him because he left in a hurry due to an automobile accident. Juan referred him to Bob Garcia, and it was Bob who decided subsequently to give him back his seniority after examining the papers that Ibarra brought in later.

Bob Garcia testified that he did not think Jesus had a valid excuse and fired him in accordance with company

policy of firing workers who did not return from leave on time. However, Garcia testified that where a foreman gave permission or acquiesced in allowing a worker to continue his leave or vacation, that would be justification for being late. Moreover, Bob Garcia testified that the company does not always discharge a worker who is late without notice, and has "probably . . . been lax in some areas."

On June 10, 1980, Jesus Ibarra and 13-15 men were laid off by Juan Perez because of cold weather. According to Perez, Ibarra had no seniority at the time, it having been taken away by Bob Garcia when Ibarra returned from Mexico.

According to Perez, he first laid off the hourly workers in the trailer crew (CGX 49). Perez testified that he retained the row water workers, who knew the presence of the valves in different fields. Perez testified that he next cut line movers who worked piece rate. According to Perez, Ibarra never moved lines or worked nights because of his physical condition. Ibarra had worked as an hourly worker. Ibarra was rehired with the other hourly workers two weeks after the layoff.

D. Esteban Villanueva

Esteban Villanueva had been an irrigator since January, 1978, and had become a foreman's helper in March, 1979. He was active during the October work stoppage, and attended the contract negotiation sessions. He testified that men were

promised $.25 more per hour to be a helper, but they never received the increase. Esteban testified that he complained several times to Frank Castro and Bob Garcia for the men. In October, 1979, he refused to drive without the wage increase, and Frank threatened him with a layoff. However, according to Esteban, Bob Garcia promised to pay the additional wages, but he never fulfilled the promise.

Esteban left work in May, 1978, and he returned on January 2, 1979. According to Frank Castro, company policy dictated a loss of seniority, his new seniority date becoming January 2, 1979. However, this date does not appear on any seniority list until the January 31, 1980 list (RX 7). On the previous lists, he still maintains a January 26, 1978 date. Frank Castro testified that in October, 1979, there was a layoff of irrigators, and that the reason Esteban was not laid off was not because of the old seniority list, but rather because he was a foreman's helper. Castro testified that he laid Esteban off because of the complaints from other workers that Esteban had not lost his seniority. However, Frank testified that he always lays off by seniority, and that he relies upon the seniority lists to determine this. Had he relied in October, 1979 on the current seniority list, Esteban would not have been laid off because Esteban's seniority date was not changed until January 31, 1980. Frank Castro could not remember who had complained about Esteban's seniority or when, but Castro recalled that many workers did.

Esteban testified that on June 28, 1980, he and his brother Leonardo complained to Frank Castro about work assignments. Also present were Armando Chavez and foreman Camerino Esparaza. Castro told the Villanueves that ever since the idea of the union, they were no longer good workers; and that he would fire them at the first chance. Leonardo Villanueva corroborated this conversation. Leonardo testified that Frank told them to get the union out of their heads.

Bob Garcia testified that he ordered Esteban's seniority changed because Esteban's brother Leonardo came to him in May or June of 1979 complaining about the wrong seniority. His only explanation for the lag of over half a year in correcting the seniority date was that the payroll girl was not "timely" in correcting it. Bob admitted that he thought it "odd" that Leonardo complained about his brother. Furthermore, Leonardo was at the top of the seniority list, and he was unaffected by the change in Esteban's seniority. Bob testified that Leonardo was the first one ever to complain about the seniority lists while Bob worked there. Further, Garcia could not recall who the others who later complained were, or when.

E. Leodegario Alvarez

Leodegario Alvarez had been an irrigator since March, 1977. He was a participant in the October work stoppages and carried flags to the office in front of the foreman and

supervisors. During the layoffs in March, 1980, he learned that his seniority had been changed.

Alvarez testified that when he was laid off on March 12, 1980, while others with less seniority worked, he confronted Frank Castro. Castro told him that he lost his seniority because he had worked on the tractors in April, 1979, while he was laid off as an irrigator. He worked three weeks as a tractor driver, and then asked for his irrigating job back. Frank Castro gave him his job back, making no mention of a possible loss of seniority. When a layoff occurred in December, 1979, he was again laid off in accordance with his old seniority date.

When he was laid off in March, 1980, he questioned Bob Garcia and Frank, telling them that the irrigator crew had not called him back when he was on the tractors. Bob Garcia refused to reinstate him. In particular, Leodegario asked Garcia and Castro why the Mendozas had left in May, 1979, and had not returned until the following January.[4/] According to Alvarez he was told they had permission, and that the company would grant permission to whom they pleased.

Dolores Alvarez, supervisor of the farm and Leodegario's uncle, had helped him get the job on tractors while he was laid off from the irrigators. After driving tractors for 3 weeks, he was laid off.

[4/] It should be noted that if Alvarez' statement is true, the Mendozas would have been absent during the October work stoppages.

Frank Castro testified that Alvarez lost his seniority because of a company policy concerning switching departments. Castro testified that the policy is not stated in the company handbook. Castro stated that Bob Garcia related the policy after March 12, 1980, and he learned about it in relation to Leodegario. According to Castro, the policy permitted workers to retain seniority in the previous department until working for 30 days in the new department. However, according to Castro, if the worker was not called back, he would not lose his old seniority. Castro admitted that this policy was never explained to the workers.

In another part of his testimony, however, Castro indicated that he initiated a conversation about switching departments with Bob Garcia before May 22, 1979 because other irrigators were complaining. Castro testified that they decided at that time to institute the policy. Furthermore, Castro testified he also talked to Fred Andrews about the policy, and Fred said that they could not allow men to accumulate seniority in different departments as Leodegario was doing. Castro told Fred Andrews that he would dock a worker's seniority for such a switch. The time lag between May, 1979 and January, 1980, when Alvarez' seniority was changed, went unexplained.

F. Margarito Alvarez

Margarito Alvarez worked 4 1/2 years as a tractor driver at San Andrews. He is the nephew of farm supervisor

Dolores Alvarez. Jessie Terrasas testified that Margarito was one of his most skilled workers.

Margarito was a well-known union activist, working for the union during the representation campaign of 1977, distributing and filling out authorization cards, and speaking to workers about the union. He served as negotiator for the irrigators for a year. During the October work stoppages, he went out into the fields to encourage workers to join the strike.[5/]

On October 16, the day the company shut workers out following their work stoppage, Margarito Alvarez filed unfair labor practice charges with the ALRB. He subsequently testified against the company at an ALRB hearing concerning that charge. Furthermore, on October 16, after filing charges, he went to the regular negotiation session with the company as a representative of the workers.

On July 22, 1980, during a busy season requiring a seven-day work week, Margarito overslept. He testified that he was very tired, missing work without notifying the company. Margarito testified that in his experience people regularly missed work, expecially when there was a seven-day shift. When he missed work he would usually notify them, or explain when he returned. According to Margarito, he had never been warned or reprimanded for absences. On the following day,

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[5/]As noted earlier, he, Felipe Pulido and Francisco Luevano, spoke to Fred Andrews on August 17, 1979, telling him that the workers wanted a contract.

July 23, 1980, when he returned to work, he worked until 1:30 p.m., at which time Jessie Terrasas came down and asked him to come with him to the office. Bob Garcia was there and Margarito explained what happened, and how he believed it could happen to anybody. Margarito testified that the reason he was given for being discharged was his July 22 absence from work. RX 20, which is the status slip discharging Margarito also states this to be the reason. Jessie testified that since this was his third warning he was automatically discharged.

Bob Garcia testified that Margarito's indifference to company policy in not calling in was the reason he was terminated, as well as the cumulative impact of other factors. Jessie Terrasas indicated that the decision was the result of a joint analysis by Bob and him of this incident plus Margarito's past record.

Jessie Terrasas testified that he issued the warning not because of Margarito's absence, but rather because of Margarito's irresponsible attitude regarding his absence. According to Jessie, the real problem with Margarito was that he did not care. Jessie testified that Margarito was insincere and that he laughed as he explained his reason for being absent. Terrasas denied that Margarito had a nervous habit of smiling at the wrong time.

The first warning issued to Margarito involved an incident on November 13, 1979, in which Fred Andrews stopped

him in a field because he felt Margarito was handling the disc on a tractor improperly. He was driving with the disc out of the ground, according to Andrews. Margarito testified that the real reason he got the warning was because he argued with Fred Andrews when he was stopped. Fred denied that he argued with him. Jessie testified that it was his mental impression that this warning was justified. However, Jessie testified that when he learned about the incident from foreman Lionel Terrazas whom Fred Andrews had ordered to give the warning to Margarito, Lionel indicated to Jessie that he felt it was not right to give the warning. Jessie further testified that there were definite problems using the disc in that particular field. Margarito testified that Lionel drove the tractor himself and experienced the same difficulties he had.

Margarito was issued a second warning in June, 1980, and was suspended for ten days because of management's belief that Margarito had been negligent in destroying some sprinkler pipe. However, at this hearing, Respondent attempted to show that he willfully destroyed 900 feet of pipe. Bob Garcia testified that Juan Torres, a tractor foreman, reported that there was evidence that the destruction had been purposeful, and that this report "heavily, very heavily" influenced Bob's decision to discharge Margarito. Irrigation foreman John Perez examined the field the next day, and he testified that the damage was done purposefully. However, Bob Garcia

testified that he would have terminated him at the time if he felt it had been intentional. Without giving an explanation, Bob testified that he knew management wanted Margarito fired at that time.

Margarito claimed that the damage was an accident. Ramon Navarro testified that accidents causing damage to sprinkler pipe are frequent on the farm. However, Jessie Terrasas and John Perez testified that Margarito should have seen the Federal yellow gate connected to the sprinkler when he entered the row and felt the bumps of riding over the pipe. Alvarez contended that his vision was obscured by the carrot tops and the spray caused by the cutting. He further testified that he did not feel the bumps of the pipe.

Jessie Terrasas testified, also evidenced by GCX 30, that Hugo Duenas was given only a notice and not a suspension for extensive property damage. Jessie further testified that he could not recall any other worker ever being suspended for property damage.

Margarito testified that he had received no warning notices during his first 3 years working for Respondent. He stated that his first notice came around the time of the October work stoppage.

G. Felipe Pulido

Felipe Pulido had been at San Andrews for 11 years as a tractor driver. During the representational election in 1977 he served as an observer for the union, and has since

functioned as negotiator and tractor captain for the tractor drivers. He went out into the fields during the October work stoppage to encourage other workers to join. Felipe Pulido testified that after the work stoppage the company assigned harder jobs, dealt out worst treatment, and had more rigid rules.

It is undisputed that Felipe had a long-standing complaint with Jessie and Bob Garcia about his work assignments. He complained that he was not given enough work in vegetables, and also that he did not want to be assigned work on the back-hoe or grader. Most of the back-hoe work was not done in vegetables, and was paid at a rate about a dollar less an hour. Felipe testified that he told Jessie that he wanted to be paid Class 1 rates all the time, and then he would drive the back-hoe all the time. Jessie testified that Felipe had complained constantly for two years that he wanted Class 1 pay for driving the grader or back-hoe. Jessie testified that he and Bob Garcia attempted to compromise in 1980 and gave Class 2 drivers Class 1 pay whenever they worked the back-hoe or grader, but Felipe wanted to be paid Class 1 rates all the time. When a new pay rate was instituted in 1980, the differential between vegetable and non-vegetable tractor work became much greater than before, and this contributed to Felipe's complaint. However Jessie testified that he believed it was more than that, and that Felipe simply did not want to drive the back-hoe or grader. Jessie testified that after this pay

raise he tried to avoid taking Felipe out of the vegetables. Jessie testified that Bob told Felipe that it was Bob's job to mediate disputes between Felipe and Jessie, and that Felipe should come to him with such disputes. Jessie stated that he did not recall Bob telling Felipe he had the right to refuse to do a job.

Felipe testified that after the work stoppages, he and Francisco Luevano went to Bob Garcia with complaints. Francisco complained about being laid off, and Felipe complained that he was being put on the caterpiller while others with less seniority were put on the tractors, thus taking Felipe out of vegetables. Felipe said that Bob responded by saying that nobody could force him to do a job, and he would not be fired for wanting to earn more money. Francisco corroborated this testimony, stating that Bob told Felipe he could refuse such a work assignment without being dismissed or given a warning.[6/]

Felipe testified that Dolores Alvarez had instructed Jessie to pay him Class 1 wages on the grader. Felipe further stated that Dolores told him to go to Bob Garcia to resolve differences.

Felipe testified that the backhoe can be a delicate job as well as an important one, for it involves sometimes

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[6/] According to Felipe, workers could refuse a particular job assignment under the Teamsters contract that expired in 1977.

involves fixing and cleaning pipes to prevent overflow and the flooding of fields. Felipe stated that he understood that he would be required to work the back-hoe only in emergencies, when there was no other worker qualified to do it. He testified that Jessie told him that owner Don Andrews had said not to put Felipe on the back-hoe.

Jessie testified that he had an agreement with Felipe that he would work the back-hoe only in emergencies, and that they had tried to train Lazaro Gonzales to be able to do the job. However, according to Jessie, Lazaro did not learn very well.

On May 31, 1980, while Felipe was working in vegetables, Jessie came by at 8:45 a.m. to replace him with another worker who had less seniority, telling him he was to work the back-hoe. Jessie testified that his field supervisor, Blackie Poisson, asked him that morning about the back-hoe, and Jessie informed him that the regular back-hoe man had now shown up. Blackie said he needed it for fields number 269, 256, and 267, and some other jobs. Jessie testified that 269 and 256 had flooding problems. Blackie told him to get Felipe.

Jessie testified that he had to force Felipe to stop his tractor and that Felipe was motioning as if he would not go with him. Felipe testified that he did wave his finger at Jessie to indicate he would not go with him. Felipe testified that he attempted to tape his conversation with Jessie

demanding that somebody else be gotten. Jessie testified that he explained to Felipe that Hector Velarde, the regular back-hoeman had not shown up and he had nobody else to do it. Jessie explained that he wanted fields 269, 267 and 256 done and that afterwards Blackie had other work to be done. Felipe testified that Jessie explained what was to be done in 269 and 256 and that the rest was "insignificant." Felipe said he would do it only on an emergency basis and demanded to see Bob Garcia. He testified that Jessie indicated that only the first two fields were emergency work. Felipe told Jessie he would park the back-hoe after doing the first two fields.

Felipe testified that after looking for Bob who was not there, he saw Juan Torres, a tractor foreman, at 9:00 a.m. at the shop, and Felipe told him he was going to quit at noon after finishing two fields.

After finishing one field and driving towards the second, according to Felipe, he met Jessie on the road and told him again he would park the back-hoe after finishing the second field because there were no more emergencies. Jessie corroborated this second meeting on the road at 10:00 a.m., and that Felipe said he would park it after finishing the second field and wait to see Bob on Monday. Jessie testified that he responded, "Pues ni modo," meaning by it "I can't help it." Felipe testified that he understood this to mean that Jessie had consented, the phrase meaning "no other way." The literal translation is "no other way." The Board's certified

interpreter indicated that the most likely meaning was "that's it."

Felipe discovered in the second field that the back-hoe was leaking oil. Although he had a radio in the back-hoe, he drove it in and parked it. He testified it had been common in the past with a mechanical difficulty to be ordered immediately into the shop. He further stated he never had used the radio. He testified that he told the foreman Juan Torres that he felt he had fulfilled his duties. He had completed all the work in the first field and most of the second. All that remained in the latter was a buried pipe which he could not find before he left. Juan Torres gave him a ride home. Felipe expected either Juan or Jessie to pick him up after lunch.

Jessie testified he had assumed that the first two fields had been finished and that he never checked them. Juan Torres told Jessie later that Felipe had informed him about the leak. Jessie admitted that Felipe would have been justified in stopping had he notified him. Jessie had offered earlier testimony that all Felipe had told Juan when he drove into the yard was that he was going to park the back-hoe because that's what he had said he would do. According to Jessie, Felipe then asked for a ride home from Juan and during the ride said he would not drive "that shitty thing" for Class 1 rates part-time. Jessie testified that nobody informed him at that time about the oil leak. Jessie stated

that he took Lazaro Gonzales out himself and worked two and one half hours to three hours before noticing the leak. He thought about what happened over the weekend and fired Felipe on June 2, 1980, and issued him a status slip (RX 16) for insubordination. Jessie testified that in 6 years, he had never before fired a worker for insubordination.

Jessie testified that proper procedure for Felipe would have been to stop the tractor, turn the lights on, or flag someone down on the radio. He testified that it was company policy that the men have a right to talk to Bob Garcia if they did not want to operate a particular machine, and that he would take them to Bob if he could not handle the problem. However, Bob was not at the farm that day. Jessie also said that Felipe had "refused" to do work in the past, but eventually always had done it.

Jessie also testified that he had had a similar problem a month earlier with Jose Flores requesting to go home rather than work on the grader. Jessie stated that he had acquiesced at that time.[7/]

H. Alleged Discharge of 11 Tractor Drivers

On Saturday, July 5, 1981, 11 tractor drivers staged a work stoppage demanding the reinstatement of a coworker. The previous weekend a fight had erupted after drinking at a picnic. The police were sent for, and Abelino de la Torre

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[7/] Company foreman Juan Torres did not testify at the hearing.

was deported to Mexico. Testimony of tractor drivers revealed that they believed that Abelino had been beaten up by the foreman and that the company was behind his being sent to Mexico.

When Abelino returned to the company, he went to Dolores Alvarez, who told him he did not think that Abelino still had a job. Alvarez sent him to see Bob Garcia who was not on the farm at that time. Abelino testified that Juan Torres, a tractor foreman, told him he did have work and requested that they talk. Abelino wanted two witnesses to go with him. He finally met with Garcia, who told him he still had a job.

It is undisputed that the tractor drivers refused to work until it had been affirmed that Abelino still had his job. They started work that day at 12:30 p.m. At 3:00 p.m., they were laid off.

Owner Fred Andrews flew in that morning after being notified about the work stoppage. He testified that he would have come to the farm that day regardless of the work stoppage. When he arrived he saw a number of men doing yard work, and because he felt this was inappropriate, he decided to send them home and call a general meeting of supervisors and foremen. RX 8 indicates that a good percentage of the men were in fact doing yard work that day. Andrews explained the layoff, stating that too many tractor drivers had been assigned yard work that day. He also advanced the disrupted workday as

another reason for the layoff, requiring a major management meeting that afternoon. According to Andrews, the purpose of this meeting was to lay out the "game plan" for the next day.

Fred Andrews also testified that it was the custom for management to meet every day to plan the next day's work. His explanation of the difference between this day and others was that on this particular day they had not accomplished what they set out to accomplish. There was no explanation as to why the men were assigned yard work at all, or if it had not been planned the day before that this yard work had to be done.

Fred Andrews further testified that early July is not a "busy time" for tractor driving, with 95% of the crops not requiring tractor work. RX 8 indicates that most of the tractor drivers did not work Sunday, July 6, and many did not work July 7 or 8.

I. Roberto Rosales

Roberto Rosales washed cars and trucks for Respondent and did some minor maintenance work on them. He participated in the October work stoppage, carrying flags, wearing buttons, and helping get workers in the fields to join the stoppage. He walked out with the mechanics and tractor drivers and was seen by his shop foreman, Alfred Ganderilla. There was no evidence of other union involvement on his part.

Rosales testified that the pressure on him increased after the October work stoppage. He stated that his foreman Ganderilla and especially Dolores Alvarez, farm supervisor,

looked at his paper work more closely, telling him that he was not doing enough.

When he was laid off on March 15, 1980, Ganderilla told him that there was not enough work, explaining that foremen now were going to wash their own cars. According to Rosales, Ganderilla told him that he would be recalled if they hired someone to do his work.

Rosales testified that about a month before he was laid off, a new carwashing machine was bought, but not installed. He testified that they were getting ready to install it when he left. According to Rosales, Ganderilla had told him before his discharge that he would be taught how to use the new machine. However, it never was hooked up before he left.

Margarito Alvarez testified that he had seen Ganderilla's son, Jorge, washing cars several times after Rosales was fired. However, GCX 37 shows Jorge working only on a limited part-time basis.

Uncontradicted was the testimony of the new company shop supervisor, Carlos Torres, who replaced Alfredo Ganderilla. He testified that there was now no full-time car washer that took Rosales' place. He further testified that Jorge Ganderilla was only a part-time employee and that the foremen now usually wahed their own cars. He testified that the new equipment was more "sophisticated," faster, included the soap machine, and was easier to use.

Fred Andrews testified that on the basis of Ganderilla's recommendation, Andrews told Ganderilla to discharge Rosales because of the new "tremendous" piece of equipment which was very easy to use, allowing foremen to wash their own vehicles.

J. Layoff of Francisco Luevano and Carlos Heredia--April 28, 1980

On Friday, April 25, 1980, Francisco Luevano and Carlos Heredia, both undisputed union activists, testified against the company at an ALRB hearing. Tractor foreman Jessie Terrazas was aware that they were testifying. On April 26 it rained, and the tractor crew was laid off until the following Saturday (May 3).

Francisco testified that he had heard that Ramon Montoya, a man with less seniority than either he or Carlos, was still working. When Francisco and Carlos went to the company for their checks on May 2, they discovered Montoya working. Francisco and Carlos were called back to work that evening for the next day.

RX 9 reveals that most drivers including Francisco worked on April 28. Heredia, who did not testify, was not called back to work that day. No evidence was offered as to his readiness to work that day or any other. RX 9 further reveals that on May 2, 1980, the only driver with less seniority than either Luevano or Heredia who worked was Montoya. He drove the grader. Jessie Terrazas testified that Montoya did most of the grader work and that Francisco

did not do any grader work. RX 9 further indicates that most drivers were called back on May 3, 1980, just as Luevano and Heredia were.

K. Layoff of Francisco Luevano and other tractor drivers--May 30, 1980

Francisco Luevano testified that on May 30, 1980, the entire crew was laid off so that foreman and workers could attend the funeral of Dolores Alvarez' daughter. Work was resumed as usual the following work day. Luevano testified that workers were not allowed to attend the funeral of two co-workers in 1980.

V. Alleged Changes of Working Conditions

A. Sal Vasquez

Sal Vasquez was a tractor driver for one and a half years, the whole time being a UFW supporter. His brother is Hugo Duenas who is very active in the union. Sal testified that he had never been assigned to the spray rig before the October work stoppages. He testified that it is a terrible job, being very dangerous. Vasquez stated that he complained to Jessie Terrazas, who told him to do it or go home. Vasquez asked Jessie why he did not assign workers who had less seniority. According to Vasquez, he was assigned to the spray rig for two months, March, April and part of May, and then he was taken off the spray rig and put on the night shift.

RX 4 shows the assignments of tractor drivers to the spray rigs during March, April and the first week of May. It demonstrates that the undisputed UFW leaders, Margarito

Alvarez and Francisco Luevano, never were assigned to it, while another leader, Felipe Pulido, was assigned only one week for four days. Sal Vasquez and Abelino de la Torre were assigned far more than the others. However, many of the drivers who were assigned had more seniority than Vasquez. General Counsel produced no substantive evidence to show how assignments had been made prior to the work stoppages.

Jessie Terrazas explained his assignments to the spray rig by stating that he wanted experienced drivers who knew the whole farm, but who were not highly skilled.

Sal Vasquez was given a warning in November 1979 for getting the tractor stuck in the mud. Respondent offered RX 3 and RX 4 to show that worker Armando Garcia had been given two warnings, the first for getting stuck in the mud, the second for absence without notice. Jessie testified that he had assigned Armando Garcia to the spray rig because he was an undependable driver.

B. Hugo Duenas, Art Gann and Felipe Pulido

The complaint alleges that Felipe Pulido, Art Gann and Hugo Duenas were denied opportunities to work vegetables, an assignment which is undisputedly the best on the farm. RX 37 shows that Arthur, Felipe and Hugo were the Class II tractor drivers with the most seniority. Felipe testified that Jose Flores, Primitivo Garcia and Albino Montiel, all Class I drivers (Class I drivers are given a higher pay rate, and there were only four on the farm, GCX 37) as well as

Carlos Heredia and Margarito Albarez, whom he described as well-known union activists, were given more vegetable work than Arthur, Hugo and he. He testified that Guadalupe Torres was assigned more vegetable work. Torres had less seniority than Felipe, Art, or Hugo.

Jessie Terrazas testified that vegetable work is the best paid because it requires the most skill, precision, and experience. Francisco Luevano testified that he received less vegetable work after the work stoppage. He testified that he overheard a conversation on the company radio between Dolores Alvarez and Lionel Terrazas which indicated that Dolores was purposefully keeping Francisco out of vegetable work. Luevano further testified that Juan Torres, another tractor foreman, told him that Fred Andrews had instructed them to hassle the union activists.

VI. Alleged Threats to the Employment of Leonardo Villanueva

Leonardo Villanueva had been an irrigator for four years. He was a very active UFW supporter, passing out cards and filling them out for workers in 1977. He also served as a representative on the union negotiating committee. During the work stoppage he picked up workers and demonstrated at the company office. He testified that in February, 1980, he had asked his foreman, Angel Gonzalo, for permission to be off on a Sunday. According to Leonardo, he was told twice by Angel that he could. However, supervisor Frank Castro overturned that decision. Leonardo told Frank that he was

expecting a call from Mexico and that it had been prearranged. Castro denied permission. Leonardo stayed away from work on Sunday. Leonardo was then given a warning the following Tuesday for not showing up. Angel Gonzalo said he did not remember giving him permission.

Frank Castro testified that he did not think that getting a phone call was a good reason for taking a day off and that there was a real need for men to show up. The irrigators were working a seven-day shift at that time. Angel had told him that Leonardo wanted the day off. Castro testified that Leonardo had had many problems in January and February of 1980, showing up late for work with car problems. Leonardo admitted that he had had car problems at that time. Frank Castro testified that Leonardo told him to issue him a warning, deciding to take off from work without permission. Leonardo testified that he told Angel to give him a warning.

According to Leonardo, Frank Castro, at an unspecified time earlier than February, 1980, told him to get it [the union] out of his head, telling him that he was going to fire him at the first opportunity. Leonardo testified that Castro told him that he could not get work at other companies in the area.

VII. Alleged Refusal to Hire the Navarro Children; Interrogation of Ramon Navarro

Ramon Navarro, an irrigator for four and a half years,

was a leader of the union at San Andrews.[8/] He served as ranch coordinator for the UFW during the work stoppages, and was in charge of their execution. Ramon testified that things had changed at work since the work stoppages with increased pressure by management. He testified that the previous summer he had gotten his daughter a job in melons by talking to Dolores Alvarez. He had gotten his son work during three previous summers. However, he testified he was unable to secure weekend work for him during the school year. He testified that only children of foremen and supervisors got weekend work. In 1980, Dolores told him his son would get work during vacation, but not his daughter. When Ramon said that his daughter had seniority, Dolores told him not to talk about seniority as he had too many problems.

Ramon's wife Arcelia Navaro worked in Cirillo Alvarado's crew and also was a union activist. She testified as to increased pressure by the company after the work stoppage. She asked Cirillo about getting her daughter work. According to Mrs. Navarro, he told her that he would notify Dolores. Cirillo then told her they had enough people at that time. She later went to see Bob Garcia because she had noticed some new people working. At that time she asked for weekend work for her daughter. Mrs. Navarro testified that

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[8/] Navarro was an impressive and believable witness. His strong leadership abilities were apparent from his testimony. He spoke loudly and with considerable authority.

Bob said no students would be hired. According to Mrs. Navarro, when she told him that she had seen Cirillo's children working, he said he would contact Dolores. She later had a conversation with Daniel Garcia, her foreman, and he said he would talk to Bob Garcia. The next day Garcia said there would be no more hiring at that time. She also told him that she saw Cirillo's son working. He told her to wait. It was the last time she asked.

Mary Lou Alvarez started work in Cirillo's crew in January, 1980. She testified that in July, on the bus going home, Cirillo told the crew he needed more workers. He said this after Arcelia Navarro had left the bus. According to Mary Lou Alvarez, Cirillo said he wanted workers who gave him no trouble. He said he needed workers in canteloupes, and five new workers came to work.

Cirillo Alvarado testified that he spoke to Arcelia in early May, and she asked if her children could work during vacation. He said he would talk to Dolores, who said they probably could. Cirillo related this to her, and never heard from her or Ramon about it again. He testified that he did hire six new people in June. They were boys 18 and older, hired to work with melon sacks. Cirillo testified that the work was very hard.

Navarro's son was hired by the company to work during the summer.

On July 8, 1980, a foreman requested Ramon Navarro

to accompany him to the company personnel office. When he arrived, he was interrogated by a company attorney.[9/] According to Navarro, after Ramon told him that he was the union coordinator for the farm, the attorney attempted to get Ramon to tell him who the union "captains" were. The lawyer had told him he could leave if he did not want to listen.

The company offered no evidence on this allegation.

VIII. Repair of Oscar Alvarez' House

Oscar Alvarez was an irrigator for 5 years, and has been a UFW member since 1968. He was an organizer during the 1977 representation election, and won an unfair labor practice case filed against the company in 1977.

Alvarez testified that the company's treatment of him changed after the October, 1979, stoppage, and that as a result the company stopped repairing his home. However, in his own testimony, Alvarez claimed that the company actually stopped fixing his house in July, 1979, when the company was repairing workers' houses, concentrating on roofs at that time. Shingles were placed on Alvarez' roof in preparation for repair work. Alvarez returned home from work to find that other workers' roofs had been repaired, while the tiles had been removed from his. Alvarez testified that the foreman in charge of repairs, Ganderilla, informed him at that time that there was other work to do with higher priority, and that

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[9/] Tom Nasiff (now deputy chief of protocol in the Reagan administration) apparently was that company attorney.

Alvarez' roof would be finished last.

Alvarez approached Bob Garcia in November, 1979, and asked why his house still was not repaired. Garcia told him nobody's house would be repaired, and then told Alvarez that Chevron Oil Co., from whom Sam Andrews Co. was leasing the land on which Alvarez' home stood, had demanded that such housing be discontinued. Alvarez replied that he had been told of this letter in October, 1978, but that the company had continued to accept his rent. There were three houses which were on the Chevron land, and they were targeted for destruction.

Fred Andrews testified that foreman Lionel Terrazas' home, and another empty one, were the other two homes on Chevron land, and that Terrazas' home was abandoned, and the other destroyed in accordance with Chevron's demand. This testimony was unrebutted.

Alvarez acknowledged that a number of homes had been repaired in July, 1979, which had belonged to UFW supporters, including Hugo Duenas. Felipe Pulido also lived in company housing at that time.

ANALYSES AND CONCLUSIONS

Section 1153(a) of the Act makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce employees in the exercise of their right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of

their own choosing . . . and . . . the right to refrain from any or all such activities . . ." Section 1153(c) makes it an unfair labor practice to discriminate ". . . in regard to hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Further, Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended in 29 U.S.C. Section 151, et. seq., (hereafter the "NLRA").

I. The Discharges and Layoffs

In order to prove a Section 1153(c) violation, the General Counsel must establish three elements of a prima facie case: (1) anti-union animus; (2) knowledge of union or concerted activities; and (3) discriminatory motivation to discourage union activity. Sunny Slope Farms, 4 ALRB 74 (1978).

The General Counsel has the burden of establishing that the employees were engaged in concerted activity, as well as establishing the causal connection between union activity and the discharges. Jackson and Perkins Rose Co., 5 ALRB 20 (1979).

In the present case, the participation of all the discriminatees in concerted activity is not challenged, nor is the employer knowledge of these activities. The whole thrust of the General Counsel's case is that Sam Andrews & Sons engaged in a retaliatory campaign of discharges,

deprivations of seniority, and other hostile acts of discrimination in response to a series of work stoppages in October in which the workers demanded that a contract be signed.

Thus the problem in every one of the charges herein is proving by a preponderance of the evidence a causal connection between the employee's union anumus and the alleged acts of discrimination.

Direct evidence of discriminatory discharge is rare and must usually be proved by circumstantial evidence. S. Karamura, Inc., 3 ALRB 49 (1977), Amalgamated Clothing Workers, 302 F2d 186 (D.C.Cir. 1962). The trier of fact must look to the record as a whole to establish the motive from circumstantial evidence. McGraw-Edison Co. v. NLRB, 419 F2d 67 (8th Cir. 1969); As-H-Ne Farms, 3 ALRB 43 (1977). The totality of the evidence and the circumstances are to be considered, Genuardi, 172 NLRB 1357 (1968). Evidence pointing to a "pattern of discrimination" is highly relevant. Abatti Farms, Inc., 5 ALRB 34 (1979).

A number of factors have been deemed to be important in inferring an illegal motive. The timing of a discharge, and its coincidence with the protected activity of an employee can be a critical factor. NLRB v. Council Manufacturing Corp., 334 F2d 161 (8th Cir. 1964). The existence of other Section 8(a)(1)(here Section 1153(a)) violations in the same time period are important. Aliceville Cotton Mill, Inc., 193 NLRB 865 (1971), as is evidence of a general hostility to

the union, NLRB v. Superior Sales, Inc., 366 F2d 299 (8th Cir. 1966). Sudden dismissal without previous notice is highly suspect. Central Distributory Co., Inc., 187 NLRB 908 (1971). Prior tolerance of employee misconduct gives rise to an inference of pretextual discharge. NLRB v. Princeton Inn, Co., 424 F2d 264 (3rd Cir. 1970), 72 LRRM 3002 (1970). Giving shifting reasons for a dismissal is suspect. S. Kuramura Inc., 3 ALRB 49 (1977), Sterling Aluminum Co. v. NLRB, 391 F2d 713 (8th Cir. 1968), 67 LRRM 2686 (1968).

In Wright Line, 251 NLRB 150, 105 LRRM 1169 (1980) the NLRB has recently clarified and formalized a test for determining "the concept of 'causality,' that is, the relationship between the employees' protected activities and actions on the part of their employer which detrimentally affect their employment." 105 LRRM 1170. In "dual-motive" cases, as distinguished from "pre-textual" cases in which the employer has no legitimate justification for his act, the Board is attempting to end a dispute between itself and various courts of appeal as to the proper test. The Board had taken the position that if a discharge is motivated "in part" by the protected activities of the employee, the discharge violated the act even if a legitimate business reason also was relied on. Ibid. This position had been criticized by some as conceptually inconsistent with the notion that management can discharge for any reason at all but one prohibited by Section 8(a)(3). Id. at 1171. In a dual motive case, where there are both an

illegal motive and a legitimate business motive, the critics contend that the Board's "in part" test failed to balance and accommodate the competing interests of the act in preserving management prerogative on the one hand, and protecting the employees' statutory rights. Leading the way was the First Circuit. "Fundamental in its rejection of the 'in part' test is the court's view that the test ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established." Ibid. The First Circuit formulated a "dominant motive" or "but-for" rule which placed the burden on the General Counsel to prove by a preponderance of the evidence that the discharge would not have occurred. Ibid. See NLRB v. Fibers International Corp., 439 F2d 1311, 1312 n.1, 76 LRRM 2798, 2928 (1st Cir. 1971).

In order to resolve direct confrontation between the Board and the First Circuit, as well as clarify an area in which confusion had grown rampant throughout the circuits, the Board reached into the area of constitutional law and adopted a test that the Supreme Court formulated in Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977), and in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 US 252 (1977). The Court found that once a "motivating factor" is established for a given act which is found to violate the constitution, it is still possible for a defendant to show by a preponderance of

the evidence that the disputed act would have occurred anyway without the illegal motive. Mt. Healthy v. Doyle, 429 US at 287.

The Board interpreted this new "causality" test as accommodating the important interests served by both the "in part" test and the "dominant motive" tests, without the limitation of either. Wright Line, 104 LRRM at 1172, 1175. By allowing the respondent to show that he would have acted in an identical manner had he not been motivated by the employee's concerted activity, this removes the union activist from the allegedly "impregnable position" in avoiding discipline. By requiring the respondent, however, to carry the burden of showing that he would have acted the same without the illegal motive, the General Counsel is saved from the problem addressed in Arlington Heights, 429 US at 265, "that it is practically impossible to examine a dual motive decision and arrive at a conclusion as to what its 'dominant' or 'primary' motive was. The shifting burden analysis set forth in Mt. Healthy and Arlington Heights represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation" Wright Line, 105 LRRM at 1175.

The Board thus adopted a new two-prong test in a dual-motive case: "First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once that is established the burden

will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Ibid. The board is specifically trying to put an end to the "quantifying" of an employer's motive, to a "weighing" of competing motives.

> In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry the burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employee's protected activities are causally related to the employer action which is the basis of the complaint. Ibid. 14

A. Animus and Knowledge of Concerted Activities

In 1977 the UFW was voted the exclusive bargaining representative by the workers at Sam Andrews. The Teamster contract expired, and the UFW and Sam Andrews during the past few years have failed to come to terms. The relationship between union and management has been a troubled one, with numerous unfair labor practice charges filed with the ALRB and civil actions filed in the California Courts regarding the housing situation. In Sam Andrews' Sons, 5 ALRB 68 and Sam Andrews' Sons, 6 ALRB 44, union animus was found, the Board in the latter making note of the union animus established in the former. The record is ripe with facts and circumstances pointing to the continued and virulent existence of this animus. Management made no effort to refute the testimony concerning changes in certain minor procedures, changes which point in no other direction but to an aggravated

and aggravating response to the concerted activity of the October work stoppage. It discontinued providing the workers with ice water in the fields. It discontinued a practice of liberally providing the workers with equipment to protect their feet in the fields. Pictorial evidence (GCX 19, GCX 20), as well as direct testimony revealed the crowded and hazardous manner of transporting workers to the fields developed after October. Irrigators were forced more often to utilize their own vehicles for traveling around the farm. A fight that occurred at a company picnic led to the deportation of that worker. There was much testimony as to disparaging or hostile remarks directed at or about union activists. In the testimony of one of the most important foremen, Jessie Terrazas, it was admitted that in the "last seven or eight months," i.e., post-October, he had personally decided to "tighten things up," and he began issuing more warnings and discharges although he disclaimed any company policy or directive which led him to do so. There was much testimony concerning this step up of pressure, including the increased use of warnings. Jessie gave no explanation as to what led to this harsher policy besides his own personal predilection.

Knowledge of union activity is not at issue. Indeed, one of the basic defenses of the company is that there is no showing of discrimination against individual workers because practically all the workers engaged in the work

stoppages.[10/]

B. Analysis of Five Discharge Cases

The General Counsel's case regarding Francisco Luevano, Placido Lopez, Jesus Ibarra, Esteban Villanueva, and Leodegario Alvarez rests upon the inference that only a discriminatory motive can explain the company policies manifested in January-March, 1980, which resulted in either layoffs or discharges. The evidence is clear that foremen have a great deal of discretion in how they handle discriminatory matters, especially as they relate to absences and lateness. The Respondent has attempted to show that returning late from leave or layoff is handled in a distinctly harsher fashion, although Bob Garcia's own testimony reveals that even in this area company policy has been lax.

In order to demonstrate a consistent past practice on the part of Jessie Terrazas concerning discharge for failing to return from leave or layoff, Respondent introduced RX 11 for Jose Frayer and RX 12 for Alberto Ramos, which are both discharge notices from 1978. Jessie stated that they indicate the workers considered "quit" after three to four days after having failed to return. Neither was signed by the workers involved or received by them.

[10/] It is not disputed that the October work stoppages, led by UFW activists, constituted concerted activity within the meaning of the Act.

Besides these discharge notices, which were allegedly filled out automatically after the passage of three days, there were no other such notices in 1978 or 1979 given by Jessie Terrazas. Jessie testified that there were no others given until after the work stoppages.

Following the work stoppages, there is only one other example purporting to prove a consistent practice. Worker Alphonso Carballo simply never requested his job back, and the status slip, RX 19, alleged to have been filled out automatically when the man was late four days, was unsigned, like those for Frayer, RX 11, and Ramos, RX 12.

The testimony by management showed a good deal of discretion involved in how a foreman reacts to unexplained absences and lateness. This contrasts sharply with the alleged procedure when a man is three days late in returning from leave or layoff. It is a basic part of the General Counsel's case that discharges similar to those of Francisco Luevano and Placido Lopez occurred in the irrigation crew in the same time period after the October work stoppages, with a similar absence of evidence concerning past practice. The cutting edge of the charges is that there was a strict enforcement of the alleged company rules which went unpublicized to the work force, and that the only pursuasive motive for it was a retaliatory and discriminatory one.

The manner of treatment of both Placido and Francisco contrasts with the case of another tractor driver, Patricio

Alvarado, which occurred around the same time period. Jessie testified that the company had problems in November, 1979, with Patricio not returning from a layoff. When he returned, he contacted Jessie by phone, and was given his job back. Jessie never found out why Patricio was late. Jessie explained the difference in treatment from Francisco on the basis that Francisco was on leave and not on layoff. He issued a status slip to Placido and not to Patricio because they were unable to get in contact with Patricio, but had made contact with Placido's wife. Lionel had told Jessie that he had contacted Placido's wife and Jose Manuel Lopez, and that this contact had extended over two weeks requesting Placido to return. However, with Patricio, they were unable to contact him for a week.

Respondent failed to show a consistent past practice in this area. The company, under subpoena for 1979 and 1980 records, produced only records to show examples where workers in fact never returned, and these occurred in 1978. Further incidents occurring after the discharges here at issue again involved workers who never returned. The company's proof in all these cases amounts to unsigned discharge notices never received, challenged or disputed by the workers involved.

The cases here involved are unique. Placido Lopez and Jesus Ibarra had both notified the company in various ways that they were delayed for either personal or family health reasons, the type of excuses the company admits are ones they

considered valid. Francisco Luevano, claimed by Jessie Terrazas to be an extremely good worker, was dismissed summarily without any attempt to resolve an apparent misunderstanding. When the General Counsel proceeded to investigate the charge filed by Francisco Luevano in response to this discharge, and when Francisco caught the company in a lie about the lack of work, Bob Garcia then proceeded to "mediate" the "dispute" and decided that there indeed had been a misunderstanding.

Juan Perez attempted to show that this policy had been consistently applied to Jesus Ibarra himself the previous year. However, Jesus' testimony, as well as the company's own seniority lists, belie this claim.

Frank Castro and Bob Garcia gave shifting reasons to explain the genesis of the policy which led to the deprivation of Leodegario Alvarez' seniority. The timing of this incident is coincidental with the "correction" of Esteban Villanueva's seniority, both occurring on the January 31, 1980, seniority list, over one half year after the alleged incidents which led to the action. Bob Garcia's explanation was that Esteban's own brother, Leonardo, himself a union activist, complained to him about his brother's seniority when it had absolutely no effect upon him. This testimony was elicited from Bob late in the trial, while he was on recall. The record showed that he had recently authorized leave for Leonardo and Esteban, who were presumed to be in Mexico and

unable to be reached to refute Garcia's unbelievable testimony.

Moreover, the policy introduced for the first time with respect to Leodegario Alvarez was never communicated to any worker. Leodegario had been given the tractor driver job by the farm supervisor himself, with no inkling that this meant he would be deprived of his seniority in his regular job. He was shocked almost a year later in March, 1980, to find that this three-week stint in tractors had a high price tag, and that the company had initiated a new policy of disciplining workers first and formulating a rule to explain why in the process.

Respondents attempted to show that Leodegario's cousin Juan Posadas was treated in a similar fashion. Frank Castro testified that Juan Posadas lost his seniority in the same manner in March of 1980. However, Posadas first makes his appearance on the March, 1980 seniority list, GCX 48, with a December 14, 1979 seniority date, which date reappears on the May, 1980 seniority list, GCX 49. He is not on any other list, thus defeating the attempt to show he was treated in a like manner. On the contrary, this testimony by Frank Castro is as incredible as much of his other testimony.

Thus a pattern of discrimination is evinced by the record as a whole and the surrounding circumstances. Union activists returning from layoffs or leave in the period immediately following the work stoppages were met with harsh

implementation of rules. The record otherwise shows the company to be quite lax and tolerant with regard to absences and lateness. Respondent contends that they simply disbelieved the excuses of Francisco Luevano, Jesus Ibarra and Placido Lopez. None of these workers had received previous notices or warnings. An admittedly new rule was involved for Leodegario Alvarez with no notice or warning given to any worker about the possibile consequences of the act in question. Records long "incorrect" were suddenly corrected for Leodegario Alvarez and Esteban Villanueva at a time coincident with the strict enforcement of usually ignored handbook rules. Furthermore, the record was devoid of substantial evidence showing any consistent practice. General hostility to the union is the clear history of this company. No contract has been signed after years of negotiation. The record reveals a deep personal hostility on the part of Fred Andrews toward his employees and their UFW sympathies. The explanation of Leodegario's case is fraught with shifting reasons and John Perez was caught in an outright fabrication in trying to show a consistent practice with regard to Jesus Ibarra.

Finally the record of the company still to be explored in other charges in this case provides further evidence of a continuing campaign on the part of the company to harass, intimidate and discharge union activists.

The General Counsel has laid a prima facie case which shows that a discriminatory motive is at least "in part" a

motive for these five discharges. This shifts the burden of the Respondent to prove that it would have acted in the same manner anyway, despite its illegal motive. (Wright Line, supra)

With regard to Leodegario Alvarez and Esteban Villanueva the record is clear--the men were not subject to the enforcement of the rules at issue for an extensive period of time. Moreover, no attempt was made to show how such a delay was possible, how the bookkeeper might have delayed so long or why, in these cases. The Respondent simply made no attempt to show that there was an alternative explanation for this large time gap other than the one inferred here--that of an illegal motive.

With regard to the discharges of Jesus Ibarra, Francisco Luevano and Placido Lopez, the sole "proof" introduced to show that these were indeed the result of a consistent policy unaffected by union animus were the unsigned notices of workers who never returned and whom the company considered "quit," a consideration never challenged by those employees. The company produced no example where an employee who was returning late from layoff or leave was actually discharged. The one frail attempt at this is the testimony of Juan Perez concerning Jesus Ibarra in 1978, which was effectively refuted by the evidence. Thus management is left with the bald assertion that, unlike other areas of discipline concerning absences and lateness where it is exceedingly lax, it is harsh and

consistent when dealing with leaves and layoffs. They have not demonstrated that this harsh policy had a genesis anywhere else but in their retaliatory reaction to the October work stoppage.

I therefore find that Respondent violated Sections 1153(c) and (a) of the Act by its discriminatory discharge of Francisco Luevano in February, 1980, and by its discriminatory layoffs of Placido Lopez in February, 1980, Jesus Ibarra in February, 1980, Esteban Villanueva in March, 1980, and Leodegario Alvarez in March, 1980.

However, I find that the June 10, 1980, layoff of Jesus Ibarra was not discriminatorily motivated. On that day 13-15 hourly paid irrigators were laid off because of cold weather. Although Ibarra improperly had had his seniority taken away by Bob Garcia on his return from Mexico, the evidence addressed established that Ibarra had been an hourly worker. According to undisputed company records, all hourly workers in the trailer crew were laid off that day and returned to work some two weeks later. Thus, even had Ibarra's seniority not been taken away, the record reveals that he would have been laid off at that time.

General Counsel has failed to establish any causal connection between the June 10 layoff and Ibarra's union activities. I therefore find no violation of the Act.

C. The Discharge of Margarito Alvarez

Respondent attempted to show that the issuance of

Margarito's third warning was prompted by the cumulative impact of his previous problems. However, no attempt was made to show that this manner of issuing a warning to a worker for an absence was consistent with company policy. On the contrary, the record consistently indicates that a worker is given such a warning only when his absences have been a regular habit and have become a problem. The record indicates that Margarito was regularly attendant and had no such problem. There is nothing in the record which shows the company considered unrelated work offenses when it issued a warning for absence or lateness.

The testimony concerning absences without notice showed that there was a great deal of discretion on the part of the foreman in deciding how to deal with it. It was undisputed that the absenteeism for oversleeping is common place in the agricultural business. Jessie's own testimony revealed that he gave workers some allowances for absences and only issued a warning to a worker if he felt missing work had become a regular habit. Frank Castro testified to much the same policy for the irrigators. Jessie further testified that Margarito had been a very regular worker. Owner Fred Andrews testified that he did not believe Margarito, who was a good worker, would be fired for an isolated incident of not calling the company.

Management's explanation for its action is quite confused and contradictory. Jessie claimed that he issued the warning not because Margarito was absent, but because he

thought Margarito showed an irresponsible attitude when he explained why he had missed work, the real problem with Margarito being that he did not care. Jessie claimed it was the first time that someone gave him an insincere explanation and that Margarito laughed as he explained. Jessie said that Margarito always had an irresponsible attitude, but Jessie denied that it was just his nervous habit of smiling at the wrong time. However, Margarito's demeanor both as a witness and as a regular attendant at the hearing demonstrated also that he in fact smiles almost constantly even at seemingly inappropriate times. Jessie acknowledged that the company rules as he understood them did not give him the right to discharge for a bad attitude. He stated that he hated to lose Margarito because he was such a good worker. He elaborated that the reason he was discharged was actually because it was his third warning, and he would have fired him even without his bad attitude. However, Jessie testified that he did not want to act on his own, so he left it to Bob.

The record points unmistakenly to an increased level of tension and hostility between Margarito and management. During the work stoppage on October 16, 1979, Margarito filed unfair labor practice charges against the company for locking the men out. He testified against the company in April, 1980. He was an active participant in the July 5 protest which is the subject of a charge in this case. Jessie testified that Margarito pulled out a tape recorder and attempted to tape

record owner Fred Andrews, arguing with him that Fred was lying about wages. Fred Andrews denied that this conversation occurred.

The record reveals that prior to the October work stoppage Margarito had been a highly favored employee, being farm supervisor Dolores Alvarez' nephew. As a Class II driver, he had been paid Class I wages for over a year longer than he was doing the work that had elevated his salary.

Further, the record reveals that Margarito was one of the three most prominent union activists at the company.

Given the circumstances of increasing hostility and tension between management and Margarito, the blatantly inconsistent application of disciplinary procedures in issuing him his third warning, and the shifting and contradictory reasons given by management, it must be concluded that the General Counsel has met its burden in proving a prima facie case of discriminatory discharge.

Having met its burden, the Respondent must show by a preponderance of the evidence that it would have fired him absent the discriminatory motive. No past practice has been shown to verify that an absence without notice will lead to a warning being issued or a discharge effected because of the cumulative impact of unrelated offenses. The company's defense is almost tantamount to an admission that the reason advanced for the discharge was pretextual and that the real motive was the purposeful destruction of property which led

to Margarito's suspension in June. However, the discharge slip, RX 20, and testimony by Jessie Terrazas and Bob Garcia, point to an unhappiness on management's part with his "attitude."

Viewing the evidence as a whole, particularly in light of Respondent's shifting reasons for the discharge, the surfacing ground for Margarito's disfavor with the company appears to be his union activism. Noting Margarito's habit of smiling constantly to be a sign of a bad attitude, a habit that was readily observable during his 4 years with the company, smacks of constructing a pretextual excuse for discharging him. Further, Respondent offered no evidence to show that warnings for absences were in any way influenced by warnings for unrelated offenses.

Thus, Respondent has failed to establish that the same action would have taken place even in the absence of the protected conduct. Wright Line, 105 LRRM at 1175. I therefore find that the discharge violated Sections 1153(c) and (a) of the Act.[11/]

D. The Discharge of Felipe Pulido

It is well established that an employer may fire an employee for insubordination, S&F Growers, 4 ALRB 58 (1978). Respondent argues that the facts of this case are similar to

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[11/] Because General Counsel did not provide substantial evidence demonstrating causal connection between Alvarez' giving testimony and his discharge, I dismiss the Section 1153(d) allegation.

those in Sam Andrews & Sons, 5 ALRB 68 (1979), when the Board overruled the ALO and asserted that an employee's refusal of a legitimate employer's request "constituted an attempt to work on terms prescribed solely by himself." This was found to be unprotected by the Board.

The circumstances surrounding the discharge of Pulido are complex and ambiguous. There is a substantial issue of interpretation--whether or not it was reasonable for Felipe to have thought that Jessie was letting things to until Bob could take care of them. Jessie admitted to a past practice of allowing Bob handle such disputes and that he had an understanding with Felipe that Felipe would do the disputed work only in emergencies. Jessie admitted a general leniency on his part to let workers not work certain undesired jobs, as he did for Jose Flores.

The Spanish phrase, "pues ni modo," received considerable attention from both parties. General Counsel asserted that Jessie Terrazas had acquiesced when he used the phrase. Respondent contended that the literal interpretation, "no other way," meant that Terrazas insisted upon Pulido finishing the work, thus not excusing his subsequent insubordination.

All testimony pointed to this phrase with multiple meanings as a very ambiguous term. All fall short of finding that Jessie demanded that Felipe do the job. I find it reasonable for Felipe to have considered this phrase as a form

of throwing one's hands up, which under the circumstances would indicate that it would be left for Bob Garcia to handle on his return. This was Felipe's understanding of "pues ni modo."

Those circumstances render it at least doubtful to a reasonable observer whether or not Felipe was being insubordinate. He was acting in a way consistent with both his own and Jessie's past practice. Moreover, Jessie admitted that the oil leak itself would have justified his stopping work.

"Failure to conduct a full and fair investigation of an employee's alleged misconduct, particularly in the face of contrary evidence, is evidence of the employer's discriminatory intent" Sunnyside Nurseries, Inc., 6 ALRB 52 (1980), citing Norfold Tallow Co., 154 NLRB 1052, 60 LRRM 1220.

Here there was no attempt by Jessie to get to the "facts." Rather, he claimed he thought about it for the weekend and then discharged Felipe. In a clear deviation from past practice, Jessie made no attempt to have Bob Garcia mediate the dispute, opting instead to unilaterally discharge him. While the actions of Felipe under other circumstances, or given different past practices, may well be considered "insubordinate," here the firing of a leading union activist who had recently filed charges over the company's assignment policies, gives rise to the inference that the discharge was pretextual, Highland Ranch and San Clemente Ranch Ltd., 5 ALRB No. 34 (1979).

I therefore find that Respondent violated Sections 1153(c) and (a) of the Act by discharging Felipe Pulido.

E. The Layoff of 11 Tractor Drivers

Eleven tractor drivers, protesting the apparent firing and deportation of Abelino de la Torre, refused to work on July 5, 1980, until Abelino was resinstated. They did not begin work that day until 12:30 p.m. They were laid off at 3:00 p.m. that day after owner Fred Andrews returned to the farm. Andrews admitted that part of the need for the layoff and the supervisory meeting that he called was to deal with the disrupted work schedule.

The inference is unmistakable that the real reason the layoff was ordered was because of the work stoppage. Although Fred Andrews attempted to explain that this was a particularly crucial time which required the emergency meeting, Fred admitted that early July is not a "busy time" for tractor drivers. Moreover, Respondent, as part of its defense, argued that most of the men did not work Sunday, and some did not work Monday and Tuesday because this was not a "critical period." It is impossible not to infer that the only serious problem that Fred Andrews found on July 5 was the work stoppage.

Given the timing of the discharges, the inherent contradictions in Fred Andrews' testimony that this was a "crucial" period, although it was also "slow," as well as his testimony that foremen meetings to plan the next day's activities were normal, the claim that there was an extraordinary need to have

an emergency meeting on the spot can only be seen as pretextual.

If a discriminatory practice is found to be pretextual, the employer is not able to show that it would have acted in the same manner had it not the illegal motive, Wright Line, supra., 105 LRRM 1169.

I therefore find that the July 5, 1980 layoff of 11 tractor drivers violated Section 1153(c) of the Act.

F. The Discharge of Roberto Rosales

The General Counsel has simply failed to lay a basis for an inference of discriminatory motive. The evidence produced is fully consistent with the company's explanation that the machine and not a man replaced Rosales, and that the foremen do most of their own truck cleaning. To infer a discriminatory motive from these facts would be mere guesswork. Rosales' union activity is undistinguished, and relegated to joining the work stoppage. The inference that he was singled out for special treatment is not supported by a pattern of discrimination or a discriminatory company policy as in the other discharge cases above, or by shifting reasons in the company's explanation. The General Counsel has not laid a prima facie case by a preponderance of the evidence.

If the evidence gives no more support to an inference of a discriminatory motive than it does to another one, then the General Counsel has not established its prima facie case. Mario Saikhon, 5 ALRB 44 (1979).

I therefore dismiss this allegation.

G. Layoff of Tractor Drivers--April 28, May 30

The General Counsel has laid no prima facie case at all for an inference of discriminatory layoff. Indeed, Francisco Luevano's testimony is directly refuted by RX 9, which was unchallenged by the General Counsel and indicates he worked on April 28, 1980.

The General Counsel also alleges that the layoff of workers on May 30, 1980, because the foremen were going to the funeral of the daughter of Dolores Alvarez, farm supervisor, discriminated against the workers who were not allowed to attend the funeral of two coworkers in 1980. Treating management differently than the work force is simply not the type of discrimination which Section 1153(c) contemplates.

I therefore dismiss both allegations.

II. Alleged Change of Working Conditions

A. Sal Vasquez

As previously noted, RX 4 demonstrates that the undisputed UFW leaders, Margarito Alvarez and Francisco Luevano, never were assigned to drive the spray rig. Another leader, Felipe Pulido, drove it only one week for 4 days. Many of the drivers assigned to the spray rig had more seniority than Sal Vasquez.

General Counsel simply fails to show any causal connection for the company to single out Sal Vasquez. No inconsistent past or subsequent practice is shown. Given

the fact that all drivers participated in the October work stoppages and the fact that some drivers would be assigned to the two spray rigs which were run year-round, no case of discrimination has been established.

Showing that some workers got assigned to the spray rig more than others does not demonstrate discrimination. The only evidence to the contrary is that the company handbook, GCX 11, states that seniority influences job assignments through personal preference. However, as the record is replete with examples of the lack of regard the company has for this handbook, and considering that the General Counsel relies on this fact of management disregard of the handbook to prove some of its other cases of discrimination, this policy stated in the handbook by itself tends to prove very little.

I therefore dismiss this allegation.

B. Hugo Duenas, Art Gann and Felipe Pulido

Aside from the testimony of Francisco Luevano involving his own assignment to vegetable work after the work stoppage, General Counsel has failed to establish a prima

facie case with regard to Duenas, Gann and Pulido. GCX 37 shows that well-known union activists Heredia and Margarito Alvarez regularly were assigned to work in the vegetables.

A purported discrimination against Francisco Luevano does not prove these others were discriminated against. As noted above, animus and knowledge are not disputed with these workers. The General Counsel simply has failed to show that these three workers were treated differently than they were in the past, or that there was a contrast with how others were treated in the same area. Finding a causal connection here would be pure guess work, which is not sufficient to prove a prima facie case.

I therefore dismiss the allegation.

III. Alleged Threats[12/] to the Employment of Leonardo Villanueva

In February, 1980, Frank Castro denied Leonardo Villanueva permission to remain home from work on a Sunday to receive a pre-arranged phone call from Mexico. Leonardo told Castro to issue him a warning because he was taking that Sunday off.

Unlike the cases analyzed above, the nature of the discrimination alleged here is difficult to fathom. The

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12/ An earlier alleged threat by Castro regarding a desire to fire Villanueva at the earliest possible time because of his union activities is not substantiated by the record. No date is assigned to the earlier threat, and the General Counsel failed to allege it in the complaint. I therefore make no finding regarding the alleged threat which General Counsel used to provide background.

General Counsel was not able to produce evidence showing that granting leave for such activities as making phone calls was a common practice. Indeed, most of the evidence pointed to medically related reasons as the norm. It is true that there is a curious twist here in that had Leonardo simply taken off, then this complaint might have presented a different face. However, this situation as developed in the record was completely unique. Here there is a direct refusal to obey Frank's orders bordering upon insubordination. With no examples of treating other workers differently than Leonardo in this case, the General Counsel has failed to show a pattern which could justify the inference of discriminatory motive. While the evidence points to a lax policy in allowing absences, the General Counsel produced no example of company tolerance of outright refusal to grant permission and a subsequent absence. A mere guess that there is an illegal motive is not enough to make a prima facie case.

I therefore dismiss this allegation.

IV. Alleged Refusal to Hire the Navarro Children; Interrogation of Ramon Navarro

The General Counsel failed to establish that the Navarro children were discriminated against concerning weekend work. Rather, General Counsel simply established that nepotism among the supervisors was standard practice, which by itself is unrelated to union activities. There simply was no evidence of discrimination among various employees' children because of union activities. The Navarros

failed to follow up on summer work for their daughter while their son was hired. There is no coherent explanation as to why they did not pursue summer work for their daughter.

Cirillo Alvarado testified, as one would expect of a supervisor, that he had other things on his mind, and he expected Mrs. Navarro to come back if she still wanted the job.

The evidence shows that the children of supervisory personnel were hired for weekends. The inference that nepotism was the reason for their being hired is at least as consistent as the inference of a discriminatory motive, and so no prima facie case is made. Mario Saikhon, 5 ALRB 44, 1979.

I therefore dismiss this allegation.

With regard to the interrogation of Ramon Navarro, I reach a different conclusion. Under the ALRA, interrogation of employees about their union activites can be an unfair labor practice even if the questioning is innocuous and even if the employee does not feel intimidated. Dave Walsh Co., 4 ALRB 84. The actual effect on the employee is irrelevant, the criterion being whether the interrogation would reasonably tend to interfere with employees in the exercise of their protected concerted activities. Foster Poultry Farms, 6 ALRB 15.

The NLRB recently has put to rest any doubts about its policies concerning when interrogations are considered a violation of the Act. In PPG Industries, 251 NLRB 156 (1980), 105 LRRM 1434, the employer was found to violate the NLRA by

interrogating employees, including open and well-known union supporters. Inquiries of this nature are coercive even when addressed to employees who have openly declared their adherence to the union, and even in the absence of threats of reprisals or promises of benefits.

Ramon Navarro was a well-known union activist. A company attorney questioned him in a company office, asking him to identify the union captains.

I find such interrogation to be coercive in violation of Section 1153(a) of the Act.

V. Repair of Oscar Alvarez' House

General Counsel attempted to establish an entirely different issue, the abolition of all employee housing, which is the subject of another case. General Counsel is attempting in this charge to bootstrap Alvarez' case onto the larger case of discrimination, whether the decision to terminate housing was in retaliation to the October work stoppage. It is as if the General Counsel is claiming the "but-for" the fact that the discrimination alleged here began in July, 1979, as Alvarez testified, it would have begun anyway in November, 1979, along with everyone else. The General Counsel simply did not prove that the disparate treatment of Alvarez, which began in July, 1979, was based on a discriminatory motive in violation of 1153(c), nor did General Counsel rebut the business justification which the company presented concerning homes on the Chevron land. No prima facie case has been

established.

I therefore dismiss this allegation.

THE REMEDY

Having round that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153(a) and (c) of the Act, I shall recommend that it cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act and take certain affirmative action designed to effectuate the policy of the Act.

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

ORDER

IT IS HEREBY ORDERED THAT Respondent, Sam Andrews and Sons, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their union membership or union activities;

(b) Interrogating employees when they engage in union or protected activities; and

(c) In any manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Sections 1152 of the Act.

2. Take the following affirmative actions which are

deemed necessary to effectuate the policies of the Act:

(a) Offer Francisco Luevano, Placido Urias Lopez, Jesus Ibarra, Esteban Villanueva, Leodegario Alvarez, Margarito Alvarez, Felipe Pulido, 11 members of the tractor crew laid off on July 5, 1980, immediate and full reinstatement to their former positions;

(b) Make those employees listed in Paragraph 2(a) whole for any loss of pay and other economic losses incurred by reason of their discharges or layoffs plus interest thereon at the rate of 7% per annum.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the provisions of this Order.

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

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

(f) Mail copies of the attached Notice in appropriate languages, within 30 days after issuance of this Order, to all employees employed in October 1979 through July, 1980.

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

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

DATED: July 27, 1981

RON GREENBERG
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing at which all sides had an opportunity to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to pose this Notice.

1. The Agricultural Labor Relations Act is a law which gives all farm workers these rights:

(a) To organize themselves;
(b) To form, join, or help unions;
(c) To bargain as a group and to choose whom they want to speak for them;
(d) To act together with other workers to try to get a contract or to help and protect one another; and
(e) To decide not to do any of these things.

2. Because this is true, we promose you that:

WE WILL NOT do anything in the future that interferes with your rights under the Act, or that forces you to do, or stop doing, any of the things listed above.

WE WILL NOT discharge or otherwise discriminate against any employee because such employee exercised any of such rights.

WE WILL NOT interrogate employees engaged in union activity.

3. The Agricultural Labor Relations Board has found that we discriminated against Francisco Luevano, Placido Urias Lopez, Jesus Ibarra, Esteban Villanueva, Leodegario Alvarez, Margarito Alvarez, Felipe Pulido, and 11 members of the tractor crew by discharging or laying them off. We will reinstate them to their former jobs and give them back pay plus seven percent interest for any losses that they suffered as a result of the discharges or layoffs.

DATED: SAM ANDREWS AND SONS, INC.

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.