Delano, California
El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS,	Case Nos.	79-CE-105-EC	79-CE-184-EC
	79-CE-13-D	79-CE-108-EC	79-CE-230-EC
Respondent,	79-CE-18-D	79-CE-111-EC	79-CE-245-EC
	79-CE-121-D	79-CE-136-EC	80-CE-7-EC
and	79-CE-127-D	79-CE-139-EC	80-CE-21-EC
	79-CE-132-D	79-CE-140-EC	80-CE-33-EC
UNITED FARM WORKERS	79-CE-133-D	79-CE-158-EC	80-CE-41-EC
OF AMERICA, AFL-CIO	79-CE-140-D	79-CE-165-EC	80-CE-51-EC
	79-CE-141-D	79-CE-174-EC	80-CE-59-EC
Charging Party.	79-CE-144-D	79-CE-175-EC	80-CE-64-EC
	79-CE-145-D	79-CE-177-EC	80-CE-73-EC
	79-CE-146-D	79-CE-183-EC	80-CE-88-EC

9 ALRB No. 24

DECISION AND ORDER

On January 11, 1982, Administrative Law Judge (ALJ)[1/] Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, Respondent, General Counsel, and the Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union), each timely filed exceptions, a supporting brief, and a reply brief.

Pursuant to provisions of Labor Code section 1146,[2/] 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 attached Decision in light of the exceptions and briefs and has decided

//////////////

[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/] All sections references herein are to the California Labor Code unless otherwise specified.

to affirm the rulings, findings,[3] and conclusions[4] of the ALJ as modified herein and to adopt his recommended Order as modified herein.

Unilateral Wage Increase of January 1980

General Counsel excepts to the ALJ's finding that by December 1979, Respondent and the UFW had reached impasse in their collective bargaining negotiations regarding issues which were "crucial" for both sides. Between January and October 1979, Respondent and the UFW reached tentative agreement on approximately 20 contract provisions, all "language articles" which the parties did not consider crucial. Still unresolved were all economic issues and such union priorities as paid representatives, union security, and hiring halls.

In the economic area, Respondent insisted that its cotton workers receive lower wage rates than workers performing similar functions on other crops, because of Respondent's need to compete in the cotton market with cheaply produced foreign cotton. The

---

[3] We find no merit in General Counsel's exceptions to certain fact findings of the ALJ which relate to the bargaining history during 1979. The ALJ has made no conclusions of law regarding Respondent's overall bargaining conduct during that period and the background bargaining history is necessary to determine whether a bona fide impasse existed in the instant case.

[4] We affirm the ALJ's conclusion that Respondent did not violate section 1153(e) by not using sack crews in the 1979 Bakersfield melon harvest. We find that Respondent's past practice was to use sack crews, as needed, to supplement the machine crews in Bakersfield. In 1979, due to weather conditions, the harvest yield was so low that sack crews were unnecessary and therefore only machine crews were used. As that did not constitute a change in Respondent's past practice, we find Respondent had no duty to bargain over its failure to use sack crews. (See Paul W. Bertuccio (1982) 8 ALRB No. 101.)

UFW was generally opposed to a wage differential. Much of the ALJ's analysis regarding impasse as to wages centers on the Union's position on the cotton differential issue.

Although the parties had been negotiating since January, there were no economic proposals made in writing until October 16, 1979. On that date, which was also the date that Ann Smith and Jerry Cohen replaced Paul Chavez as the negotiators for the UFW, Respondent proposed the wage rates contained in the recently signed Sun Harvest agreement. Respondent's wage proposal also contained different rates for tractor work on different crops.

The UFW responded to Respondent's October 16 wage proposal on November 5 with its first complete economic proposal. Respondent caucused for a good part of the day to consider the Union's proposal. After some further discussion, the parties adjourned and met again on November 15. At that meeting, the parties discussed the Sun Harvest contract and Respondent's negotiator Tom Nassif inquired whether the Union was proposing the Sun Harvest contract as a package deal. Although the UFW wanted Respondent to formally propose the Sun Harvest contract, the Union clearly indicated that it would be interested in a Sun Harvest-type agreement. The UFW further stated that to get such an agreement they would be willing to negotiate a cotton differential.[5/] Respondent asked for some time to consider that proposal.

When the parties next met on November 20, Respondent

[5/] As the ALJ noted, these discussions about the Sun Harvest contract were initially "off-the-record." However, the discussions are now on-the-record, without objection from either party, and are treated like any other part of the bargaining history evidence.

immediately rejected the Sun Harvest contract as a package, primarily because of the provisions therein concerning the hiring hall, paid representatives, and union security. The parties then discussed new proposals by Respondent regarding the shop employees, subcontracting, and travel. As to its wage offer, Respondent changed its proposal to a differential for cotton only and a most-favored-nation clause for all other flat crops. Before the meeting ended, the parties agreed to consider each other's proposals further and to meet again after Nassif's vacation.

The parties did not formally meet again until January 15, 1980, although there was an informal discussion on December 7, 1979, between Tom Nassif and UFW counsel Jerry Cohen, during which Cohen again inquired whether there was any way to work with the Sun Harvest agreement. Nassif again said no.

Following the December 7 conversation, the parties did not communicate again until Respondent's mailgram of December 28, 1979, asking whether the Union wished to negotiate over proposed wage increases consistent with Respondent's October 16 proposal. The UFW responded that it would not separately negotiate wages and that it was not willing to agree to Sun Harvest wage rates without the Sun Harvest language the Union had bargained to obtain. Respondent thereafter declared that an impasse had been reached and increased its employees' wage rates on January 1, 1980.

At the parties' next meeting, on January 15, 1980, the Union modified its November 5 economic proposals as to holiday pay, travel allowance, and company housing allowance. Nassif was not satisfied with the Union's movement. Ann Smith responded that

if the Sun Harvest contract was not acceptable to Respondent as a package, the UFW intended to proceed article-by-article. The negotiations then continued as the Union suggested, but no agreement was reached that day.

The next bargaining session was held on January 24, 1980, but neither party presented any new proposals. The Union asked Respondent to state what it thought was necessary to reach an agreement. Respondent simply restated its problems with the Union's hiring and union shop proposals, and no progress was made.

Although it is not a part of the record of the instant case, there is a complete discussion of the next phase of the negotiations in Sam Andrews' Sons (1982) 8 ALRB No. 64. After January 24, the parties did not exchange any new proposals until Respondent's letter of March 21, 1980. In that letter, in which Nassif stated what he mistakenly believed was Don Andrews' position, Respondent offered the Sun Harvest language on cost-of-living allowance and union representatives. Interpreting that as a significant move on Respondent's part, the Union requested another meeting, which was held on April 15. At that meeting, the UFW accepted Respondent's apparent offer of March 21 and countered with a ten-cent cotton differential in its wage proposal. Shortly thereafter, Nassif became aware of his mistake and Respondent withdrew its proposal regarding cost-of-living allowance and union representatives. That change of position apparently had a negative effect on the negotiations as no further meetings were held until October 1980.

The ALJ found that between November 5 and

December 28, 1979, the Union refused to accept any change in its wage proposal and indicated that it was "unalterably opposed" to different wage rates for different crops. During that period, Respondent expressed its unwillingness to accept the Union's proposals regarding hiring, paid union representatives, and union security. As those were crucial issues, the ALJ found that the parties had, by December 28, reached an impasse in the negotiations. He therefore concluded that Respondent did not violate its duty to bargain by unilaterally raising its employees' wages on January 1, 1980. We find merit in the General Counsel's exceptions to that conclusion.

Taft Broadcasting Co. (1967) 163 NLRB 475 [64 LRRM 1386], relied on by the ALJ, does hold that impasse may be reached as to certain crucial issues, while agreement is still possible in other areas. However, when Respondent declared impasse in the instant matter, the parties still had twenty-five unresolved issues, including all the economic proposals, most of which had not even been discussed by December 28, 1979. In past cases, this Board has held that there is no bona fide impasse as to the entire negotiations when substantial issues have not yet been explored. (See Admiral Packing Co. (1981) 7 ALRB No. 43; Montebello Rose Co. (1979) 5 ALRB No. 64.)

Moreover, in the Taft case, the parties had met twenty-three times over the critical issues and appeared no closer to agreement than at the beginning. Here, the parties discussed wages at three bargaining sessions prior to Respondent's declaration of impasse. In fact, the parties barely discussed specific wage

proposals or other economic issues. The primary issue during November and December 1979, was whether the Sun Harvest contract could be agreed to as a package. It seems clear that by December 7, the parties had reached impasse over the issue of the Sun Harvest contract. However, that simply meant that the parties would have to negotiate proposal-by-proposal and to make small moves toward a complete agreement. The Union demonstrated its willingness to proceed in that manner on January 14, 1980, at the first meeting after it became clear that the Sun Harvest contract package was not acceptable.

Further, unlike the Taft case, where the impasse had centered on the issue of employer freedom to assign work, the issue of wages in the instant case is a matter of economics, not principle.[6/] That is, the Respondent's insistence on a certain wage level with differentials is really a question of the economic cost of the contract. Most economic issues had not even been discussed by December 28 and the Union was quite willing to negotiate wages and all cost related proposals in the item-by-item manner described above.

Finally, the ALJ's findings regarding the cotton differential issue are not supported by the evidence. It is undisputed that on November 15, 1979, the Union indicated it would negotiate a cotton differential if Respondent agreed to the rest of the

---

[6/] See also, Southern Wipers, Inc. (1971) 192 NLRB 816 [78 LRRM 1070] where the NLRB found an impasse as to the issue of wages, but only after many meetings, and only after it became clear that the employer insisted on a wage system based on individual merit and the union demanded across-the-board wage rates for job classifications. This difference was one of principle and not economics.

Sun Harvest contract. We find little significance in the fact that the Union did not at first propose a specific cotton differential. The offer was tied to the general discussion of the Sun Harvest contract, none of which was actually in writing. In fact, the Union did offer a ten-cent cotton differential in writing on April 15, 1980, when it believed Respondent had changed its position on the issue of paid union representatives. This shows that the Union was never "unalterably opposed" to a differential.

As we find that the parties were not at a bona fide impasse over wages on December 28, 1979, we hold that Respondent's pro forma notice to the Union on that date did not satisfy its duty to bargain in good faith with the Union before granting the wage increase. (See Winn-Dixie Stores, Inc. (1979) 243 NLRB 972 [101 LRRM 1534].) We therefore conclude that Respondent violated section 1153(e) and (a) by unilaterally raising its employees' wages on or about January 1, 1980.

Unilateral Wage Increase to Shop Employees

General Counsel excepts to the ALJ's conclusion that Respondent did not grant an unlawful unilateral wage increase to its shop employees in September 1979.[7/] We find merit in this exception.

[7/] The ALJ specifically concluded that General Counsel failed to meet its burden of proving that the shop employees were in the bargaining unit of Respondent's agricultural employees. While we agree with the ALJ that General Counsel did not present a prima facie case in its case-in-chief, we find that Respondent, in its rebuttal case, provided the evidence which supports our findings and conclusions herein. We find that this issue was fully litigated and closely related to allegations in the complaint regarding the status of the shop employees. (See Prohoroff Poultry Farms v. Agricultural Labor Relations Bd. (1980) 107 Cal.App.3d 622, 628.)

The shop employees were among those who voted in the 1977 representation election among Respondent's employees. Respondent filed post-election objections on the ground that nine of its shop employees were nonagricultural, and therefore not in the bargaining unit, because they spent a substantial amount of time working in Respondent's commerical packing shed.[8/] This Board dismissed Respondent's objection, since the number of employees involved could not have affected the outcome of the election, and suggested that Respondent file a petition to clarify the bargaining unit, in the event the Union was certified as a result of the election. Neither Respondent nor the UFW thereafter petitioned the Board for unit clarification. Instead, the parties have raised the issue through these unfair labor practice proceedings in the context of Respondent's assertion that it has no duty to bargain over the nonagricultural shop employees. Although a unit clarification petition is the preferred procedure for resolving unit issues, we will resolve the issue in the case before us. (See Paul W. Bertuccio (1982) 8 ALRB No. 101; Robert H. Hickam (1982) 8 ALRB No. 102.)

Jose Cervantes, the foreman of the welding shop employees, testified that he had ten full-time employees in 1979: six welders

---

[8/] Respondent asserted in its post-election objection that 17 percent of the produce handled in its packing sheds came from other growers, and that that would make the packing sheds "commercial" and therefore under NLRB jurisdiction. (See Garin Co. (1964) 148 NLRB 1499 [57 LRRM 1175].) Although the status of the packing sheds has never been litigated, the claimed commercial nature of the sheds is not determinative of the status of the shop employees, who spend only a portion of their time on packing shed related repairs and maintenance.

who did repairs on the farm equipment, on the packing shed, and on the cooling shed; two employees who primarily repaired metal or cement irrigation lines; one painter who painted the equipment and the sheds; and one hoist truck driver who moved agricultural machinery around the field.

Alfredo Gandarilla, the machine shop foreman, testified that he supervised ten workers in 1979: four shop mechanics who repaired all Respondent's vehicles, farm equipment, and equipment at the sheds; two servicemen who primarily repaired vehicles and equipment in the field; two gardeners who maintained the labor camp; one carpenter who made repairs on the labor camp housing; and one water truck driver who kept the access roads wet to keep dust down.

The Board has determined the unit placement status of mechanics who work on both agricultural machinery and commercial packing shed equipment in several past cases. In Carl Joseph Maggio (1976) 2 ALRB No. 9, the Board included a mechanic in the unit because he worked solely on farm equipment and excluded a mechanic who worked solely on the commercial packing shed. In Dairy Fresh Products Co. (1976) 2 ALRB No. 55, the Board held that several mechanics were agricultural employees because, although they performed "mixed work," the "bulk" of their duties involved repair and maintenance of farm machinery. The Board held that as those duties are incidental to a farming operation, the employees who perform them are agricultural employees. Finally, in Joe Maggio, Inc. (1978) 4 ALRB No. 65, this Board, relying on the NLRB case of Olaa Sugar Co., Ltd. (1957) 118 NLRB 1442 [40 LRRM 1400], held

that an employee who performs "mixed-work" is an agricultural employee if a regular and substantial portion of the employee's time is spent on work that is incident to the employer's primary agricultural activity.

We are persuaded, based on the testimony of Cervantes and Gandarilla, that all of the employees in both shops spent a regular and substantial portion of their work time either fixing, maintaining, or moving Respondent's equipment used in irrigation, cultivation, and harvesting or maintaining the camp where seasonal agricultural employees were housed. We therefore find that the shop employees were properly included as members of the appropriate collective bargaining unit and we conclude that Respondent violated section 1153(e) and (a) by its failure and refusal to bargain with the UFW about the wages, hours, and working conditions of those employees.

Replacement of Lettuce Harvest Workers After Partial and Intermittent Strikes

General Counsel also excepts to the ALJ's conclusions that Respondent lawfully replaced, and subsequently eliminated the seniority of, lettuce harvest workers who engaged in work stoppages in October and November 1979.

There is no dispute over the essential facts. In October and November 1979, Respondent's tractor drivers, irrigators, shop employees, Holtville thinning crews, and Bakersfield lettuce harvesters engaged in a series of four or five preplanned work stoppages, although not all on the same days. During each such stoppage, the employees came to work for a few hours, then walked

off the job for the remainder of the day and returned to work the following day. There was no violence associated with those walk-outs. However, there was disruption of Respondent's operations and its ability to fill orders for lettuce. The work stoppages were generally intended to persuade Respondent to sign a collective bargaining agreement.

On November 13, with eleven days left in the harvest, after four such stoppages, Respondent told all the lettuce harvest workers they were replaced and recruited two entirely new crews from the Bakerfield area. The replaced workers were asked to sign a list if they wished to be rehired in subsequent seasons. When the Holtville harvest began in December 1979, the workers who were replaced in Bakersfield found that they had lost their seniority for rehire purposes and were being treated essentially as new hires. Some of those workers were hired for the Holtville harvest, despite the loss of seniority. The seniority system used in Holtville in December 1979, was also later used in the spring 1980 Bakersfield harvest.

General Counsel and the UFW contend that, although the work stoppages in November 1979 were partial and intermittent, the ALJ erred in concluding that the stoppages were unprotected by Labor Code section 1152.[9/] They contend that any concerted

---

[9/] Labor Code section 1152 provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor oragnizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for

(fn. cont. on p. 13)

work stoppage to protest working conditions is protected unless it is violent, expressly illegal, in violation of contract, or indefensible, citing NLRB v. Washington Aluminum Co. (1962) 370 U.S. 9 [82 S.Ct. 1099]. General Counsel and the UFW concede that the National Labor Relations Board (NLRB) and courts have considered recurrent partial or intermittent work stoppages to be unprotected in the past and provide an accurate summary of the history of this legal theory in their exceptions briefs. They contend, however, that this NLRB and court precedent has been eroded by subsequent decisions of the U. S. Supreme Court which have tended to expand the concept of protected activity and to reduce the power of the state to regulate such activity.

In C. G. Conn, Ltd. (1938) 10 NLRB 498 [3 LRRM 455], the NLRB concluded that the employer violated the National Labor Relations Act (NLRA) by its refusal to rehire four workers because they engaged in a partial strike to protest overtime work. The Seventh Circuit reversed. (C. G. Conn, Ltd., v. NLRB (7th Cir. 1939) 108 F.2d 390 [5 LRRM 806].) From this inauspicious beginning, the NLRB developed a "per se" rule, finding all partial strikes to be disloyal and indefensible activity, and hence unprotected by the NLRA. (Elk Lumber Co. (1950) 91 NLRB 333 [26 LRRM 1493]; NLRB v. Montgomery Ward & Co. (8th Cir. 1946) 157 F.2d 486

(fn. 9 cont.)

> the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.

[19 LRRM 2008].)

In Automobile Workers v. Wisconsin Emp. Rel. Board (1949) 336 U.S. 245 [69 S.Ct. 516] (Briggs-Stratton), the U. S. Supreme Court held that twenty-three short work stoppages, all on company time, were unprotected and therefore subject to state court injunction because the employees never left the payroll and gave the employer no opportunity to take economic countermeasures.

The central issue in the Briggs-Stratton case was the power of a state to regulate labor relations given the potential federal preemption of that area. However, since the court's conclusion that the state could enjoin such strike activity was based on the unprotected nature of the recurrent partial strikes, the case, for many years, set a standard for determining whether partial, intermittent, and recurrent strikes are protected.

In NLRB v. Insurance Agents (1960) 361 U.S. 477 [80 S.Ct. 419], the Supreme Court stated that it was not completely within the power of the NLRB or state courts to regulate the choice of economic weapons used in collective bargaining. The court therefore held that some forms of concerted activity, though not arguably protected by section 7, were intended by Congress to be unrestricted. This decision implicitly criticized the Briggs-Stratton analysis which seemed to find certain strike activity unprotected because it was too effective and therefore unfair to employers.

In Washington Aluminum, supra, 370 U.S. 9, the Supreme Court held that a one-time work stoppage to protest a particular working condition was protected. The court there stated that a

one-time stoppage is presumed protected unless it is violent, unlawful, in breach of contract, or indefensible. This rule has been followed by the NLRB, although the board has distinguished between the single partial work stoppage and recurrent partial stoppages.[10/]

In Local Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission (1976) 427 U.S. 132 [96 S.Ct. 2548], the Supreme Court was called upon to determine whether a state court was preempted of jurisdiction over employee protests regarding overtime work. The Supreme Court determined that, while the employee protest was arguably unprotected by the NLRA,[11/] this was an area that Congress had determined must be left to the free play of economic forces and could not be regulated by the states or by the NLRB. Specifically, the court

---

[10/] The Administrative Law Judge in First National Bank of Omaha (1968) 171 NLRB 1145 [69 LRRM 1103], enforced (8th Cir. 1969) 413 F.2d 921 [71 LRRM 3019], gave an interesting review of the partial work stoppage cases and observed two kinds of unprotected activity. The first is the sit-down strike or on-the-job protest in which the workers remain at their work place. The second is the limited refusal to work part of the workday, often involving overtime. The ALJ reasoned that these activities are unprotected because the employees refuse "to assume the status of strikers, with its consequent loss of pay and risk of being replaced." (171 NLRB at 1151.)

[11/] Regarding this premise, the court stated:

> The assumption, arguendo, in Insurance Agents that the union activities involved were 'unprotected' by § 7 reflected the fact that those activities included some bearing at least a resemblance to the 'sit-down' strike held unprotected in NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 4 LRRM 515 (1939), and the 'disloyal' activities held unprotected in NLRB v. Electrical Workers, 346 U.S. 464, 33 LRRM 2183 (1953). See Insurance Agents, 361 U.S., at 492-494. The concerted refusal to work overtime presented in this case, however, is wholly free

(fn. cont. on p. 16)

stated:

> ... rather, both [the states and the NLRB] are without authority to attempt to 'introduce some standard of properly "balanced" bargaining power' ... or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'
> (Lodge 76 v. WERC, supra, at 96 S.Ct. 2549, quoting NLRB v. Insurance Agents, supra, 361 U.S. at 497, 500.)

The state of the law on intermittent, partial or recurrent work stoppages remains unclear at this time. While the NLRB and the states may not sit as economic handicappers in reviewing the collective bargaining process, they remain free to continue to view such employee activity as outside the ambit of protection afforded by section 7 of the NLRA (and therefore, section 1152 of the Agricultural Labor Relations Act [ALRA or Act], see section 1148 of the ALRA). Accordingly, employer countermeasures to such

(fn. 11 cont.)

> of such overtones.
>
> It may be that case-by-case adjudication by the federal Board will ultimately result in the conclusion that some partial strike activities such as the concerted ban on overtime in the instant case, when unaccompanied by other aspects of conduct such as those present in Insurance Agents or those in Briggs-Stratton (overtones of threats and violence, 336 U.S., at 250 n. 8, and a refusal to specify bargaining demands, id., at 249; see also Insurance Agents, supra, at 487 & n. 13), are 'protected' activities within the meaning of § 7, although not so protected as to preclude the use of available counter-vailing economic weapons by the employer. (Cites omitted.) The Board in those cases placed emphasis on whether the decision to work overtime was voluntary with the individual in deciding whether a concerted refusal to work overtime is protected by § 7. The parties in the instant case dispute the volitional nature of overtime prior to the concerted ban. In light of our disposition of the case we have no occasion to address the issue. (Lodge 76 v. WERC, supra, 427 U.S. at 153, fn. 14.)

unprotected activity are also not within the ambit of NLRB (nor, we hold, ALRB) regulation. We here adopt the NLRB test on such employee activity and will allow countermeasures, such as undertaken by Respondent herein,

> ... when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of work normally expected of them by the employer.
> (Polytech (1972) 195 NLRB 695 [79 LRRM 1474]; see also Gorman, Basic Text on Labor Law (1977) p. 321.)

We are persuaded that the trend in national labor policy has been away from government regulation of the economic weapons used in collective bargaining. We have taken the position in Seabreeze Berry Farms (1981) 7 ALRB No. 40, that:

> ... this Board does not sit as an 'economic handicapper' trying to parcel our economic burdens and risks, but as a quasi-judicial administrative board charged with vindicating legal rights whose substance is not limited to their economic ramifications. While the strike is clearly an economic weapon, the statutorily protected right to strike has a value immeasurable in dollars and cents. This right provides an ultimate guarantee of the dignity of free, uncoerced labor, which is an essential element of democracy in our industrialized society.
> (Id., at p. 12.)

However, while the Act affords broad protection to agricultural employees, it does not follow that an employer, if otherwise innocent of violations of the Act, has lost the right to protect and continue his or her business. (NLRB v. MacKay Radio & Telegraph (1938) 304 U.S. 333 [58 S.Ct. 904]; American Ship Building v. NLRB (1965) 380 U.S. 300 [85 S.Ct. 955].

Therefore, Respondent's replacement of lettuce harvesting workers for engaging in the partial recurrent work stoppages here,

and Respondent's subsequent elimination of their seniority for having engaged in such activity was not unlawful. Further, the warning notices given to the crews of Ramon Hernandez and Felipe Orozco were not discriminatory for the crews refused to perform overtime work and thereby acted in an unprotected fashion by attempting to set their own working conditions. (Polytech, supra, 195 NLRB at 695; Sam Andrews' Sons (1979) 5 ALRB No. 68.)

ORDER

By authority of Labor Code section 1160.3, 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) Failing or refusing to meet and bargain in good faith, on request, with the United Farm Workers of America, AFL-CIO (UFW), as the exclusive certified collective bargaining representative of its agricultural employees concerning said employees' wages, hours, and working conditions, including the following matters:

(1) Wage increases granted to its employees in September 1979, October 1979, and January 1980;

(2) Installation of screens on bus windows;

(3) Termination of bus service from Calexico to Respondent's premises.

(b) Threatening employees with a curtailment of production in the event that they, through their representative insist on certain items in collective bargaining.

(c) In any like or related manner interfering with,

restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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

(a) Upon request of the UFW, rescind the unilateral wage increases granted to its employees in September and October 1979 and January 1980; remove any protective screens from company bus windows; restore bus service for employees from Calexico to Respondent's fields; and meet and bargain with the UFW concerning any proposed changes in those, or any other, conditions of employment of its agricultural employees.

(b) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's unilateral changes in wage rates and/or transportaion benefits, described in paragraph 2(a) above, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (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 copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between September 1979 and the date on which the said Notice is mailed.

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

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

(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: May 9, 1983

ALFRED H. SONG, Chairman

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano and El Centro Regional Offices, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, Sam Andrews' Sons, 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 raising your wages without negotiating with the United Farm Workers of America, AFL-CIO (UFW) as your certified representative, and by unilaterally deciding to put screens on bus windows and discontinuing bus transportation. 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 make changes in your working conditions without first notifying the UFW and giving them an opportunity to bargain on your behalf.

WE WILL NOT threaten you with less work or the decrease of certain crop production if you, through your Union, insist on certain items in your contract.

WE WILL, at the UFW's request, rescind the wage increases granted in September and October 1979 and January 1980, remove the screens from bus windows, and resume providing bus transportation, and thereafter bargain with the UFW about these matters before making changes.

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) 725-5770. Another office is located at 319 Waterman Avenue, El Centro, California, 92243. The telephone number is (714) 353-2130.

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

 DO NOT REMOVE OR MUTILATE.

MEMBER McCARTHY, Concurring in part and Dissenting in part:

On the basis of the Administrative Law Judge's (ALJ) findings and conclusions herein and the reasoning expressed in the relevant portion of my Dissent in Admiral Packing Company (1981) 7 ALRB No. 43, I disagree with the majority's finding that the parties were not at impasse over wages on December 28, 1979. I would therefore affirm the ALJ's conclusion that Respondent acted lawfully when it raised the wages of its employees on January 1, 1980.

With regard to the issue of intermittent work stoppages, I agree with the result reached in the majority opinion but I do so on the basis of a less expansive interpretation of the law as to partial and intermittent work stoppages. I take strong exception, however, to the suggestion in Member Waldie's separate opinion that the unprotected nature of intermittent work stoppages is an "open question" and that this Board is free to ignore or reject the NLRB's and the U. S. Supreme Court's, long-standing

precedents and to conclude, herein and henceforth, that intermittent work stoppages are a form of protected concerted activity.

As noted by the ALJ:

> the record evidence reveals that on no less than 10 separate occasions, distinct groups of respondent's employees engaged in intermittent work stoppages, that is, presenting themselves for work in the morning, working for a portion of the work day, and then walking off the job. The employees would return on the day following and would seek to resume their employment.

The majority opinion does not dispute the findings of the ALJ that the work stoppages were premeditated, recurrent, economically motivated, unaccompanied by a specific bargaining demand, and inordinately disruptive of the employer's operations. Under these circumstances, there is not one NLRB or court case which, when properly read, can be said to support the conclusion that the participants in such work stoppages were engaged in protected activity and thus insulated from discharge, discipline, loss of seniority, or replacement.[1/]

The preamble to the Agricultural Labor Relations Act (Act) states that the intent behind the statute is "to ensure peace in the agricultural fields by guaranteeing justice for

---

[1/] By replacing the striking workers, Respondent was attempting to protect its business operation. Although it could have lawfully discharged or otherwise disciplined those workers, Respondent lawfully replaced them and thereby reduced their seniority for rehire purposes, in accordance with Respondent's existing seniority rules. Contrary to the argument expressed by Member Waldie in his separate opinion, that act of Respondent did not and could not ipso facto convert the unprotected intermittent work stoppages into a protected economic strike which would entitle the replaced strikers to preferential hiring in subsequent harvests. Only the actions of the strikers make a strike intermittent and unprotected or full-time and protected. No act of an employer can establish or alter such aspects of a strike.

all agricultural workers and stability in labor relations" and "to bring certainty and a sense of fair play to a ... potentially volatile condition in the state." I agree with the ALJ that,

> It is difficult to conceive of a situation which would create greater instability than the state, through this Board giving its sanction to unannounced, repeated, partial work stoppages which have no stated specific objections other than the broad purpose of bringing economic pressure on an employer.
> (ALJD, p. 164.)

In addition, this Board is mandated by section 1148 of the Act to "follow applicable precedents of the National Labor Relations Act [NLRA] as amended." (Emphasis added.) This means that the particular circumstances of agriculture must be taken into account in applying NLRA precedent to cases under our jurisdiction. In so doing, it becomes evident that the reasons why intermittent work stoppages are, and have been, considered unprotected activity under federal precedent are even more compelling in the agricultural setting. Because of the seasonal nature of agriculture and the fact that an agricultural operation is at the mercy of the elements, growers must operate under extremely limited time-frames that can easily be disrupted, with disastrous results, by carefully-timed intermittent work stoppages. If a grower were required to permit the employees participating in such stoppages to come and go as they choose, no effective planning for continuing the operation could take place. In a conventional strike situation, the employer can at least hire and keep replacements for the duration of the strike and thus has some assurance that its efforts to continue its operation will not be undermined by those whom it employs. (It has long been recognized that an employer has a fundamental right

to protect and continue its business operation as normally as possible during a strike. (NLRB v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333 [2 LRRM 610].) In the industrial setting, the employer has the ability to stockpile goods or suspend work in progress when confronted by intermittent work stoppages. Those defenses are generally not available to the agricultural employer. Thus, as the ALJ put it, "differences between agriculture and industry ... create the need for a more stringent rule in the agricultural setting regarding the unprotected nature of such activities." (ALJD, p. 164.)

Member Waldie's analysis of the law fails to recognize the difference between intermittent (i.e., recurrent or recurrent-partial) work stoppages and partial strikes in protest against specific working conditions. The latter type of strike generally has well-defined parameters that enable the employer to determine whether it will be able to continue any given phase of its business operation with the existing work force. Perhaps as a consequence of that fact, the Supreme Court has intimated that a concerted refusal to work overtime might be deemed a partial strike that could, in certain circumstances, enjoy the status of protected activity. (Lodge 76, Machinists v. Wisconsin Employment Rel. Comm'n (1976) 427 U. S. 132.) However, the NLRB and U. S. Supreme Court cases (the only binding sources of NLRA precedent) have never held or even suggested that intermittent work stoppages, as opposed to partial strikes of the type described above, are a form of protected activity. The cases upon which Member Waldie's separate opinion so heavily rests are illusory when it comes to the issue

of intermittent work stoppages; the supposedly relevant statements in those cases are geared toward partial strikes whose nature is considerably more benign than the repeated and random work stoppages with which we are confronted here.[2/]

Member Waldie apparently feels that any untoward results of the policy he favors can be avoided if protected status is made contingent on the absence of certain circumstances such as violence, sabotage, or obstruction of the employer's business. However, intermittent or recurrent-partial strikes, like violence and sabotage, are per se obstructive of the employer's operations, even if the employees leave the work site during the recurrent strike periods, and go far beyond the legitimate economic pressure a union may exert through conventional strike activity. Under the applicable NLRA precedents that bind this Board, employees may strike (i.e., withhold their services completely, for a long or a short period, at the risk of being replaced) to support their economic demands, or they may refrain from striking. Both rights are guaranteed by Labor Code section 1152. But, not all concerted activities are deemed protected, and the law will not support

---

[2/] Member Waldie appears to place heavy reliance on dicta contained in two Supreme Court cases, Lodge 76, Machinists v. Wisconsin Employment Rel. Comm'n, supra, 427 U.S. 132, and NLRB v. Washington Aluminum Co. (1962) 370 U.S. 9, and in one Tenth Circuit case, NLRB v. Empire Gas (1977) 566 F.2d 681, [96 LRRM 3322]. As noted by the ALJ, the facts in Washington Aluminum are "fundamentally inapposite to those presented here," while the footnote in Lodge 76 merely mentions a possible case-by-case approach which the NLRB might apply to relatively innocuous partial strikes in the future. As for Empire Gas, the court there indulged in unwarranted speculation without the benefit of thorough legal analysis. Moreover, it noted differences in degree among partial work stoppages such that the conduct here in question would not have been deemed protected even under the court's own erroneous standard.

an attempt by employees to "have it both ways" by engaging in intermittent or recurrent-partial strikes. Such unprotected activity constitutes just cause for the employer to discharge, discipline, suspend, or replace (permanently or temporarily) the employees involved.

Neither the NLRB nor the U. S. Supreme Court has ever conferred protected status on any partial, intermittent, or recurrent strikes, aside from the one-time strike of short duration. (See Morris, The Developing Labor Law, Ch. 19, and supplements thereto; Gorman, Basic Text on Labor Law, p. 321.) Ultimately, there is one basic reason why that is the case: as one court put it, "we are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him." (C. G. Conn, Ltd. v. NLRB (7th Cir. 1939) 108 F.2d 390, 397; see Polytech, Inc. (1972) 195 NLRB 695, 696.) That, of course, is precisely what the striking workers here were attempting to do: they alone would decide how many hours and on what days they would work. Any enterprise, agricultural or otherwise, cannot long survive under such circumstances.

In light of the foregoing, it is clear that we have no authority to find that intermittent work stoppages, or even partial stoppages, are a form of protected concerted activity.[3/] The ALJ's

---

[3/] Member Waldie suggests that an employer would incur no disadvantage under a rule which would require the employer to treat the intermittent strikers as if they were ordinary economic strikers and replace them only on a temporary basis. Aside from the fact that we cannot ignore or reverse the applicable precedents we are required to follow, the problem with that rationale is that it

(fn. 3 cont. on p. 25.)

analysis of this issue was correct and should have been upheld without further comment.

Dated: May 9, 1983

JOHN P. McCARTHY, Member

(fn. 3 cont.)

contains no disincentive to engaging in intermittent work stoppages, especially since, under this Board's ruling in Seabreeze Berry Farms (1981) 7 ALRB No. 40, ordinary economic strikers could oust the replacement workers at the beginning of the next season.

MEMBER WALDIE, Concurring in part and Dissenting in part:

I generally concur with the majority opinion including the portions of the ALJ's Decision that have been adopted, and I specifically agree with the majority's analysis of the current state of the law regarding intermittent and recurrent partial work stoppages. However, I dissent from the majority's conclusion that Respondent here has not violated Labor Code section 1153(c) and (a) by reducing the seniority of the lettuce harvest employees who went on strike in November 1979. In my opinion, NLRB v. Washington Aluminum Co. (1962) 370 U.S. 9 [50 LRRM 2235]; Local Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission (1976) 427 U.S. 132 [92 LRRM 2881]; and NLRB v. Empire Gas, Inc. (10th Cir. 1977) 566 F.2d 681 [96 LRRM 3322], cast doubt on the validity of a categorical approach to determining whether an intermittent work stoppage should be considered protected activity under section 1152. I consider the legal question open and, absent express National Labor Relations

Act precedent to the contrary, would hold that intermittent work stoppages are protected unless they are violent, unlawful, in violation of a no-strike clause, indefensible acts of disloyalty, or obstructive of the continued operation of the employer's business.

The work stoppages in this case lack any of the characteristics which the Lodge 76 or Washington Aluminum cases find to be unprotected. There was no violence or property damage. There was nothing expressly illegal about the stoppages (compared, for example, to a secondary strike). There was no breach of a "no strike" contractual provision. The strikes did not involve sabotage or other indefensible acts of disloyalty. The UFW had stated its demands through its contract proposals. Further, the strikes, although intentionally recurrent in nature, were not "sit-downs," "slowdowns," or work time meetings. The workers here actually left work, suffered loss of pay, and did not obstruct the continued operation of the business by occupying the employer's premises while they were striking.

The Respondent here was free to treat the partial strikers as ordinary economic strikers and replace them, which it did. What Respondent has done, in essence, is convert a partial strike into a full-time strike by replacing its regular employees. Under Seabreeze Berry Farms (1981) 7 ALRB No. 40, Respondent was entitled to consider the replacement workers permanent for the duration of the 1979 fall lettuce harvest in Bakersfield. That economic countermeasure by Respondent allowed it to stay in

//////////////

operation and finish the harvest.[1/]

As previously stated, I would find that the intermittent strikes herein were a form of protected concerted activity by economic strikers. Accordingly, I would find that Respondent was not entitled to permanently eliminate the seniority of the strikers who made unconditional offers to return. Such discrimination for engaging in protected activity is clearly unlawful. (See NLRB v. Fleetwood Trailer co., Inc. (1967) 389 U.S. 375 [66 LRRM 2737].) The Seabreeze case stated that an employer may not consider replacement workers permanent in seasons which follow an unconditional offer by the strikers to return to work, absent some showing that it was necessary to offer the replacement workers employment in subsequent seasons in order to recruit them during the first season of the strike. No such showing of necessity was made here and, since the strikers made an unconditional offer to return prior to the 1979-80 Imperial Valley lettuce harvest, Respondent could not create a new seniority system which favored replacement workers or nonstrikers over strikers. I would therefore conclude that Respondent violated section 1153(c) and (a) by changing its seniority system and by refusing to rehire the economic strikers from the 1979 Bakersfield lettuce harvest.

Dated: May 9, 1983

JEROME R. WALDIE, Member

[1/] I disagree with Member McCarthy and the ALJ when they argue that partial or intermittent strikes are more destabilizing than conventional strikes. Since an employer may lawfully replace partial strikers, the employer's uncertainty is no greater than during any other strike.

CASE SUMMARY

Sam Andrews' Sons (UFW)

9 ALRB No. 24
Case Nos. 79-CE-13-D, et al

ALJ DECISION

The ALJ dismissed the majority of the allegations, which included numerous acts of alleged discrimination against union supporters, unilateral changes in working conditions, and various threats and other interference with the employees' rights under Labor Code section 1152. The ALJ found that Respondent did violate the Act by unilaterally raising wages in October 1979, installing screens on bus windows, terminating bus service to its premises, and also by threatening the workers with curtailment of production if they continued to press certain bargaining demands.

BOARD DECISION

The Board adopted the ALJ's findings and conclusions with several exceptions. The Board did not agree with the ALJ's finding that the parties had bargained to an impasse over wages by December 31, 1979, and therefore concluded that the unilateral wage increase in January 1980 violated section 1153(e). The Board also found that since Respondent's shop employees are substantially involved in activities related to agriculture, those employees are in the UFW bargaining unit and Respondent must bargain with the UFW about their working conditions. As to the issue of intermittent or partial recurrent work stoppages, the Board upheld the ALJ's conclusion that Respondent did not violate the Act by replacing partial strikers and eliminating their seniority because such concerted activity is unprotected by the Act.

CONCURRING AND DISSENTING OPINIONS

Member Waldie would find that the partial work stoppages in this case were protected and conclude that Respondent violated the Act by eliminating the seniority of the employees involved.

Member McCarthy, agreeing with the ALJ, would find that the parties were at impasse over wages on December 28. He would also uphold the ALJ's findings and conclusions concerning the issue of intermittent work stoppages. He notes that neither the NLRB nor the U. S. Supreme Court has held or suggested intermittent work stoppages are a form of protected activity. He would have dismissed the allegation in this regard without further comment.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case Nos.	79-CE-105-EC
		79-CE-127-D 79-CE-140-EC
SAM ANDREWS' SONS,		79-CE-132-D 79-CE-158-EC
		79-CE-140-D 79-CE-165-EC
Respondent,		79-CE-141-D 79-CE-174-EC
		79-CE-136-EC 79-CE-175-EC
and		79-CE-245-EC 79-CE-177-EC
		80-CE-7-EC 79-CE-183-EC
UNITED FARM WORKERS OF AMERICA, AFL-CIO,		80-CE-21-EC 79-CE-184-EC
		79-CE-144-D 80-CE-33-EC
		79-CE-145-D 80-CE-41-EC
Charging Party.		79-CE-146-D 80-CE-59-EC
		79-CE-108-EC 80-CE-64-EC
		79-CE-139-EC 80-CE-88-EC

Appearances:

Gray, Cary, Ames & Frye
by Thomas A. Nassif, Esq. and
Richard A. Paul, Esq.
for the Respondent

Constance Carey, Esq., and
Carla Jo Dakin, Esq.,
for the General Counsel

Javier Cadena, Esq., and
Chris Schneider, Esq.,1/
for the Charging Party

Before: Matthew Goldberg,
Administrative Law Officer

DECISION OF THE ADMINISTRATIVE LAW OFFICER

1. Cadena and Schneider were present for perhaps four or five of the hearing days. Ellen J. Eggers, Esq., wrote the Charging Party's post-hearing brief.

I. STATEMENT OF THE CASE

Unfair labor practice charges were filed by the United Farm Workers of America, AFL-CIO (hereinafter the Union) and served on Sam Andrews' Sons (hereinafter respondent or company) on the dates as set forth below:

CHARGE NUMBER	DATE FILED	DATE SERVED
79-CE-13-D	4/3/79	4/3/79
79-CE-18-D	4/12/79	4/12/79
79-CE-121-D	10/10/79	10/10/79
79-CE-127-D	10/23/79	10/23/79
79-CE-132-D	10/24/79	10/22/79
79-CE-133-D	10/24/79	10/22/79
79-CE-140-D	10/30/79	10/30/79
79-CE-141-D	10/31/79	10/31/79
79-CE-136-EC	11/15/79	11/13/79
79-CE-230-EC	12/17/79	12/17/79
79-CE-245-EC	12/31/79	12/31/79
80-CE-7-EC	1/7/80	1/7/80
80-CE-21-EC	1/10/80	1/10/80
80-CE-51-EC	1/21/80	1/21/80
79-CE-144-D	11/9/79	11/9/79
79-CE-145-D	11/9/79	11/9/79
79-CE-146-D	11/13/79	11/13/79
79-CE-105-EC	11/5/79	11/1/79
79-CE-108-EC	11/5/79	10/31/79
79-CE-111-EC	11/6/79	11/3/79
79-CE-139-EC	11/15/79	11/15/79

79-CE-140-EC	11/15/79	11/15/79
79-CE-158-EC	11/17/79	11/25/79
79-CE-165-EC	11/30/79	11/30/79
79-CE-174-EC	12/3/79	12/3/79
79-CE-175-EC	12/3/79	12/3/79
79-CE-177-EC	12/4/79	12/4/79
79-CE-183-EC	12/7/79	12/7/79
79-CE-184-EC	12/7/79	12/7/79
80-CE-33-EC	1/15/80	1/14/80
80-CE-41-EC	1/16/80	1/16/80
80-CE-59-EC	1/23/80	1/23/80
80-CE-64-EC	1/25/80	1/25/80
80-CE-73-EC	1/26/80	1/26/80
80-CE-88-EC	1/31/80	1/31/80

The charges alleged numerous violations of Section 1153(a), (c) and (e) of the Act. Based on these charges, the General Counsel for the Agricultural Labor Relations Board issued a series of consolidated complaints. An initial complaint dated November 30, 1979, was filed by the General Counsel for the Board based on a number of the aforementioned charges. Subsequent complaints and orders consolidating the cases were issued, culminating in the third amended consolidated complaint which was issued on February 8, 1980, and which incorporated allegations based on all of the above charges. Respondent timely filed answers to each of the complaints involved in this proceeding. The answers, in essence, denied the commission of any unfair labor practies.

On February 19, 1980, the consolidated hearing opened. The

hearing proceeded over the course of six months, involved some 70 days of testimony, and was finally adjourned on August 7, 1980. The General Counsel and Respondent appeared through their respective counsels, and the Charging Party, as noted previously, was represented sporadically. All parties were afforded the opportunity to present evidence, to examine and cross-examine witnesses, and to submit oral arguments and briefs.

Charges 79-CE-13-D and 79-CE-18-D (paragraphs 7 and 8 of the third amended consolidated complaint) were withdrawn based upon settlement between the parties.[2/] The following charges were withdrawn on motion of the General Counsel and the paragraphs which pertain thereto were stricken as follows: 79-CE-121-D (Paragraph 11), 79-CE-230-EC (Paragraphs 20, 21 and 24[3/]),and 79-CE-111-EC (Paragraph 34). The following allegations were dismissed upon motion of Respondent: 79-CE-121-D (Paragraph 12), 79-CE-133-D (Paragraph 15), 79-CE-158-EC (Paragraph 37), 79-CE-245-EC (Paragraph 23), 79-CE-51-EC (Paragraph 28), 80-CE-59-EC (Paragraph 47), and 80-CE-73-EC (Paragraph 49).

Based upon the entire record in the case, including my observations of the demeanor of the witnesses as they testified, and having read the briefs submitted after the close of the hearing, I make the following:

---

2. References to paragraphs (and hence allegations) of the third amended complaint will be cited as Paragraph ___.

3. It is uncertain which charge gave rise to this allegation.

II. Jurisdiction

A. The Respondent is and was, at all times material, an agricultural employer within the meaning of Section 1140.4(c) of the Act.

B. The Charging Party is and was, at all times material, an agricultural employee within the meaning of the Act.[4/]

III. The Unfair Labor Practices Alleged

A. Preliminary Statement

Respondent is a general partnership which presently engages in agricultural operations in two locations, the Imperial Valley near Holtville, and in Bakersfield. The company cultivates and/or harvests lettuce, cabbage, carrots, cantaloupe, watermelons, mixed melons, alfalfa, wheat, garlic, onions and cotton, as well as other "flat" crops. The same crops are not necessarily planted each year. Those workers who are employed in the lettuce and melon crops are principally involved in this proceeding, as are certain tractor drivers and irrigators who work in a variety of crops.

In 1979, Respondent carried out agricultural operations on about 12,000 acres in the Bakersfield area and approximately 3,500 acres in the Imperial Valley. Seventy percent of the acreage in Bakersfield, or about fifty percent of respondent's total acreage, is devoted to the cultivation of cotton. About 1,800 acres in the Imperial Valley were consigned to lettuce production.

---

4. The jurisdictional facts were considered admitted in Respondent's answer by the lack of a denial to the allegations which pertained thereto.

Concerning the melon and lettuce crops, its seasons and employment patterns run as follows: from late October to mid-November, the respondent harvests lettuce in the Bakersfield area, employing approximately 120 people. From December to March, the lettuce harvest moves to the Imperial Valley, and from April to May it returns to Bakersfield.[5] Respondent begins harvesting melons in the first week of June in the Imperial Valley,[6] continues the operation for about three to four weeks, whereupon the melon harvest moves to Bakersfield in July. The melon harvest generally utilizes a combination of sack and machine crews.[7] During a harvest, 10 to 11 sack crews are usually employed which consist of 15 members each. When machine crews are utilized, 6 to 8 crews work and each crew contains 17 workers.

The respondent also has a lettuce thinning season in the Holtville area which runs from the beginning of October through mid-December in which three crews of about 30 members each are employed. The Bakersfield lettuce thinning season takes place between late August and the first week of October, employing one crew of 35 people. March and April are thinning seasons in the melons: 20 to 25 people are employed to perform this task.

---

5. Lettuce is planted in the Imperial Valley in the late summer or early fall.

6. The planting for cantaloupe and watermelon takes place in early spring.

7. The sack crews walk along the field roads with, as the term implies, sacks slung over their shoulders which they fill with melons. The melons are then carried by the picker up to loading bins on 9 waiting trucks. With a machine crew, the worker places the melons on a conveyor belt which transports the fruit up to the bins on the trucks.

In regard to other crops that the company grows and/or harvests in the Imperial Valley, alfalfa is grown all year long and is harvested throughout the year except during the very hot summer months. Carrots are grown in the winter and harvested in the spring. Wheat, barley and milo are planted in late spring and harvested in summer. Garlic is planted in the winter and harvested in the late spring. Cotton is planted in the early spring and harvested in the late summer. Respondent also grows cabbage and Sudan grass in the Imperial Valley. The company does not harvest its alfalfa, carrots, garlic, cotton, wheat, barley or milo, but contracts with other companies for this service. It harvests only cantaloupes, melons, lettuce, and recently, cabbage.

In Bakersfield, respondent cultivates carrots, lettuce, cantaloupes, watermelons, honeydews, garlic, onions, wheat, Sudan grass and cotton. As in the Imperial Valley, the company merely harvests its own lettuce and melons.

The partnership itself is owned by three brothers, Robert S. Andrews, Fred S. Andrews and Donald S. Andrews. Donald's responsibilities include supervision of harvesting and packing of all crops, and supervision of all office functions, including staffing, personnel, insurance and money management. Don is principally responsible for labor relations for all employees, including agricultural employees. He has performed these functions since 1959. In addition, Don Andrews is responsible for the acquisition, maintenance, design, sale and purchase of all of the company's equipment, including packing, harvesting and farming equipment. He also has some minimal duties in connection with

sales.

Fred Andrews is responsible for the growing and cultivation of crops, whereas Bob Andrews is responsible generally for their sale. Fred Andrews is also in charge of land purchasing and/or leasing.

B. Negotiations History

1. Introduction

Of the thirty allegations remaining operative at the close of the hearing, thirteen concerned "unilateral" changes alleged to be violations of section 1153(e), and one additional allegation involved a general "bad faith" contention resulting from "bypass[ing] the employees' . . . representative." Prior to any analysis of these specific allegations, the history of the bargaining between respondent and the union is presented so that these allegations may be viewed in their total context.[8/]

---

8. The allegations include unilateral changes regarding:

1. Wages for:
   a. Shop employees
   b. Lettuce harvest workers
   c. Tractor drivers and irrigators
   d. Thinning crew employees
2. Working conditions: screens on transport bus windows.
3. "Mechanization displacement" of melon crew workers.
4. Methods in rehiring lettuce harvest crews.
5. Subcontracting of tractor work.
6. Refusal to pay Thanksgiving pay to negotiating committee members.
7. Refusing to provide transportation from Calexico to harvest sites.
8. Losses of seniority for lettuce harvest workers.
9. "Past practice regarding loan repayment through payroll deductions."
10. Refusal to pay for two hours' field waiting time.

Although the Union was certified to represent respondent's employees in August 1978, the first negotiating session between the parties did not take place until January 1979. Paul Chavez was assigned as the Union representative in the negotiations with respondent from the end of December 1978 until the end of July 1979. In that period, the Union and the company met on a regular basis, except in July when the parties met only once. There were about 16 negotiating sessions during this time. Generally, negotiating sessions were attended by Chavez and a negotiating committee consisting of about 10 workers on behalf of the union, and Don Andrews,[9] supervisors Jose Rea and Robert Garcia, as well as attorney Tom Nassif, representing the respondent.[10]

---

9. Don Andrews has been involved with labor relations on respondent's behalf since he began working full-time for the company, or 1959. His responsibilities include contract negotiations, contract interpretation, and contract compliance. Respondent has been a party to various collective bargaining agreements since 1950, when it had a contract with its packing house workers, which included at that time packers for lettuce and cantaloupe. (Lettuce is currently packed in the fields.) The Teamsters Union has had contracts with the company since 1959 or earlier, and currently represents the drivers who truck produce from the fields to the shed. Regarding agricultural operations, the Teamsters represented agricultural employees in two separate contracts which dated from 1973 to 1975 and from 1975 to 1978. The union which represents the packing house workers is the Fresh Fruit and Vegetable Workers Union, AFL-CIO.

In the course of negotiations with the United Farm Workers, Don Andrews attended every negotiating session save one or two.

10. As noted in the appearance prologue, Thomas Nassif was also the attorney for respondent. He testified on its behalf concerning negotiations and their progress or lack thereof. While Nassif may have been possessed of what could be termed an obvious bias in that he was employed as an advocate by the respondent, and often sought to explain his own particular participation in the negotiations and to lend credence to that participation, his

(Footnote 10 continued----)

2. The First Session

At their initial meeting held on January 26, the respondent and the Union developed an understanding that negotiations would commence with the "language" articles of the contract with its economic aspects to be negotiated at some point in the future. Of the negotiating sessions in which Paul Chavez participated, all but two were devoted to language. These two sessions, taking place in June, were devoted to discussions of economics (wages) pertaining to the melon workers, with reference also made to the lettuce harvest piece rate.

Chavez stated that he had full authority to negotiate a complete collective bargaining agreement with the respondent, including econonomics[11/] and language. Being the first negotiator assigned to negotiate with respondent, he denied that he received any instructions other than simply "obtain a contract." Chavez testified that he had not been advised what were acceptable economic parameters for the agreement by superiors at the Union. A contradiction in Chavez' testimony thus arose as a result of his

---

(Footnote 10 continued----)

testimony was for the most part candid. He has had extensive experience in the field of agricultural labor relations. Counsel sought to qualify him as an "expert" in order that he might venture opinions concerning events involving respondent. Without deciding whether or not Nassif was qualified as an expert and discounting much of the opinion evidence that he proffered, it nevertheless remains that many of the factual elements which he presented were essentially uncontradicted.

11. Included within Chavez' understanding of economic items were wages, holidays, vacations, waiting and standby time, medical coverage, pensions, cost of living, travel time, camp housing and mechanization.

assertions that he had full authority to negotiate an agreement. In light of his professed ignorance of the limits of that authority vis-a-vis economic items, coupled with the fact that he had never negotiated a collective bargaining agreement for the Union prior to this time, it is highly doubtful that he was in any position to conclude a complete contract. He denied he was ever told that he should not reach an agreement with the respondent prior to the time that industry negotiations were completed.[12/]

By contrast, Don Andrews testified that at the first meeting, Chavez stated that he did not have the ability to "break any new ground" with the company, and the lack of settlement in the industry negotiations would impede setting an agreement with respondent.[13/]

Among the procedures agreed upon at the initial meeting, the parties mutually decided to attempt to resolve individual articles. Agreement would be symbolized by the parties "signing off" or initialing a particular provision. That article would then

---

12. "Industry" negotiations were then currently in progress. They culminated in the Sun Harvest agreement, discussed infra, executed in September 1979.

13. This assertion parallels one made by Andrews in reference to a statement made during the June 25 negotiating session. Neither Andrews nor Chavez proved to be consistently credible witnesses as their obvious, respective biases might indicate. Chavez was an exceedingly evasive witness professing not to recall any of the details of any of the particular negotiating sessions. Andrews' testimony contained several internal contradictions. In comparison, Raymond Gonzalez, a member of the employee negotiating committee, recounted incidents and details with marked candor. His testimony provides the most reliable source of corroboration for events occurring during the course of negotiations. He testified that at a number of negotiating sessions discussions were held between the parties regarding the impact of the industry bargaining.

be set aside. Paul Chavez stressed, however, that agreement on distinct articles would be contingent upon approval of the entire contract. Thus, "signing off" on an item would, in that sense, demonstrate only tentative approval.

At the first session, there was a discussion concerning leaves of absence for worker representatives, with the suggestion that the Union negotiator prepare a list of those individuals so that the company would be apprised of their anticipated absences, and not discipline them for missing work. The parties agreed that leaves of absence for negotiators would be unpaid.[14/]

Chavez admitted that respondent stressed that it was a different sort of operation than those companies involved in industry negotiations. As such, respondent was not participating in those talks, and should resolve its collective bargaining agreement on a separate basis.

Don Andrews felt his company to be significantly different from those other companies because most of the companies under the prior industry contract operated primarily in the Salinas area. Additionally, other companies in the industry negotiations with operations in the Imperial Valley area did not grow much lettuce, but merely packed it, and were not extensively involved in many other crops. By contrast, slightly more than 10 percent of Respondent's acreage was devoted to lettuce. Respondent regarded itself as unique in that it grows and harvests all its lettuce by itself. It is a partnership, unlike the other companies which are

---

14. This fact figures crucially in the "unilateral" change affecting holiday pay for negotiators.

generally multiple corporations. According to Don Andrews, the Union also had previously not represented employees who harvested cantaloupes. Further, respondent is heavily engaged in operations in the Kern County area, most of which are devoted to cotton. According to Andrews, the Union does not have much of a foothold in that area, apart from those contracts which have been settled in the grapes. In sum, therefore, Don Andrews expressed the notion that the contracts the Union was negotiating with the industry were primarily with lettuce packing companies which respondent, he felt, was not. All of the aforementioned was conveyed to Paul Chavez. As will later be seen, these differences between the respondent and other agricultural employers set the stage for hard negotiations, during which the company would not readily fall into the patterns for collective bargaining agreements established in other segments of the industry, or simply acquiesce in a "master" agreement.

Don Andrews noted yet another way in which the company's operations are somewhat unique: since the 1975 to 1978 Teamster agreement, the company has maintained a crop differential or a different rate of pay for tractor, irrigator, and general field work, depending on which crop operations are performed on. The primary rationale for the existence of the differential is the ability of the company to compete based on the cost of operation. According to Don Andrews, in the Imperial Valley the respondent's lettuce and cantaloupe competes only with lettuce from Blythe, and the Yuma Valley. In the Bakersfield area regarding lettuce, respondent said Don Andrews "competes with approximately 13 districts including Blythe, Yuma, San Joaquin, Huron, Texas and

Florida." Don Andrews was unaware of any company in the Bakersfield area which packs lettuce and which is unionized or certified. Regarding cantaloupes from Bakersfield, respondent competes with Blythe, Yuma and the Imperial Valley as well as areas in the San Joaquin Valley. However, in regard to cotton, the company competes on a world-wide basis.[15/] Following the expiration of the collective bargaining agreement in July 1978, respondent continued its past practice of maintaining a wage differential.[16/]

3. Negotiations: February -- June, 1979

Prior to the first bargaining session, the Union sent out a request for information and a bargaining proposal. At the first meeting that the parties held in January 1979, the Union withdrew this proposal. At the negotiating session held on February 5th, Chavez presented Nassif with a proposal essentially encompassing what could be termed "non-economic" items. When Nassif asked Chavez when a complete proposal would be made in order that the respondent might give a complete response, Paul Chavez said that he would get a complete proposal to the respondent within a week. No such proposal

---

15. The issue of the "cotton differential" assumed major significance when economic issues began to be discussed.

16. The first time the company implemented the cotton differential was in the wage reopener of the '75 through '78 Teamster contract which occurred in 1976. This differential was negotiated with the Teamsters union following the acquisition by the respondent in the year previous of the Santiaga ranch, which involved a significant amount of acreage devoted to cotton. The Santiaga ranch is approximately 10,000 acres and comprises about two-thirds of respondent's Bakersfield acreage. As previously noted, about 9,000 acres there are devoted to cotton.

was provided at that time.[17]

At the February 16th meeting an agreement was reached on clauses regarding discrimination and income tax withholding. At the bargaining session held on February 26, respondent submitted to the Union a proposal on language for various articles including hiring, maintenance of standards, worker security, and family housing. Agreement was reached at this meeting on clauses concerning modification, location of company property, access,[18] bulletin boards and the savings clause as well as the discrimination clause. Also during the course of this meeting, a list of crop operations performed by the company in Bakersfield and Holtville was given to the Union. Company past practice in this regard was outlined. The list was offered in the context of delineating which work the respondent subcontracted out. Specifically, respondent's representatives pointed out that it subcontracted some tractor work when it fell behind. In addition, the respondent told the Union that labor contractors were used for other operations, including thinning and hoeing.

The problem with subcontracting, as far as the Union was concerned, was that the Union needed to know exactly what operations

---

17. While economic items were discussed among members of the negotiating committee and the Union, a complete proposal, including economic items, was not presented to the company until November 1979, several months after Chavez had been relieved of his duties as Union negotiator.

18. Although agreement on the access clause was later, by inference, withdrawn, the wording of the clause figures tangentially in one as the violations alleged, to wit, "interference with employees meeting with[a] union representative."

respondent had subcontracted in the past in order to reach agreement concerning future subcontracting. Chavez recalled that when the particular situation arose, the company had to utilize operators from subcontractors for its tractor work even though there were members of the bargaining unit who could perform those specific operations, as it was part of the agreement that the respondent reached with the subcontracting companies.

Testimony revealed that subcontracting was debated over the course of several meetings, including those held on March 22nd and April 2nd. Throughout these discussions, according to Don Andrews, the Union never expressed objection to the status quo, and agreed to allow a continuation of past practices. However, the Union continually emphasized that work which the respondent had the equipment and personnel to perform should not be subcontracted.[19/]

Additionally, on February 26th, there was a conversation between representatives of the Union and representatives of respondent regarding shop employees and whether they should be included in the bargaining unit. The company expressed its position that the shop employees were not part of the unit. The rationale

---

19. Chavez did recall that company past practices regarding subcontracting were discussed, and that he was informed by respondent exactly which operations had been subcontracted. No agreement was reached on a subcontracting clause. The company position outlined in its letter of understanding of July 30, 1979, was essentially that it be permitted to continue its past practices. The Union's position contained in its November 5 bargaining proposal was that no bargaining unit work should be subcontracted. Although this may reflect, inferentially, on Don Andrews credibility, it does not negate the fact that the company had an established practice of utilizing subcontractors.

proferred by the company for not including them was that these employees had not been covered by the previous Teamster agreements. Some of the work they perform is, according to Don Andrews, done in areas which do not have bargaining unit employees, such as in the cooling plants and the melon sheds. They work on building maintenance, roofing, painting, gardening, plumbing, modifying, restructuring and rebuilding. However, these employees also work on harvesting and tractor machinery. In discussions with the Union, respondent suggested that a unit clarification hearing be held in order to determine whether or not these individuals should be included in the bargaining unit. The Union never agreed to a clarification hearing. The shop employee issue was also discussed at the March 5 session.

At a negotiating meeting held on March 12th, Don Andrews recalled there was a discussion why Filipino crews were used in Bakersfield.[20/] Respondent had begun using Filipino crews in that area about 13 years earlier. The rationale offered by Andrews was that in Bakersfield weather patterns were such that at the particular time of the year when the lettuce was harvested in the spring, rain was likely. Because of either wet field conditions or the fact that rain was pounding on the barracks roof during the night where the Mexican crews were housed, many of the workers would leave the following morning with the result that the company would have an inadequate work force to harvest its lettuce. Filipino

---

20. The issue of employing a Filipino harvest crew figures centrally in the allegation concerning the "method utilized to rehire employees."

workers, Andrews asserted, did not seem to be bothered by the rain, since many of them worked in the Santa Maria area where the fields are wetter.

Don Andrews testified that at the April 23rd negotiating session,[21] a discussion took place involving problems with crews not wanting to work more than four hours on Saturdays. Apparently, many of the Bakersfiled harvest workers lived in the Imperial Valley and wished to return home for the weekend, or a portion thereof. Some left Friday and did not report on Saturday; others simply left earlier on Saturday than the company wished. He stated that an agreement was reached with the Union[22] that respondent would endeavor not to require employees to work more than four hours on a Saturday. He added that the company could not guarantee this, however; historically, it had harvested lettuce on Saturdays and often needed employees to work more than four hours to fill its orders. The respondent also submitted a list of individuals that did not work on the Saturday recently past and indicated to the Union that it should consider this to be a warning notice to those

---

21. General Counsel sought to attack Don Andrews' credibility by showing that his name was not on the attendance sheet for the April 23rd meeting, and hence he was most probably not there. Although Chavez and Ray Gonzalez could not recall whether this discussion took place on that particular date, they did corroborate the essence of Andrews' testimony.

22. Chavez was unable to state definitively whether a "formal agreement" was reached in the matter. Throughout the course of negotiations no agreement was reached on the "Hours of Work and Overtime" provision, which would arguably set forth conditions for Saturday work.

employees.[23]/

At a meeting held on April 30th, the use of labor contractors was discussed. According to Don Andrews, the company explained that it would require the services of these contractors for short periods of time due to the exigencies of weather or other deadlines. It was difficult for the company to have access to a large number of skilled people and competent foremen when the need arose.[24]/

At a session on May 21st in Bakersfield, agreement was reached on the leave of absence article. A provision in that article allowed for a temporary leave of absence without pay to conduct union business. There was no mention of the circumstances which would arise in the event that the leave is taken around the time of a paid holiday.

Discussions concerning accelerating the negotiations schedule were held at the June 4 meeting. Respondent requested that meetings be held on a week-long basis, since the melon harvest was imminent and wage rates needed to be established. No wage proposal had by this time been received from the Union. The Union maintained

---

23. Two allegations involved work on Saturdays, and the "discriminatory" issuance of warning notices in connection thereto, although no unilateral changes were asserted in that connection. That the company had issued the equivalent of warning notices for failing to work the required amount of hours on Saturdays is not subject to dispute. As will be discussed infra, employees in November 1979 and in January 1980, received notices for similar conduct.

24. As noted earlier, respondent employs labor contractors for thin and hoe work. The fact is tangentially related to an allegation concerning "[deliberate failure] to lay off crews as it has done in the past."

that it was unavailable for week-long negotiations at that time.

4. The "Emergency Meetings" and Thereafter.

As will later be discussed, on June 9, 1979, a strike began against the company's melon operations. Focused in the Imperial Valley, incidents of mass picketing, physical intimidation, and violence broke out. On that day, in response to those events, Don Andrews attempted to contact the Union. He also tried to find replacement workers as well as provide for security personnel and equipment, presumably in anticipation of continued strike activity.

On Sunday evening, June 10, an "emergency meeting," as characterized by Paul Chavez, was held. In attendance were Paul, his uncle, Richard Chavez, who was Director of Negotiations for the Union, Tom Nassif and Don Andrews. The parties attempted to work out an interim agreement regarding the wage rates paid the melon workers in order that these people might return to work. Both sides exchanged economic proposals:[25/] the Union proposed a "me, too" agreement which, in essence, stated that whatever companies involved in the industry negotiations would agree to, respondent would agree to as well. Respondent countered with a "favored nations" proposal which, according to Chavez, was essentially the same as the "me, too" type of agreement. However, the "favored nations" proposal was more restricted in scope, not applying to the entire contract. Despite the apparent similarities in the proposals, the parties were

---

25. Significantly, this was the first instance of a wage proposal being discussed in nearly five months of negotiations. At some point earlier, the Union had proposed a general wage retroactivity date to the expiration of the last Teamster contract, or July 1978.

unable to reach an accord.

At the time the Union offered a "me, too" agreement concerning the melons, there was no industry agreement pertaining to the Imperial Valley area and/or this crop. In other words, the Union was asking the company to agree to a contract that had yet to be negotiated. Subsequently, the Union amended its proposal and requested the company to "me, too" in addition to wages, rather than an entire contract, simply the medical, pension, cost of living, Martin Luther King, paid representative, and apprentice provisions. Significantly, at this same meeting, the company, in its counter-proposal, offered to accept the same lettuce harvest piece rate as was negotiated in the industry negotiations, even though there was no industry agreement at that time concerning this rate. Respondent was apparently attempting to resolve the issues of the melon and lettuce harvest rates as part of a package. The Union did not accept this proposal.

Andrews justified the rejection of the "me, too" agreement by citing the "significant" differences, alluded to above, between the company and the participants in the industry negotiations. However, the company was willing to agree to the lettuce harvest piece rate because of Andrews' belief that the lettuce piece rates which would result from the industry negotiations would more or less establish the industry standard: "The rates seemed to get set in Salinas, and whatever that rate is, when those workers come south as the season moves on, they always seem to get paid the same amount of money wherever they work regardless of what the situation is. It becomes a standard norm in the industry probably because the same workers work in so many different districts."

Other items were discussed regarding the melon harvest, principally those concerning working conditions, such as the size of the crews and the type of ramp that the crew utilizes to walk up to unload their melon sacks. Significantly, there was no discussion of "mechanization" as it pertained to the melon workers, nor was there any discussion at that time of any anticipated modifications in company operations which would affect the utilization of sack crews as opposed to machine crews.

A negotiating session had previously been scheduled for June 11 to discuss certain language items in the contract. Significant among those items was the management rights clause, which was signed off by the parties on that date. The clause provides:

> "The company retains all rights of management including the following, unless they are limited by some other provision of this Agreement: to decide the nature of equipment, machinery, methods or processes used; to introduce new equipment, machinery, methods or processes, and to change or discontinue existing equipment, machinery or processes; to determine the products to be produced, or the conduct of its business; to direct and supervise all of the workers, including the right to assign and transfer employees; to determine when overtime shall be worked and whether to require overtime."

Under it, Andrews believed that the company possessed the right to mechanize. However, he also recalled that in a later Union proposal the mechanization clause and the management rights clause were contained in separate articles.

Paul Chavez admitted that certain aspects of the mechanization issue were subsumed within the management rights clause. What differentiated the use in that clause of the term "mechanization" from its use in other mechanization articles is that, according to Mr. Chavez, mechanization in the mechanization article pertained to the displacement of employees. By

mechanization, Chavez essentially construed the article as concerning the introduction of a new piece of equipment.[26/]

As the parties resumed discussions of the melon harvest issues on June 11, Don Andrews expressed to the Union his concern over the property damage and verbal abuse which had been reported to him that arose from the strike activity engulfing his company. There ensued a debate over the melon wage rates. When the Union offered a certain rate for both Bakersfield and Holtville, the company modified its offer by increasing its previous proposal. The Union responded by retracting its offer as it pertained to Bakersfield, restricting the proposal solely to the rates paid in the Imperial Valley, and demanding a different rate be set for the Bakersfield harvest. Richard Chavez stated that if the respondent agreed to an increased Bakersfield rate, it would be like "buying insurance," since there would be "strikes all over hell."[27/] According to Andrews, the Union progressively increased the amount that it requested. Needless to say, no resolution of this issue was

---

26. As will be seen, the "mechanization" alleged by the General Counsel did not involve the introduction of a "new" piece of equipment.

27. A tape recording of the meeting was produced which corroborated Andrews' testimony concerning it. Paul Chavez' repeated failure to recall regarding his uncle's statements, the retraction of proposed wage rates and the proposing of different rates for different locations, indicated his decided lack of candor. Despite the emotionally charged atmosphere, both in the meeting and in the fields during those days, he incredulously expressed initial doubts that wages, hours, and working conditions for the melon workers were discussed at all at that time.

achieved. The "foot rate"[28] was, in Chavez' words, probably the "major stumbling block in getting people back to work."[29]

Despite continued strike activity culminating in a temporary restraining order dated June 15, and the shift of respondent's melon operations to Bakersfield,[30] the parties did not resume negotiations for two weeks. They met again on June 25.

At that meeting, Paul Chavez' attention was called to Andrews' concern regarding what he felt was an escalating level of violence. Andrews declared that the company would have to curtail certain transportation practices for workers because of these problems; specifically, that it would no longer pick up workers, as was customary, in Calexico, or provide transportation in Bakersfield.[31]

---

28. The "foot rate" is the piece rate at which melon workers are paid. This piece rate is determined according to the number of feet in a particular sized truck bed that is loaded with melons.

29. Notably, the complaint did not allege the subsequent setting of the melon rates as a "unilateral change."

30. The Imperial Valley harvest ended on June 16.

31. The source of this statement was the mutually corroborative testimony of Paul Chavez and Tom Nassif as well as Nassif's notes from that negotiating session. No further clarification of the statement was provided. I find that the "transportation" practices which Andrews alluded to at that time would logically be those involved in bringing people from the Imperial Valley to Bakersfield by bus, where they would work in the melon harvest. Testimony established that this had been company practice. In December, respondent did not provide bus transportation from Calexico for its lettuce harvest workers as it had done in the past. This was alleged in the complaint as a violation of section 1153(e). I find that it is highly improbable that Andrews was referring to curtailing transportation for lettuce workers due to the melon strike, particularly in light of the fact that throughout the fall, 1979 in the Imperial Valley, thinning workers were provided with transportation from Calexico to the fields.

When Chavez asked about the possiblity of some of the melon workers from the Imperial Valley working in Bakersfield, Don Andrews responded that they could have their jobs on a preferential hiring basis. However, they would have to notify the company that they were willing to work, then apply and put their names on a list to be hired.[32/]

The course of respondent's negotiations that was again discussed in reference to bargaining currently in progress for the industry. Andrews testified that Paul Chavez asserted that he would not be able to conclude a collective bargaining agreement with the respondent until industry negotiations had been completed. According to Nassif, Chavez stated that the contract could not be settled until "the guys in the north, or the Salinas people, would settle theirs, that no contract would be ratified by the workers until these negotiations were concluded."

Articles which were agreed upon during the meeting of the 25th included discipline and discharge, worker security, and union label.

The parties did not meet again until July 30, 1979.[33/]

---

32. This stance lends credence to the inference that respondent believed its melon workers were still on strike. No notification from the Union was given to the effect that the strike had terminated following the demonstrations in Calexico, which will be discussed later at greater length. That respondent solicited reapplications for work on a preferential hiring basis is consistent with the notion that it had "replaced" striking employees.

33. The evidence showed that Chavez cancelled two previously scheduled meetings.

At this session, the company's position regarding subcontracting was set forth and presented to the Union in the form of a Memorandum of Understanding. The document states in part that "the parties agree that the company's past practices regarding the use of subcontractors, including but not limited to custom harvesters, may continue. Employees of the subcontractors and custom harvesters who are employed in garlic, onions, carrots, tomatoes, cotton, wheat, milo, Sudan grass and alfalfa shall not be considered within the bargaining unit regardless (sic) whether or not they operate or maintain equipment or machinery."

No negotiating meetings were held between July 30 and October 16, 1979. Although a session was tentatively scheduled and respondent's negotiator repeatedly attempted to contact Paul Chavez, the Union negotiator remained "unavailable" to meet.[34/]

By late summer 1979, the company was anxious to arrive at some settlement of wage rates, since Don Andrews testified it was paying substandard wages and wished to raise them. The thin and hoe season in Bakersfield usually started in late August, while in the Imperial Valley the season started in late September or early October. Presumably, workers in those crews would be the ones first affected by the lack of an increase.

5. The Meeting of October 16

Ann Smith became the chief negotiator for the Union in the early part of October 1979. Her first contact with the respondent occurred about that time via a telephone call from the respondent's

---

34. Chavez was apparently in the process of being reassigned.

negotiator, Tom Nassif, who requested that the Union agree to an interim wage increase for the thin and hoe workers in the Imperial Valley. Smith outlined the Union's position on the matter, in essence stating that it would be opposed to any interim adjustments in the wage rates for these classifications. Rather, it wanted to settle the complete contract, including economic benefits, which would effect wage rates for all employees. Under cross-examination, Smith admitted that Nassif, by letter dated October 7, expressed respondent's desire to raise wage rates for all classifications, not simply just thin and hoe workers.

Smith next contacted Nassif approximately one week later for the purpose of informing him that she had, in fact, been appointed to be the chief negotiator for the Union. Both expressed a mutual desire to get negotiations moving and set a date of the 16th of October for a possible meeting. In her testimony, Smith alluded to the fact that Nassif requested that the Union prepare an economic proposal to submit to him at his meeting on the 16th. When Smith expressed doubts that she would be able to submit an economic proposal by the time of the meeting, Nassif stated his wish to meet nevertheless. At that meeting, the company, itself, would make a wage proposal.[35/]

On the 16th of October, Nassif, Don Andrews and Bob Garcia, representing the respondent, met with Smith, Jerry Cohen and Marshall Ganz from the Union, and the Employee Bargaining Committee, consisting of 15 to 20 workers. The first order of business at the

---

35. Nassif and Smith provided mutually corroborative accounts of these matters.

meeting was the presentation by the respondent of a wage proposal to the Union. Essentially, the rates proposed were identical to those in the Sun Harvest agreement for the vegetables and melons; however, a rate differential for other crops would apply (see below).

Where ambiguities on the face of the wage proposal had arisen, Smith sought explanations. For example, a "listing premium" was paid in the Imperial Valley but not in Bakersfield for tractor work.[36/] The company explained that this had been the traditional practice. The proposal also contained columns headed with the words "effective dates." One of these columns was dated July 17, 1979. Smith explained that Nassif told the Union at that time that the company was not proposing a retroactive wage payment, but had merely put this particular date on the proposal since that was the usual time for the company to make wage increases.[37/] When asked about the significance of the absence in the proposal of rates for mechanics and shop and maintenance personnel, Nassif replied that the company did not feel that these classifications should be included in the bargaining unit.

There was also a discussion at the meeting concerning the wage differential which the company paid for tractor work in vegetables and melons, as opposed to such work in cotton. As noted, the differential issue figures significantly in the course of the bargaining between the Union and the respondent, the respondent insisting though that the differential be maintained. Smith

---

36. As noted elsewhere, "listing" connotes the construction of beds and furrows for row crop cultiviation.

37. Smith's assertion in this regard was uncontrovered.

admitted that Nassif repeatedly emphasized the importance of the differential, and that under the previous collective bargaining agreement with the Teamsters, the differential had been recognized.

Nassif stated that the Union was informed that the wage offer was not a package proposal, but rather it could accept or reject any part of it. The Union responded that it wanted to have an entire contract and not just agree to a wage proposal. A discussion ensued concerning why the respondent was not participating in the industry negotiations, what the historical reasons were for the company's paying the wage differential, as well as the reasons for subcontracting out some of its operations.[38/]

Cohen outlined three issues which were of major concern to the Union: paid representatives, union security, and the hiring hall. Apparently, resolution of negotiations would turn upon agreement in these areas. As will later be shown, little, if any, movement from either side occurred regarding any of these provisions. These issues, as well as the differential and wage items, figure centrally into the consideration of whether or not an impasse had been reached in the course of negotiations.

Regarding the hiring hall itself, Jerry Cohen stated that the hiring hall was an essential part of the Union's structure for controlling discrimination, that the Union needed centralized hiring procedures. Nassif responded with the assertion that the discrimination clause in the contract would cure any discrimination problems; the company wished to retain the right to hire and fire

---

38. As outlined above, these matters were treated when the Union was represented by Paul Chavez.

its own employees, although it had no problem with the centralized hiring procedure.

Insofar as the union security clause was concerned, Cohen emphasized, according to Nassif, that this article was essential in order that the Union have a mechanism for disciplining its workers via the use of the article's "good standing" requirements. The company responded by telling the Union that it was not opposed to requiring the workers to join the Union, but that it objected to the Union's prerogative to suspend or discharge an individual in respondent's employ.

As the meeting concluded, according to Smith, Nassif asked the Union whether any of the wage rates proposed by the respondent were satisfactory, emphasizing his concern for implementing a wage increase before the harvest began. On behalf of the Union, Jerry Cohen replied that it was impossible to determine whether or not the wage rates were acceptable in the absence of the complete economic package and also with respect to the lack of information regarding "the nature of certain job operations."[39/] As is clear from its face, the wage proposal differed from a total economic proposal in that it did not contain the benefit components such as medical insurance, overtime, pension funds, etc., that would add to the cost-per-unit package for employees covered by the contract. It also did not contain a cost-of-living allowance, as provided for in the Sun Harvest agreement.

---

39. Nassif testified that Cohen echoed Smith's previously expressed sentiment that the Union would not acquiesce to an interim increase without a complete contract being agreed upon.

Concerning the scheduling of future negotiation sessions, representatives of the Union suggested that the company's wage proposal be studied and that a complete economic counter-proposal be prepared. They estimated that about two weeks were needed to formulate a response. Don Andrews replied that he felt that this was a long period of time and wanted assurances from the Union that there would be no economic activity taken against the company in the interim. After discussing the situation with the bargaining committee, the Union returned with the suggestion that the meetings be resumed towards the end of that week, approximately the 18th or 19th. Nassif and Andrews caucused, after which Nassif, according to Smith, co-opted the Union's previous position that they take a few weeks to prepare the economic proposal: the Company would await its submission around the week of the 29th.[40/]

6. The Meeting of November 7th

The Union and respondent's representatives met on November 7th. Prior to the meeting, on November 5th, the Union delivered a complete written proposal to Nassif, including economic, language and local issues items. As repeatedly stressed by respondent

---

40. Economic activity in the form of intermittent work stoppages had commenced that same week. As will be discussed, several employee witnesses sought to justify the work stoppages they engaged in on the basis that they were trying to get the company to set a date for negotiations. It is clear from the bargaining history that the company was actively involved in collective bargaining, and that scheduling of negotiation sessions was not a problem, particularly insofar as it was concerned. Respondent appeared at all times ready, willing and able to meet with the Union, with the only obstacles to meetings being the personal schedules of the participants. The credibility of those witnesses who so testified was somewhat undermined, or, at the very least, they were misinformed regarding the status of negotiations.

throughout the hearing, it had been nearly fifteen months between the Union's certification and the submission to the company of an economic proposal.[41]

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

---

41. Nassif testified that throughout his experience he had not witnessed such a delay. Similarly, Marshall Ganz, then with the Union's Executive Board, "could not recall" an example of a situation where the parties had met on a regular basis, and there was a delay of eight months between the opening of negotiations and the presentation of a wage demand.

At the meeting, Smith, Cohen and Ganz, as well as the employee bargaining committee, represented the Union, while Nassif, Don Andrews and Bob Garcia represented the respondent.

Nassif initially expressed dismay that the Union's proposal of November 5th contained retractions and modifications of articles which had previously been agreed upon by the Union representatives.[42/] Representatives of the respondent then caucused to further analyze the Union proposal. Negotiations reconvened that same day at 4 o'clock in the afternoon. The company submitted its proposal on all language and economic terms under consideration at that time. Included in this was an offer that wages be paid retroactive to July 16, 1979, the date appearing on the respondent's wage proposal of October 16th. The Union caucused and prepared a response which accepted certain aspects of the respondent's proposal and offered some modifications to other parts of it. The Union also requested information regarding current wage rates in the shop and maintenance job classifications. In addition, the date of the next negotiating session was set for November 15th.

7. THE MEETING OF NOVEMBER 15th

Smith, Cohen, Ganz and the bargaining committee were present for the Union at this session, while respondent was represented by Nassif and Don Andrews. As the meeting opened, Nassif submitted three proposals on respondent's behalf concerning

---

42. Don Andrews testified that the Union proposal "eliminated a lot of individual sections that we had agreed to with Paul Chavez." However, as noted above, Chavez stated at the initial negotiating session that agreement on individual items would be contingent upon agreement to the entire contract.

mechanization, travel allowance and injury on the job. The Union, at some point after considering the articles, agreed to the injury on the job clause. Agreement was also reached on the bereavement and family housing proposals, as well as on a portion of the travel time article.

As previously noted, respondent is alleged to have made unilateral changes involving mechanization in the melon harvest, and changing the pick-up point for its Imperial Valley lettuce harvest workers. Regarding the mechanization proposal, no evidence was presented concerning a discussion of mechanization in the context of the melon operations. The proposal submitted was nearly identical to its counterpart in the Sun Harvest contract. Although there was a reference to a pick-up point in the "travel" article, no pick-up point was specifically named. Further, the company did not mention at that time that there was to be any change in the designated pick-up point in the Imperial Valley, although, as the facts demonstrated, such a change was imminent.

The Union made counter-proposals on the aforementioned articles. Discussions of other issues relating to the contract were held, including an exchange regarding the subcontracting article as it applied to the Andrews operation. According to Ms. Smith, there was no discussion of any changes the company might implement concerning subcontracting.[43/] Following this, there was an employer-initiated caucus.

---

43. The alleged unilateral changes in subcontracting were asserted as having taken place near the time of this session.

In the course of discussing the various issues, Nassif asked the Union whether or not it was actually proposing that the respondent sign the Sun Harvest contract.[44/] The Union expressed the notion that discussions concerning the Sun Harvest agreement were best held "off the record." Pursuant to that end, according to Smith, Jerry Cohen told respondent's representatives "off the record" that a settlement based on the Sun Harvest contract would be acceptable to the Union should the respondent, not the Union, formally propose it at the bargaining table. Furthermore, the Union would be willing to negotiate a cotton differential if the differential was in fact requested by the company in conjunction with that agreement.[45/] Don Andrews raised some questions that he

---

44. As Nassif testified, he told Union negotiators that rather than "beating around the bush," the Union should simply submit the Sun Harvest agreement to the company, as opposed to submitting proposals to it which were more burdensome than those contained in the Sun Harvest agreement. Among the proposed articles which he specifically felt were more onerous were the wages, paid representatives, cost of living allowance, travel allowance, and hours of work or overtime.

45. The above version was essentially supplied by Smith. As Nassif characterized the situation, the Union would not offer Sun Harvest formally unless respondent announced in advance that it would accept it. After this was accomplished, the "Union would decide, how much, if anything, it would grant in the way of a cotton differential." Don Andrews' version of the Union's position on the differential at that point was that although it "never really came in with an explicit offer," the Union indicated that the differential would be a few cents an hour above the regular rate. The Union-proposed "regular rate," however, was too high to be acceptable to the company. The Smith and Nassif accounts are essentially mutually corroborative, and it is therefore found that the Union did not, at any time submit a monetary figure in connection with the differential.

(Footnote 43 continued----)

had in general about this latest Union proposal, and expressed the desire to discuss the matter with his two brothers. Once these discussions were held, he noted, the company would be in a better position to inform the Union of the feasibility of settling on the basis of Sun Harvest. Among the specific items Andrews wished to explore were, as he testified, the wage rates, and the articles on the hiring hall, the union security clause, and paid representatives.

Smith explained that the Union presented this proposition in an "off the record" discussion and not as a formal bargaining proposal because the Sun Harvest agreement had already been reached as a result of negotiations. The Union did not want to negotiate down from that agreement as if it were a bargaining proposal.[46/]

When the parties returned to the bargaining table following the "off the record" discussion, the respondent modified its

---

(Footnote 45 continued----)

Notwithstanding the above, it is noteworthy that the Union did not at anytime formally propose a differential or indicate its willingness to accept one. Smith admitted that the Union "did not want to move on the cotton differential...other than telling them that we would negotiate until other things were solved." (sic)

46. While all the ramifications of discussing proposals "off the record" are not readily apparent, since these discussions currently are very much "on the record," it seems that presenting and debating them on that basis permits the parties to engage in a form of collective bargaining legerdermain, i.e., that a proposal, not formally presented "on the record," is to be viewed in the same light as if the proposal had never been presented at all. Another inference which might be drawn is that the Union, in not wishing to formally propose Sun Harvest, did not want to be backed in to an impasse situation. There would be little, if any room for movement in a contract which had been the subject and result of extensive negotiations, and which could, in all likelihood, be characterized as the Union's "bottom line," or best offer.

position concerning the crop differential to limit it solely to the cotton crop. With respect to flat crops other than cotton, respondent was interested in including a "most-favored nations" clause which would provide for the company's ability to adjust wages in the flat crops in the event that the Union should settle a contract with another employer in the Imperial Valley who compensated work in these crops at a lesser rate than the rate paid for vegetables and melons under Sun Harvest. Don Andrews regarded this as "extremely substantial movement."

Under cross-examination, Smith recalled that in this meeting the subcontracting issue was in fact discussed. Particular emphasis centered on those operations which the company previously had subcontracted, despite the fact that the operations might be considered bargaining unit work. Specific concerns of the tractor drivers were enunciated in this regard. A list was submitted to the Union by the respondent of the work that the company subcontracted. Later in the cross-examination, Smith could not recall whether or not Nassif told her that the Company wished to continue subcontracting. Smith did recall, however, that Nassif expressed concern about how the company's past practices would mesh with the proposals that the Union had submitted, specifically those articles dealing with hiring and subcontracting. Smith adamantly denied that Union representatives ever stated that under their proposed language in the subcontracting article, the company would be able to continue its past practices in regard to subcontracting.47/

---

47. It appears that much of the information given to Smith at the meeting had already been supplied to Chavez. Apparently Chavez did not pass the information on.

8. THE MEETING OF NOVEMBER 20th

Negotiations between the parties resumed on the 20th of November. Cohen, Ganz, Smith and Tom Dalzell, as well as the employee negotiating committee, appeared on behalf of the Union; respondent was represented by Don Andrews and Nassif. Nassif opened the meeting by stating that respondent rejected settlement based on the Sun Harvest contract for a number of reasons. Among these he enumerated the Union's failure to formally propose the contract, as well as the company's specific objections to particular articles, including union security, hiring, supervisors, cost of living allowances and paid representatives.

Nassif submitted proposals regarding the shop employees (not conceding them to be in the unit), subcontracting and travel. A caucus was held, after which the Union agreed to submit a wage proposal for the mechanic and shop maintenance classifications. Following the submission of this proposal, there was an employer caucus and a response prepared. No specific discussion was held in reference to a possible implementation of increases for these classifications.[48] Smith recalled that at this meeting also Nassif proposed a central pick-up point in Holtville for irrigators and tractor[49] drivers (not harvest workers) and transporation from there to the work site.

---

48. As previously noted respondent attempted to resolve the inclusion or exclusion of these employees via a request for a stipulated unit clarification hearing. The Union would not accede to this procedure and the issue remained unresolved.

49. The words "traffic drivers" appear in the transcript. This appears to be a typographical error.

The parties agreed that it was necessary to take some time to consider the various proposals and, since Nassif had scheduled a one week vacation, negotiations were postponed at least until he returned. Either side could initiate resumption of talks.

9. DISCUSSIONS AND COMMUNICATIONS: DECEMBER 1979

The next contact that Nassif had with a Union representative regarding respondent was around the first week of December, when he spoke to Jerry Cohen on the telephone. The substance of their phone conversation was the parties' outlining their differences regarding the proposals that had been exchanged. There was no movement from one side or the other regarding any of these proposals. The possibility of tentative meeting dates was discussed, and the mutual conclusion reached that it would take time for the parties to overcome their mutual distrust and come to an agreement.

Jerry Cohen, Ann Smith and Tom Nassif had a brief meeting at Nassif's office on December 7, when they met not only for the purposes of discussing this particular respondent but several other companies as well. Neither the Union nor the respondent considered the December 7th meeting as a formal negotiating session. Although the possibility of a meeting regarding respondent on December 11th was discussed, no actual formal bargaining sessions were held during the entire month of December.

Nassif testified that on December 7 Smith and Cohen again wanted to know if the company had decided whether it could accede to a settlement based on the Sun Harvest agreement. Nassif reiterated that there were certain articles in that contract, such as hiring

hall, paid representatives, and union security, which were simply unacceptable to the company: as the Union had insisted on their inclusion, even assuming further agreement on a cotton differential, a collective bargaining agreement on that basis could not be reached. The representatives from the Union restated their position, according to Nassif, that these items had to be included in the contract. Nassif asked the two whether there was any position in the Sun Harvest agreement that the Union would consider moving from. The Union responded that because there was no hiring hall in operation in Bakersfield, it might opt for a paid representative who would be responsible for hiring.[50/] Nassif replied that this proposal was totally unacceptable. He then asked the representatives whether there was any other item which the Union was willing to demonstrate movement on. The Union representatives responded in the negative. At that point, there was a mutual realization that further discussions would be fruitless and the meeting concluded.[51/]

In the third week of December, Nassif contacted Marshall Ganz to inform him of the rate that respondent wished to pay the cabbage workers, and that he would like to discuss the rate and its

---

50. Although there was no testimony on this issue, Ann Smith's negotiating notes of the November 15 session reveal that Marshall Ganz broached this subject at that meeting. He explained that at Sun Harvest, hiring was handled through the ranch committee and the paid representative.

51. Nassif's summary of the events of that meeting was not refuted, and hence must be credited.

implementation with a Union representative.[52/] Ganz responded that he would get back to Nassif with an answer. However, according to Nassif, no one from the Union called to discuss the matter with him. Nassif admitted that he had no conversations or discussions with anybody from the Union regard the implementations of rates other than the cabbage rate.

On December 28th, Nassif sent a mailgram to Smith outlining his contention that the Union was simply proposing the Sun Harvest contract, and that this was unacceptable to the company. Nassif further stated that an impasse had been reached in negotiations. Therefore, the company intended to implement its wage proposal of October 16th as amended in the negotiations of November 15th. Any retroactive wages would be paid before the end of 1979, whereas the implementation of the new rates would be effective as of January

/

/

/

/

/

/

/

/

/

/

52. No charge was filed regarding the setting of this rate.

1st.[53] Nassif mentioned that the Company was willing to discuss the implementation of the wage rates with the Union, although he was aware that the Union's position was to refuse to negotiate implementation of wage increases before the signing of a contract.[54]

Marshal Ganz, responding on behalf of the Union, acknowledged receipt of Nassif's mailgram, which he termed "self-serving," and stated "it is the Union's position that we are not at impasse and negotiations should continue." The Union also accused Nassif of failing to set up negotiating sessions in December as he had promised, although the facts reveal that either the Union or the respondent could have assumed this responsibility, and that Nassif had attempted to reach Union officials by telephone at least insofar as discussing cabbage rates was concerned.

Nassif's response of January 2 noted that Ganz' assertion that it was Nassif's responsibility to set up a bargaining session when he returned from vacation in December was incorrect: according to his understanding, when negotiations were concluded in November, "neither party had any further proposals." Nassif declared that Company would be willing to meet with the Union to discuss and receive any proposals. Nassif delineated his position that the

---

53. Smith admitted at the hearing that the wage changes were consistent with respondent's bargaining offers.

54. In fact, the Union declined to discuss the implementation of any wage increase.

Union's "last and best offer" was the Sun Harvest contract with the possible addition and/or exception of a cotton differential. He reiterated his contention that the company felt negotiations had reached an impasse.

In response, by letter dated January 10th, Ann Smith declared "at no time did the Union take the position that the Sun Harvest contract is 'its last and best offer,' nor did the Union ever submit to the company a 'last and best offer.'" Smith suggested in her letter that further meetings be held the week of January 14th. It is noteworthy that neither side made any proposals from November 20 until January 15, save for a modification submitted by the Union in the meeting of December 7 concerning the hiring halls. As previously discussed, no hiring hall was currently operating in Bakersfield. Consequently, the Union proposed that hiring be accomplished through the "paid representative." Nassif rejected this out-of-hand, deeming it more onerous than the Union's previous stance. Since the company had steadfastly refused to agree on the paid representative, it would be anomalous to accept one in the context of another article which it had also declined to accept, i.e., the hiring hall.[55/]

By letter dated January 14, Nassif asked Smith whether she would be agreeable to meet the following day, Tuesday, January 15th.

---

55. General Counsel's brief blantantly misstates the record evidence to the effect that the Union "offered to negotiate a differential rate in cotton" at the December 7 meeting. Nowhere can there be found support for this assertion. The Union, as noted repeatedly, could barely accept the differential in principle, let alone propose rates to which it would be applied, or offer to discuss same.

In the letter Nassif restated his position on behalf of the respondent that the Union should submit a further proposal apart from the Sun Harvest contract or the Sun Harvest contract with a cotton differential.

10. THE MEETING OF JANUARY 15th

Negotiations continued on the 15th of January in El Centro. Present were Ann Smith and the negotiating committee for the Union, and Tom Nassif and Don Andrews for the company. At this meeting, Smith submitted a further posposal which she characterized as "modifications in the Union's position as last set forth in its bargaining proposal." In actuality, this latest "proposal" was a compilation of the Union proposal originally submitted on November 5th with the wage items for the shop and mechanic employees presented on November 20th attached.[56/] The original proposal consisted of 47 articles and was some 70 pages in length. It also contained wage appendices and supplemental agreements regarding job classifications, descriptions and restrictions, and seniority.

The modification submitted by the Union on the 15th concerned three articles: the holiday pay proposal was modified to the extent that September 16th and Good Friday were withdrawn as paid holidays; the article on travel pay was modified by withdrawing the Union's proposal for a travel allowance for a change in operational areas and compensation of 15 cents per mile for the change; and a provision in the company housing article concerning

---

56. The wage appendix to the November 5th proposal and the shop and mechanic's wages were the only wage demands submitted by the Union. No movement from this position occurred.

the housing allowance was withdrawn. The changes brought the Union's proposal closer to the Sun Harvest language.

After the submission of this proposal, Respondent's representatives caucused. Nassif returned and expressed dissatisfaction with the kind of movement that the Union had made from its previous position. Smith contended that since the company was not interested in the kind of settlement based on Sun Harvest, they would have to continue bargaining from each individual proposal. Following this exchange, extensive discussions took place concerning the conduct of bargaining and how matters might proceed from that point. The holiday pay provision was debated, the company not yielding from its former stance. There was also a discussion about the cabbage wage rate and whether the rate that the company was paying was acceptable to the Union. The Respondent offered 70 cents per box and the Union returned with a proposal for $1.10 per box. Prior to the meeting, there had been no discussion about the cabbage rate[57/] although the rate had already been established.

Smith's notes from that session demonstrate that the negotiations were essentially at a standstill. No substantial movement resulted from discussing the Union's "latest" proposal. Nassif's comments as recorded by Smith are filled with recriminations such as "bad faith," "pred.[ictably] unacceptable," "over a year -- bargaining," "fruitless." While Nassif attempted to

---

57. As noted above, there was no charge or allegation regarding a unilateral establishment and/or implementation of the cabbage rate, despite the fact that respondent was harvesting cabbage for the first time in several years, and no previous rate had been in effect.

address the "critical issues," Smith insisted on bargaining from each article in the proposal. Finally, Smith asks to "set meeting date -- discuss critical or uncritical issues." Nassif "agrees next [meeting] discuss critical issues."

11. THE MEETING OF JANUARY 24th

Jerry Cohen and Smith, on behalf of the Union, met with Nassif and Don Andrews in El Centro. Smith characterizes the discussions as follows: "We met to see what might be done in terms of making progress in the negotiations. We suggested to Don that he tell us what he wanted, that we had already told him in the context of previous off-the-record meetings that the terms of the Sun Harvest contract, if offered, would be acceptable to us; that we wouldn't negotiate a cotton differential.[58/] And yet, that didn't seem to move anything along even with the company knowing that. So we asked him to tell us what other things were on his mind in terms of reaching a settlement."

No discussion was held concerning specific proposals other than reiterating previously expressed dissatisfaction with particular articles such as hiring. There were no discussions of any planned changes that the company might implement. As is plain, no revision of previous positions on the issues took place.

The 24th of January was the last meeting between the

---

58. The Union's stance on this critical issue remained consistent throughout the negotiations in 1979. While barely willing to accept the concept of the differential (see discussion of the November 15 session), the Union never discussed it in terms of dollars and cents, notwithstanding considerable movement in this area by respondent. Smith admitted that despite respondent's repeated emphasis on the need for a differential, the Union refused to propose a figure for one.

parties through the date of the hearing. During this period however, there were exchanges of correspondence between Smith and Nassif. On March 21st, Nassif wrote to Smith and set forth his client's position in regard to each of the articles contained in the Union's proposal. Respondent demonstrated its willingness to accept several articles as they were written in the Sun Harvest agreement. However, Nassif also reiterated to the Union the company position that, for the most part, the Sun Harvest agreement remained unacceptable. Smith, by way of response, was "encouraged" by the company's movement, and requested future meeting dates.

12. SUMMARY OF NEGOTIATIONS

After more than a year of bargaining, the parties were barely closer to an agreement than they had been when bargaining commenced. The numerous agreements on "language" items arrived at by Nassif and Paul Chavez over the course of seven months of bargaining were scrapped when the Union changed negotiators and submitted a proposal on November 5 which was totally new, for all intents and purposes. However, the major stumbling blocks to finalizing an agreement[59/] appeared to be the respective issues deemed "critical" by both sides: the cotton differential on the one hand, and the hiring hall, union security, and paid representatives articles on the other. No movement or revision of position was indicated by the submission of written modifications or

---

59. While the parties offered no revisions to their original wage demands, testimony revealed that the company was willing throughout to pay the "going rate." As such, agreement on this issue was probable, assuming no undue recalcitrance on the part of the Union.

counter-proposals on these items. While the Union "off-the-record" alluded to a change in its stance regarding the differential, Smith made it clear that all other issues should be resolved before that one was negotiated. It made no counter-proposals on this issue. Regarding the hiring hall, discussions on modifying the Union's position proved fruitless, as respondent contended that the "modification" was more unacceptable than the original article. Thus, at least by the time of the hearing, the relative positions of the parties appeared fairly well entrenched.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

C. ALLEGATIONS RELATED TO NEGOTIATIONS

1. PARAGRAPHS 18, 25, 26: UNILATERAL WAGE INCREASES

a. Facts

The parties stipulated that on October 19, 1979, respondent increased the lettuce harvest piece rate paid to employees in harvesting trios, as well as the hourly rate paid to waterboys and windrowers.

Respondent further increased wages for tractor drivers, irrigators, and general field workers beginning in the payroll period ending January 2 in the Imperial Valley, and January 1 in Bakersfield. Additionally, it made rates in those classifications retroactive from July 16, 1979, to the week ending December 26, 1979 (December 25, 1979).

I specifically find that the aforementioned increases were within the ambit of wage proposals submitted to the Union on October 16, 1979 with the retroactivity component being definitively proposed by respondent at the negotiating meeting of November 7.[60/]

Further, at no time did the Union agree to the specific amounts set forth in the wage proposal, nor did it agree that the company might implement the increases.

b. Legal Analysis and Conclusions of Law

1) Increase in the Lettuce Harvest Piece Rate (¶18)

It is axiomatic that when employees have a certified bargaining representative an employer, absent other factors, may not unilaterally, without the agreement of that representative, alter

---

60. Respondent, during the course of the June negotiations proposed that it "me-too" the lettuce industry harvest piece rate. The rates proposed by respondent on October 16 were the Sun Harvest, or "industry" rates.

their wage rates. N.L.R.B. v. Katz, 369 U.S. 736 (1962). An employer who does so per se violates Section 1153(e) of the Act. See, e.g., Pacific Mushroom Farm, 7 ALRB No. 28 (1981); Kaplan's Fruit and Produce Co., 6 ALRB No. 36 (1980).

Respondent argues that its conduct in instituting changes in its lettuce harvest piece rate did not violate the Act because the Union "implicitly" agreed to such a change. It bases this argument on evidence that the Union and the company, from the June, 1979 negotiations forward, "understood" that the company was willing to "me-too" the Sun Harvest, or industry, piece rate.

These factors notwithstanding, it is clear that the Union never agreed to the specific rate instituted by the respondent, nor did it agree that respondent could implement this rate prior to the beginning of the 1979 fall lettuce harvest in Bakersfield. To the contrary, the Union was unalterably opposed to any interim wage increase instituted in the absence of an agreement on an entire contract.

Respondent contends that the Union's bad faith, as shown during the course of negotiations,[61/] permitted it to institute unilateral wage changes. However, this Board has held that a Union's declining to submit a wage proposal for an extended period during negotiations does not, even when coupled with acts arguably amounting to Union "bad faith," allow an employer to implement revisions in the wage structure absent agreement from the Union. Kaplan's Fruit and Produce Co., supra.

---

61. This issue is more fully discussed in connection with the year-end wage increases.

Respondent next argues that the increases were non-discretionary, and in keeping with "past practice." The evidence showed that under its Teamster contracts, respondent increased wages each year in July. Further, respondent always paid its workers what it termed the "prevailing rate" in the industry. It did not alter this practice in October, 1979. This argument is similarly unavailing. As correctly pointed out by General Counsel in its brief, "past practice" arising under a prior collective bargaining agreement with a union which is no longer certified cannot in any way limit negotiations or set parameters with a newly certified union. To permit same would be to allow less than full collective bargaining on all mandatory subjects. Consolidated Fiberglass Products, 242 NLRB No. 7 (1979).

The "past practice" argument similar to the one raised here was definitively determined contrary to respondent's position in the Kaplan's case, supra. There, as here, at p. 17, respondent contended that the increases followed a:

> 'Well established company policy of granting certain increases at specific times.' The increases, it is argued, represent the maintenance of the 'dynamic status quo,' not a change in conditions. NLRB v. Ralph Printing & Lithography Co., 433 F.2d 1058 (CA 8 1967). While this is an exception to the general rule, the Katz case specifically distinguishes between automatic increases which are fixed in amount and timing by company policy and increases which are discretionary. The increases here [were]...in an amount fixed by Respondent's sense of the prevailing rate. We therefore conclude that the increases were discretionary and subject to collective bargaining. See also O. P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979).

It is concluded, therefore, that respondent violated Section 1153(e) of the Act by unilaterally increasing its lettuce harvest piece rate in October 1979.

2) Unilateral Increases and Retroactive Pay -- Year End 1979 (¶¶25 & 26)

Central to determining whether or not respondent unlawfully increased wages on or about January 1, 1980, and likewise unlawfully granted certain of its employees a retroactive wage increase at or near that time, is the issue of whether or not an impasse existed in the course of negotiations between respondent and the Union. For reasons set forth below, it is concluded that an impasse did in fact exist, and that respondent was at liberty to implement those wage increases which it had presented to the Union previously during the course of negotiations. See McFarland Rose Production, Inc., 6 ALRB No. 18 (1980).

As stated in the case of Bill Cook Buick, Inc., 224 NLRB No. 154 (1976) at page 1095,

> Impasse, at best, is a plastic concept, the existence of which depends on analysis of the particular factual situation. It might briefly be described as a set of conditions which sometimes coalesce during the course of collective bargaining whereby the parties are in substantial disagreement upon one or more significant items to the point movement by one or the other seems unlikely, absent additional factors. When such a deadlock exists, then both sides are free to exert economic pressure which might otherwise be unlawful [such as implementing unilateral wage increases].
>
> Impasse, then, is a word of art meant to describe a set of circumstances in which it is unlikely that either party will move sufficiently so as to effectuate a contract. Finding impasse is recognition that agreement to a contract is not realistic, absent an additional factor such as economic pressure.

The lead case in the area of defining when an impasse exists is most probably Taft Broadcasting Company, 163 NLRB No. 55 (1967) enf'd sub nom AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968), see also McFarland Rose Production Inc, supra, Masaji Eto, et al., 6

ALRB No. 20 (1980).

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed. 163 NLRB at 478.

As the facts set forth above clearly point out, by the latter part of December, the parties were firmly set in their relative bargaining positions. The Union would not agree to any sort of interim wage increase without having a total contract. As was emphasized by the respondent throughout the course of negotiations, its operations were in no small measure devoted to the cultivation of cotton, that it differed in several material respects with the typical lettuce packing company, that in order to remain competitive in the production of a cotton crop it must have a wage differential for work that was performed on that crop, as opposed to work that was performed on other crops. The Union never accepted this proposition and steadfastly refused to propose any sort of differential whatsoever.[62/] This is particularly apparent after the

---

62. The fact that the differential was alluded to in the so-called "off the record" negotiations taking place in November 1979, I do not find to be any indication that the Union was softening its position in regard to this issue. The Union proposed, as will be recalled, that it might offer the Sun Harvest agreement to the company with a differential if the company were willing to accept a contract on those terms. The hypothetical nature of the proposition, as well as the company's ultimate position that it could not, under any circumstances, accept Sun Harvest, coupled with the fact that the Union did at no time propose an actual monetary figure, leads to the conclusion that the Union was unalterably opposed to the concept of a cotton differential.

meeting of November 15th, where the respondent modified substantially its prior position and withdrew the demand for a differential for all crops, except for cotton. The Union did not counter-propose any sort of differential rate.

At the first negotiating session attended by Ann Smith, the one on October 16th, the Union outlined what it considered its three most critical issues: paid representatives, union security (good standing), and the hiring hall. Over the course of the next few months, there was no movement whatsoever from either side in any of these areas, despite the notion that these areas presented serious problems for the respondent.[63]

On the 15th of January the Union submitted further counter proposals, withdrawing portions of its demands concerning holidays, travel pay and company housing. Despite the fact that this indicated some movement by the Union, the movement was not in areas which had been considered crucial.

Lastly, the Union made no movement whatsoever in the area of wages or retroactivity. It had proposed certain rates on November 5th, and had not altered its proposal from those rates. It

---

63. At the informal meeting held in Nassif's office in December, the Union submitted an alternative to its hiring hall proposal in regard to the Bakersfield operation, as there was no hiring hall in existence in that particular area. However, Nassif characterized this offer as even more unacceptable than the union's standard hiring hall procedure. The Union proposed that is paid representative handle hiring for Bakersfield. As the respondent had been opposed to outside agencies handling its hiring in the first place, or being responsible for same, the concept of using a paid representative to assume this responsibility was even further from anything which it would consider acceptable. There had been no discussions whatsoever regarding the other items the union considered "critical," i.e., the union security and the paid representative clause.

had proposed retroactivity be paid from July of 1978, and similarly did not move from this position.

Merely because there has been movement in some areas or concessions made in portions of a collective bargaining proposal does not militate against a finding that an impasse has been reached. As noted by the Appeals Court in the Taft Broadcasting Company case, "minor advancements toward agreement were being made all along. But on what the company considered the critical issue, the union had not budged...and it showed no prospect whatever of budging in the future." 67 LRRM 3035. The Court went on to note that the continuation of negotiations, as in the instant case, did not militate against a finding that an impasse had been reached, or that the company would not violate its duty to bargain by implementing unilaterally certain changes which it had proposed.

> [NLRB v. Katz, 369 US 736 (1962)] is not to be given a too literal reading that ignores its spirit and reality. It is indeed a fundamental tenet of the act that even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong bonds of agreement. But some bargaining may go on even in the presence of deadlock. Here the continued meetings and occasional progress - facts by no means immaterial - were overborne in the board's view by the conceded impasse on the critical issues . . . on which the progress had been 'imperceptible' and indeed, had led in some aspects, each party claimed, to a widening of the gulf between them. As we see it, the board's finding of impasse reflects it's conclusion that there was no realistic possibility that continuation of discussion at that time would have been fruitful." Id. at 3036.

Conduct of the Union and the respondent in the negotiating sessions held towards the end of 1979 indicates that major disagreement existed on the three items which the Union considered critical, as well as on the issue of wages and retroactivity, which the Union had not submitted any further proposals concerning since

November 7th. The company had, as early as June, 1979 demonstrated its willingness to go along with whatever wage rates had been negotiated in the industry with the exception that it would pay, or would insist upon, a differential for work performed in cotton crops. The Union never indicated any agreement with this position. These facts all point to the conclusion that an impasse or irresolvable conflict had arisen during the course of the negotiations.

Reviewing the circumstances of the instant case in the context of the various criteria set forth in the Taft decision, supra, a study of the bargaining history reveals that although certified in August 1978, the Union took no steps to negotiate with the company until January 1979. At that time, a negotiator was appointed who was not at liberty to discuss economics with the company. The inference is clear that at that time the Union was in no position to propose wage rates to the respondent without having those wage rates settled in industry-wide negotiations in which it was participating. Since Paul Chavez could not submit or did not submit any economic proposals to the company, it follows a fortiori that he was not in a position to conclude a final and complete agreement with the Respondent.

It was not until October 1979, approximatley 10 months after the appointment of the initial negotiator for the Union and approximately one year and three months after the certification of the Union, that a negotiator was appointed who could have concluded a total agreement. Despite frequent meetings from January to June, and three or four meetings between October and the end of the year

which resulted in agreement on many facets of the respective collective bargaining proposals, the parties were still apart on what each understood to be "critical" issues.

The good faith of the parties during the course of the negotiations has not been called into question in regard to the absence of it as creating an impediment to agreement, at least insofar as respondent was concerned. It has not been charged that respondent did not possess the requisite "sincere . . . 'desire to reach ultimate agreement, to enter into a collective bargaining contract.'" (O.P. Murphy Produce Company, Inc. (1979) 5 ALRB No. 63 at p. 4.) To the contrary, agreement was reached between the parties on a good number of issues, most principally arrived at in the course of negotiations with Paul Chavez. These articles included recognition, seniority, access, discipline and discharge, discrimination, worker security, leaves of absence, maintenance of standards, management rights, union label, new or changed operations, rest periods, records and pay periods, income tax withholding, credit union withholding, bulletin boards, family housing, location of company property, modification, and savings clause. By way of emphasis, however, movement on the so-called critical issues was conspicuously absent. It is well settled that a firm position on an issue consistently maintained is not necessarily evidence of bad faith bargaining, as the duty to bargain collectively does not include the obligation to concede on any issue. (See N.L.R.B. v. Herman Sausage Company (5th Cir. 1960) 275 F.2d 229; Times Herald Printing Company (1975) 221 NLRB No. 38.)

As I have found that an impasse existed in the course of

negotiations as of December 1979, the changes in the wage structure which respondent implemented towards the end of that month which had been previously presented to the union and which were "reasonably comprehended [its] pre-impasse proposals" (163 NLRB at 478), respondent did not violate Section 1153(e) by implementing either the wage revision or the retroactive wage payment at the end of December 1979. (N.L.R.B. v. Katz, supra; Taft Broadcasting Company, supra; N.L.R.B. v. Intracoastal Terminal, Inc., et al., (5th Cir. 1961) 286 F.2d 954; Milben Printing, et al. (1975) 218 NLRB No. 29; H & D Inc. v. N.L.R.B. (9th Cir. 1980) 633 F.2d 139, 105 LRRM 3070.)

General Counsel argues that the company's eleventh-hour notice to the Union that it was going to implement wage changes in various categories and also grant retroactive wage increases is somehow evidence of a refusal to bargain in good faith. As noted by the Appellate Court in the Taft case, "a company that has so exhausted bargaining that it may make a unilateral change is not to be put under a universal requirement of a duty to bargain about timing or other specific aspects of a change that is within the ambit of proposals already made and rejected." (67 LRRM at 3037.)

General Counsel's other arguments concerning the issue of impasse are similarly unavailing, containing misconstructions of law and of the facts which were established at the hearing. General Counsel seems to argue that no impasse can exist where parties are willing to make concessions on some of the issues involved in negotiations, that deadlock must be total and irreconcilable. However, as noted in the Taft case, supra, at page 478, "an impasse is no less an impasse because the parties were closer to an

agreement that previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in position." As in the H & D Inc. case, supra, the record here "manifests continuing disagreement on the central issue[s] of the . . . contract." The General Counsel unabashedly states in its brief that "the union offered to negotiate a differential rate in cotton and offered a modification of the hotly contested proposal on hiring halls." As pointed out previously, the record is devoid of any evidence which would indicate that the Union formally proposed that the company would be allowed to maintain its differential rate in cotton. Additionally, the hiring hall proposal submitted by the union in mid-December was even more objectionable, according to Nassif, than the one which was contained in its written contracts. Thus, the so-called movement pointed out by General Counsel was in reality no movement at all.

General Counsel also contends in its brief that evidence that respondent's representatives, in December 1979, discussed future negotiating sessions and expressed the desire to continue negotiating militates against a finding of impasse. However, the mere fact that further negotiations are scheduled is not an indication that a bargaining impasse does not exist. See, generally, Dallas General Drivers Local 745 v. N.L.R.B., 355 F.2d 842 (C.A.D.C. 1966).

Although not under consideration in this case, in the sense of a refusal to bargain, the Union's posture in negotiation must be taken into account in determining whether or not the respondent's position was a reasonable one regarding impasse. (See, generally,

Cheney California Lumber Company (9th Cir. 1963) 319 F.2d 375, 53 LRRM 2598.) The Union and respondent had reached agreement on some 17 separate articles when Paul Chavez was responsible for negotiations. When Ann Smith and Jerry Cohen were assigned to negotiations, the bargaining essentially proceeded from "scratch," as the Union's proposal submitted on November 5th contained modifications of those articles to which even Paul Chavez had agreed. As General Counsel concedes in its brief, seven of the 17 proposals agreed to by Chavez were acceded to by Smith and Cohen. On November 7th, four more of these were agreed to, while of the remaining six, two had significant differences and the remaining four "slight substantive changes." In light of the bargaining position adopted by the Union,[64/] that is,

---

64. Instructive in this context is an examination of the Union's bargaining conduct in light of certain criteria for bad faith set forth by this Board in McFarland Rose Production, Inc., supra at p. 26.

1. "Availability of Negotiator": Paul Chavez was virtually "unavailable" from June to October, 1979.

2. "Authority to Commit": Clearly, Chavez did not have the authority to agree to a complete contract given the absence of his submission of an economic proposal and his lack of understanding as to what limits might be placed on economic demands.

3. "Changes in Negotiating Team": The transition from Chavez to Smith occasioned further delays in the negotiations. Agreements between Chavez and respondent were abrogated. Smith did not obtain information from Chavez (such as that regarding subcontracting) and had to request it again.

4. "Refusal to State Priorities": Smith's negotiations notes of the January 15 meeting indicate that she insisted

(Footnote 64 continued----)

essentially treading water while Paul Chavez was in control of the negotiations and waiting until the industry agreement had been settled before any economics could be proposed, the inference is quite strong that any modifications in the Union position regarding what it considered critical issues would not be forthcoming. If the Union had any inclination toward movement in these areas, it would logically have demonstrated this over the course of the ten and one-half months before Smith took charge.

It is concluded therefore that respondent did not violate section 1153(e) by instituting wage changes in certain classifications, and by making them retroactive at the end of 1979 since an impasse had been reached in negotiations. It is recommended that allegations pertaining thereto be dismissed.

/

/

/

/

/

/

/

/

(Footnote 64 continued----)

on bargaining from each proposal, refusing to address or delineate the "critical issues."

5. "Willingness to Break Impasse": No real movement took place from the Union's position as set forth in its November 5 proposal.

2. PARAGRAPH 16: UNILATERAL WAGE INCREASES TO SHOP EMPLOYEES

The essential fact upon which this allegation is based is not subject to dispute. Respondent admitted that on September 9, 1979, it increased the wages of its shop and maintenance employees, retroactive to July 14, 1979, and that it did so without agreement from the Union regarding the change.

A refusal to bargain can be established only where that refusal applies to employees that are included within the appropriate bargaining unit. (See, e.g., Southern Newspapers Inc. (1980) 255 NLRB No. 22; Barrington Plaza, et al. (1970) 185 NLRB 962.) Conversely, a refusal to bargain is not unlawful if the employees concerned are not in the appropriate unit. (Burns Electronic Security (1981) 256 NLRB No. 139.)

General Counsel adduced no proof whatsoever that the shop and maintenance employees should be included within the overall unit of all agricultural employees certified to be represented by the Union.[65/] In its brief it assumes that such employees are agricultural employees. Part of the problem may stem from the fact that General Counsel was unaware that as an essential element to a Section 8(a)(5) allegation under the NLRA (the counterpart to §1153(e)), the General Counsel thereunder must also allege and prove that the employees involved were in an appropriate unit. In the

---

65. General Counsel called as a witness Gilberto Carrillo, employed as a welder at the Santiago Ranch in Bakersfield. He has worked for Sam Andrews Sons for two years. Apart from vague testimony regarding the performance of his duties in the shop and in the field, Carrillo did not go into extensive detail about the nature of his work, nor was he questioned about these issues by the General Counsel.

instant complaint no such allegation was made, nor was there any proof on the issue. For this reason alone, the allegation should be dismissed. One may not simply assume that shop and maintenance employees and mechanics are agricultural employees. This Board has decided the issue regarding mechanics on a case-by-case basis, depending on the particularized types of functions these mechanics and/or maintenance employees actually perform. (See e.g., Carl Joseph Maggio (1976) 2 ALRB No. 9; Dairy Fresh Products Company (1976) 2 ALRB No. 55; Joe Maggio Inc. (1978) 4 ALRB No. 65.)[66/]

Respondent maintained throughout the course of negotiations that the employees in question here were not part of the bargaining unit, while the Union maintained that they were.[67/] However, respondent offered to submit the question to a stipulated unit clarification hearing; the Union refused to do so. There is a stated policy under this Act not to award voluntary recognition to a union which has not been duly certified. (See ALRA Section 1153(f); Section 1159; Regs. §20385; cf. Harry Carian Sales (1980) 6 ALRB No. 55.) Under the NLRA there is a policy in favor of resorting to the election process rather than to declare by accretion that a group of employees have become a part of a bargaining unit. (See Westwood Import Company, Inc. (1980) 251 NLRB No. 162.) By

---

66. When respondent attempted to present evidence on the issue of job function and description to support its premise on exclusion from the unit, General Counsel objected on the basis of irrelevance. The issue was framed in terms of whether respondent had a good faith belief in excluding these employees from the unit. Plainly, these cases demonstrate a good faith basis for respondent's contention that they are at least mixed-unit employees.

67. As discussed below, under the previous Teamster contracts, these employees were not represented.

implication therefore, there is a similar policy underlying voluntary recognition or accretion of a group of employees into an already existing unit. The Union, not willing to submit the question to the favored, recognized procedure should not have its position on the issue affirmed by a determination herein that such employees were in fact a part of the unit and that Respondent was under an obligation to bargain regarding them.

Therefore, it is recommended that this allegation be dismissed.[68/]

---

68. Respondent attempted to prove through its witnesses what it initially felt was an essential element of its defense to this particular charge, to wit: that these employees should not be considered part of the bargaining unit. Although some evidence was received on the point, I specifically stated that I was not going to decide this issue. Since the parties themselves had not agreed to submit the issue to a determination voluntarily, I had serious reservations as to whether under Chapter 6 of the ALRA I had jurisdiction over the matter. Bearing in mind that General Counsel has failed to prove a prima facie case in regard to this particular allegation, the following recitation of testimony is set forth in the event that the Board decides this issue to the contrary. In lieu of that determination it is suggested that should the issue require resolution, remand would be the appropriate avenue.

Jose Cervantes, the welding shop foreman for the respondent, testified that in 1979 there were 11 employees in the welding shop. The shop is located on the Santiaga Ranch on Copus Road, Bakersfield. Among the job descriptions applicable to these employees are general welder, painter, and driver of a hoist truck. The welders work on aluminum and steel equipment and sometimes work in the packing shed, replacing equipment and making repairs on machinery. A helper cleans the shop and also aids the welders. The welders and the painters also work on the respondent's coolers from time to time. Welding shop employees perform repairs on the machinery that is utilized in and around the respondent's properties, including the Likens machine which is used in the melon harvest. They work on pipe trailers and irrigation pipes, planters, cultivators, discs and subsoilers. In short, many tasks in which they are occupied involve work on agricultural equipment and machinery. Cervantes' supervisors are Delores Alvarez and Albert "Blackie" Poisson.

(Footnote continued...)

(Footnote 68 continued----)

Alfred Gandarilla is the foreman of the mechanical shop at the Sam Andrews Sons company. The shop is also located near the Bakersfield offices on the Santiaga Ranch. There are four employees working under Gandarilla at the shop, and two service men, a water truck driver, and two gardeners. In 1979, Gandarilla also had under him a carpenter and a man who worked in the car wash. The carpenter was utilized to perform maintenance work on company housing. The gardeners take care of all of the yards and all the company houses.

The water truck driver wets down the roads in and around the respondent's fields, yards and housing. Service men service the tractors and heavy equipment such as the caterpillars, back hoes, etc. These men work in the fields. Of the four people in the shop, one is in charge and assembles equipment that is pulled behind tractors, such as cultivators, discs, and the like. The other is a mechanic, presumably working on all of the engines. The third works primarily on tires but also is employed fixing tractors and trucks. He moves the equipment from one place to the other. In 1979 people from the shop worked in the coolers maintaining the compressors, fixing lights, oiling chains and rollers and also attending to the forklift. This crew also does similar tasks at the packing sheds in Bakersfield. In the shop, employees performed maintenance on company trucks of all sizes and on some of the cars owned either by the company itself or by some of its foremen. Maintenance work is also done on the Likens and Selma machines used in the melon harvest, and on the stiching machines. Basically, every type of vehicle and equipment which belongs to respondent is serviced by this group of employees. In addition, the employees maintain the diesel and gasoline pumps located in the yards and in the fields.

Tractor drivers assist in the maintenance work that is done on their equipment, although they are not specifically assigned to the shop. This often occurs when they bring their tractor in to the shop either to be worked on or to change the equipment being pulled behind it.

Gandarilla's supervisors are also Delores Alvarez and Albert "Blackie" Poisson. When tractor drivers are in between operations, at times they will come and help out in the yard. However, they are assigned work by their own particular foreman, and not by Gandarilla.

Shop and maintenance employees were regarded as not represented by the Teamsters Union under the agreements in effect between 1973 and 1978. They were not considered as part of the bargaining unit.

3. PARAGRAPH 14: UNILATERAL "MECHANIZATION DISPLACEMENT"

General Counsel alleged that "on or about June 15, 1979, . . . respondent unilaterally replaced approximately two hundred melon employees with machines without notice to or negotiation of the mechanization displacement with the UFW."

As previously noted, respondent utilizes a combination of melon and sack crews to harvest its melon crop. In the Bakersfield melon harvest of 1979, respondent discontinued the use of sack crews, and used machine crews exclusively for the harvest. General Counsel contended that this change constituted a violation of Section 1153(e).

a. Cultural Considerations; Past Practice

In Bakersfield in 1979, between 500 and 540 acres of melons were planted by respondent following the first week in March. The first three fields, or 250 acres, were planted in three days. Following this there was a severe rainstorm, and according to Fred Andrews, the rest of the planting could not be done until the end of March.

The bed which is constructed for melons is unique and can be used only for that crop. If there are problems with the weather and the bed is not constructed, another crop could be put in those fields and melons not planted because the ground is too wet. Unfortunately, as Fred Andrews noted, the beds had already been contructed and respondent was committed to planting melons in certain areas: the company had so much invested by the time it was necessary to plant the crop that it had no alternative other than to put the crop in and hope that it would work out, despite the

foregoing indications that the crop would not be successful.

In 1979, melon yields, because of this later planting, were severely curtailed. Despite the fact that there were approximately 100 more acres of melons planted in the Bakersfield area for respondent in 1979 than there were for 1978, in absolute numbers the total crates of melons harvested was approximately 20,000 less from the previous years. Yields were 201.7 crates per acre for 1979, compared to 1978, when they were 288.5 crates per acre.

The melon harvest itself is characterized by extreme peaks of production. These peaks are the result of weather conditions, particularly nighttime temperatures. Rising temperatures, both nighttime and daytime, eventuate in a rapidly ripening crop. Due to uncertainties inherent in the ripening process, problems regarding harvesting manpower are endemic. Fred Andrews noted that attempts are made to estimate when a field will begin production. An average flow is determined according to personal judgment and experience. Primarily based on weather information, respondent attempts to estimate starting dates and the intensity of the harvest. As production increases, personnel are added to harvest the crop.

The Bakersfield cantaloupe harvest began on June 22nd and ended on July 14th. The peak of the harvest was on June 26th. There was no overlap with the Holtville melon harvest, i.e., the Holtville melon harvest had ended by the time the one in Bakersfield began. Once a field is under production, harvesting is accomplished seven days a week until the field has yielded all the melons that it can. Melons mature every day. If a day in the harvest is missed, the next day will be more than double the production, and many of

the melons will by this time be overripe. Although they will be harvested, the packing shed will have to throw half of them away. According to Fred Andrews,

> When you have a situation where you miss a day, ninety percent of the time you are better off just walking away from the field, because it is an impossible situation.... They mature too rapidly. The melon tells you when to pick; you don't have anything to say about it. When it is ripe, you get it. And six hours later it's lost.

Respondent began using melon harvesting machines between 12 and 14 years ago. They have been utilized in each melon harvest since, up to and including the harvest in Bakersfield in 1979. In 1978, the company experienced a problem obtaining enough machines to harvest its melons. It had previously borrowed machines from other companies which were not yet in production. Respondent would then lend its machines to those companies. In 1978, those companies did not wish to pursue that arrangement. Therefore, respondent had to use less machines that year.

Elaborating further on this point, Andrews stated that in 1978, respondent transported five Likens machines from the Imperial Valley to Bakersfield for the melon harvest. The company had a total of ten machines which it used in the Imperial Valley; however, only five of these were owned by it, while the other five were part of a trade arrangement. In 1978, respondent was unable to obtain the five additional machines for Bakersfield and therefore, only five machines were utilized.

In 1979, respondent purchased four machines before the Holtville harvest. However, they were not delivered until the beginning of the harvest in Bakersfield. According to Andrews, the machines were in a bad state of repair. Work on them was performed

at the shop in Bakersfield. The machines purchased were not self-propelled as the Likens machines, but were machines that had to be pulled by a tractor, and operated less efficiently. Additionally, respondent used another type of machine known as a Selma loader.69/

Thus, respondent used a total of ten melon machines in the 1979 Bakersfield harvest. The company has used as many as ten machines in almost every year prior to 1979. However, sack crews had also been used in years prior to 1978. Andrews stated that the reason sack crews were needed was because the Bakersfield crop "comes at us at such a horrendous tonnage that we don't have enough machines to do the harvest." Nevertheless, he could not recall one year where they did not use at least one sack crew other than 1979.

The number of sack crews which the company might utilize varies greatly depending on the tonnage, yield, etc. The numbers range from as few as five or six to as many as 10 or 12. The general practice of the company is to begin with machines in Bakersfield and then supplement them with sack crews, depending on the intensity of the harvest or how the volume develops. The central philosophy regarding personnel is, according to Fred Andrews, to protect those people who start initially in the

---

69. Respondent's evidence on the use of machines was basically uncontroverted. Only one witness for the General Counsel, Baudelio Carillo Gaeta, testified as to the use of machines which he had not seen in operation in previous years. Andrews' explanation was sufficient to refute any inference that respondent was employing a different technique or process, to the detriment of its workers. Either the same machines or ones which were less efficient were used in the harvest in question.

machines. When the volume increases, this central core will be supplemented by sack crews, who will also be the first laid off when production diminishes. Employees in the sack crews come principally from the Imperial Valley. In addition, a labor contractor has, at times, brought in sack crews to assist in the harvest.

Fred Andrews proffered the following explanation for not utilizing sack crews in Bakersfield in 1979. The company, as usual, began harvesting with machine crews. However, due to the tremendous gap in the planting of the melon acreage, harvesting in the earlier acreage could be completed by the time the latter acreage began to ripen. Therefore, the company was able to move machines from one spot to the other and there was no need to supplement the machine crews.[70/]

The peak of the harvest was reached very early during the course of the harvesting month, approximately around the fourth or fifth day. This, according to Fred Andrews, was an abnormal situation. In addition, volume had been extremely curtailed, being about fifty percent of normal.

---

70. Harvest Supervisor Eddy Rodriguez corroborated Andrews' testimony in these respects. He recalled that temperatures in Bakersfield were about ten degrees below normal in 1979. The cooler weather had a definite impact on the harvest. The company was able to pick the earlier fields of cantaloupe before some of the later ones ripened. Normally, Rodriguez noted, the first few fields will start slowly. At approximately mid-season, many of the fields will ripen all at once and crews have to cover a larger area. If the melons all become ripe at the same time, more people are needed to harvest the melons. Consequently, sack crews are utilized to pick the added volume. In 1979 respondent was able to harvest cataloupes at a slower rate and thus use less people. Don Andrews likewise substantiated remarks regarding the rate of the crops maturity. General Counsel presented no evidence to refute Rodriguez' or Andrews' assertions regarding the pace of the harvest.

According to Andrews, the composition and availability of the labor force in Bakersfield is somewhat different than it is in the Imperial Valley. These factors contribute to the generally more extensive use in Bakersfield of machine crews. In the Imperial Valley, as a whole, most of the melons are ordinarily harvested with sack crews. Despite the fact that respondent's melon acreages there are fairly modest, and that it might handle the harvest with machines supplemented by a sack crew or two, respondent has had to change practices regarding the use of machine crews in recent years. Other companies in the area begin their harvests with sack crews and tend to hire most of the sack crew workers in the area. When respondent needs to hire sack crews for its harvest, it has not been able to obtain enough personnel in the last one or two years. Accordingly, respondent determined that its procedures should be changed to the effect that the harvest would be started with sack crews to ensure that the personnel would be available and committed, after which respondent would add its machine crews.

In Bakersfield, on the other hand, respondent calls some local people for that melon harvest, including women who work in the lettuce thinning and hoeing, and who do most of the hand labor work that respondent has in garlic, onions and other crops. However, the main body of the work force for the melon harvest are people that migrate from Texas and come to the Bakersfield area. According to Fred Andrews, the respondent has been using the same people and their families in this capacity for approximately 15 years: the work force for its machine crews has been fairly stable. Respondent has never had a problem obtaining people for its sack crews in

Bakersfield since the area is a stopping-off point for those moving north to work in the San Joaquin Valley. "If they can step into our volume for four or five days, they do terrifically well; and they then move on to their next job, which is a job that will keep them busy most of the summer."[71]

As the Bakersfield melon season opened, Fred Andrews flew down to the Imperial Valley. His object was to hold a meeting and explain the harvest employment situation to the people who would ordinarily be in the Bakersfield sack crews. Also present from the company was Angel Avila. Andrews spoke to a group of about 40 people.

General Counsel's version of this speech was presented by Antonio Alaniz. Alaniz, a lettuce crew representative, testified that one day in July 1979, he had heard that a group of melon workers were assembling to be taken to Bakersfield. Alaniz recognized several members of his lettuce crew there. Fred Andrews, one of the company owners, was speaking with one such person, Pancho Hernandez, who, according to Alaniz, said that all the workers were there so they could be taken to Bakersfield. Andrews allegedly replied, "I do not have any workers here, my workers are inside the field. Those here outside are not my workers." Andrews also stated that the women were more courageous to work, that all the women[72]

---

71. Andrews' description of the Bakersfield melon work force was uncontroverted.

72. Apparently, this is a reference to the fact that machine crews, which were used exclusivlely in Bakersfield, contained women members, whereas sack crews did not.

were working in Bakersfield because they were not afraid of the Chavistas. Andrews also wanted assurances from the workers that if he took them to Bakersfield and the Chavistas arrived they would not stop working. Alaniz then spoke up, saying that if Andrews wanted assurances about the work, the workers also wanted assurances about their benefits. Andrews then asked Angel Avila, who was also present, "Who is this man?" Avila told him that he was a representative from the lettuce crews, whereupon Andrews, according to Alaniz, said: "You know what? This year I lost a lot of melon seed. I am not going to plant them. I have a lot of seeds to give to you," at which juncture he pointed his finger at Alaniz' chest and appeared to Alaniz to be very angry. Alaniz then left the gathering.

Alaniz' confrontation with Andrews was essentially corroborated by Francisco Hernandez, a melon harvest worker who also was present at this meeting.

Fred Andrews supplied the following, somewhat different, version of the speech. At the outset, one of the workers asked why they were not going to be used in Bakersfield. Fred Andrews responded that the company was harvesting with its machine crews, that the acreage was not as extensive as it had been in the past, and that the machine crews were able to handle it. There was a possibility, however, that people might be needed three or four days hence. He told the people that he would send Avila back down to inform them whether or not they could be hired.

Andrews admitted that he was not in the Imperial Valley at the time of that melon harvest when there was a problem with getting

the work on the crop completed. As explained in his testimony, when the Imperial Valley operation reached its peak harvest volume there were many sack crews that did not work.[73/] This resulted in a major monetary loss to the company, estimated at around $500,000.00. The problem was particularly acute since, according to Fred Andrews, the market was extremely high and the company had a very large crop.

Fred Andrews asked the group of melon workers why they had acted so "totally out of character" and did not harvest the crop in the Imperial Valley when the respondent had never experienced a problem like that before. He stated to the workers that it seemed as though they were a bit unstable by their actions, and it was risky to have an unstable work force in the cantaloupes. He could not understand their behavior, since they had a good crop and the people could make good money harvesting it. One of the workers thereupon stated that they wanted a contract. Andrews responded by saying that he was not the negotiator, and that the representatives and their negotiators were trying to work out a satisfactory arrangement. Fred Andrews denied that he ever told the workers that the company was not going to plant any more melons.[74/] Andrews also testified that one of the workers at the meeting told him that he was becoming so wealthy with the melons that in the worker's judgment one couldn't miss. Fred Andrews responded by telling him that they had a lot of seed left from the Bakersfield planting and

---

73. These events will be discussed more fully below.

74. Parenthetically, the respondent did not plant any melons during 1980 in the Imperial Valley.

that he was welcome to it; in the event that it was such a good deal, Andrews would be glad to furnish the seed to him. Andrews denied physically touching any of the workers or pointing an accusatory finger at them during the course of this exchange.

Three or four days later, as promised, Andrews instructed Angel Avila to return to the Imperial Valley to talk with the melon workers. Unfortunately, Avila informed the workers that they would not be needed for the Bakersfield melon harvest. No sack crew workers were hired.

Whatever version of the speech is credited, it appears that Andrews was deeply concerned about employing a "reliable" work force to harvest the melons in Bakersfield. As noted, melons are a highly perishable crop which must be harvested when it is ripe. Strike activity, work stoppages, etc., have especially injurious consequences. Andrews was seeking to insure that in Bakersfield there would not be a repetition of the problems which arose during the Imperial Valley harvest, discussed below.

b. The Imperial Valley Melon Strike

Numerous witnesses, including both supervisors and employees,[75/] testified that commencing June 9, 1979, on Saturday during the first week of the Imperial Valley melon harvest, mass demonstrations began which were directed against respondent. Hundreds of demonstrators wore Union buttons and carried Union

---

75. These witnesses included supervisor Sergio (Jose) Rea, foremen Ruben Quihuis, Francisco Amaya and Salvador Alonzo, and workers Mateo Cerda, Ramon Ramirez, Josefina Calzada and Gloria Lopez.

flags, massing in the parking lot of the Shopping Bag where respondent's busses picked its workers up each day to take them to the fields. When and if a company bus entered the lot, it was surrounded by demonstrators. They proceeded to rock the bus, pound on its sides, and yell at the foreman/driver to drive away. Harvest workers were prevented from boarding the busses. If any had already done so, they were exhorted to get off. The foremen themselves were threatened with physical harm, stones were thrown at them and they were chased through the streets of Calexico, once the use of busses had been abandoned: after the first few days of demonstrations, respondent attempted to rendezvous with workers surreptitiously by driving small trucks to various points in the city instead of the customary, single pick-up location.

At the fields during the melon harvest there were numbers of pickets outside. While on the line picketers would yell to the people to come out, threatening physical assault if they did not. Harvest workers were identified by name, and told they would be beaten once they returned to Mexicali. The flags carried by picketers and the buttons that they wore clearly identified them with the Union. Rocks were thrown from the picket lines, some picketers using slingshots to shoot marbles and stones at the workers in the fields. There was also a considerable amount of yelling of profanities, etc., emanating from the line.

Foreman Salvador Alonzo noted that harvesting procedures had to be modified due to the strike activity: the course that his machine followed through the fields was different when there were picketers surrounding the field. Usually the machine went from one

end of the field to the other. When there were picketers surrounding the field, the machines could not go that far, since rocks and other objects were being thrown at the workers. According to Alonzo's estimate, about one-half of the field remained unpicked, that is, one quarter by each edge was not harvested. Alonzo further testified that trucks which came to pick up the harvested melons were often turned away by the picketers. Access into the fields for trucks to haul the melons to the shed was interfered with. Demonstrators on occasion punctured the tires and smashed the windows of these trucks.

On June 15th, Judge John Shea of the Superior Court of Imperial County issued a temporary restraining order in ALRB case number 79-CL-37-EC enjoining the Union from, inter alia, mass picketing, blocking ingress or egress to fields, engaging in violent conduct, and specifically enjoining it from standing or entering within 25 feet of the Sam Andrews busses while employees entered or left them at the Super Shop Market parking lot in Calexico.[75/]

As Don Andrews had characterized the situation, most of the crop in the Imperial Valley had by that time already been lost.[76/] The Union was attempting to exact an agreement on wages under the threat of loss of the next, or Bakersfield crop. As noted earlier, no agreement had been reached on wage rates for the melon harvesters despite the "emergency meetings" convened for that purpose. Labor strife continued right until the end of the Imperial Valley harvest.

---

75. This was the central pick-up point alluded to above.

76. By Don Andrews' estimate, about 60 percent of the melon crop in the Imperial Valley was lost due to labor unrest, which amounted to a dollar loss of $500,000.00.

Don Andrews testified that ordinarily, the melon season in the Imperial Valley would have run from June 5th to about the 16th. Toward the latter days of the harvest there were no sack crews at work. According to Don Andrews, the fields had deteriorated to such a point that preliminary sorting of melons had to be done in the fields since there were so few good melons left. Typically, it had been easier to sort melons from the machines than it was with the sack crews. On the first day of the strike activity in the Imperial Valley, respondent lost 11 sack crews and one machine crew and had only 3 machine crews working that day. As opposed to the pack out of the previous day, or 12,719 crates, on the first day of the activity, there were only 980 crates packed out. This occurred at a time when respondent was approaching the peak of its melon harvest.

Much controversy arose during the course of the hearing as to how to characterize the actions of numbers of people during the melon harvest in the Imperial Valley in 1979. General Counsel was extremely reluctant to put on any evidence whatsoever concerning a strike fomented or organized by the Union; nor did any workers testify that they engaged in such activities. Even Union representatives, when confronted directly with the issue, declined to accept responsibility for these actions. As a result, one of General Counsel's allegations concerning discrimination against these melon workers was dismissed for lack of evidence of their concerted activities.[77/]

---

77. General Counsel argues in its brief that this allegation, contained in paragraph 15 of the third amended

(Footnote 77 continued---)

Union representatives would not openly admit that there was a strike that took place at such time. Their credibility was seriously damaged and undermined thereby. This is particularly so in the case of Paul Chavez, negotiator for the Union, who claimed to have no knowledge of any strike activity despite the fact that he

---

(Footnote 77 continued----)

complaint, should be reinstated. The motion is denied on a number of grounds. As noted above, General Counsel determined, for reasons best known to it, not to introduce evidence of picketing, strikes, demonstrations, etc. Perhaps it felt that tactically such evidence might damage its case. Even in its brief, General Counsel was reluctant to link the sack workers with the Holtville melon stoppage: "For whatever reason the sack crews stayed away from work." (G.C. Brief, p. 27, emphasis supplied). At the close of its case-in-chief, I granted a motion to dismiss the allegation, stating:

> The evidence that was presented regarding the "support and activities on behalf of the UFW" [alleged in that paragraph] was exceedingly sketchy... [O]f all the witnesses that we've had to come testify, only one or two were melon workers. And out of these one or two melon workers that did come to testify, none of them spoke of any Union activity prior to June 15, 1979.
>
> We've had some testimony about people not being able to board busses but that was in no way tied to any support or activities on behalf of the UFW. So, therefore, the requisite conduct on behalf of each of these workers has not been established in this record. [R.T. XLIV:23]

In short, General Counsel failed to present a prima facie case. It cannot now be heard to argue, on equitable grounds, that its failure to introduce evidence was somehow cured by facts presented during the course of respondent's case.

Further, under Regulations Sections 20242 and 20240(f), appeals "shall be filed with the Board...within 10 days from the ruling." No appeal was taken from my ruling, and hence the request to reinstate the allegation should be denied on procedural grounds, as being untimely and directed to the wrong office.

The final rationale for denying the request (if such is what it is) is essentially a due process one. Respondent, believing it to be dismissed, presented no argument or cases to counter the allegation.

was chief negotiator for the Union. He similarly denied that anyone, in preparation for a strike, asked him about the progress of negotiations.[78]

No matter what terminology one uses in connection with the activities that took place during such times, the facts point to the conclusion that work was interferred with, the normal work force in the melon harvest in the Imperial Valley was not utilized to bring in the crop, serious disruptions occurred during the course of the harvest, mass demonstrations were held, picketing occurred at work sites, several incidents of violent conduct occurred resulting in property damage and physical harm to individuals, and respondent incurred damages which were by no means insubstantial.

Don Andrews enumerated among the reasons for not using sack crews in Bakersfield in 1979 the damage and violence which had taken place in the Imperial Valley. Andrews attempted to couch his assessment of that situation in terms of the reliability of sack crews in general, stating that they would usually come in for the peak production of the crop in Bakersfield and were not interested in slower production times. Andrews stated that the sack crew workers were more "volatile" than people who worked on machines. He re-emphasized the perishability of the melon crop which requires a reliable labor force to harvest it. When activities commenced in the Imperial Valley, according to Don Andrews, the company began

---

78. Whatever shred of credence remained in Paul's testimony was destroyed by his later admission that he spoke with Gilberto Rodriguez and Manuel Chavez on June 10, that Manuel Chavez was involved in strike activity and "may have been" strike coordinator, and that Paul and Manuel discussed worker demands prior to the June 10 negotiating session.

(PAGE 81 IS DELETED IN ITS ENTIRETY AS IT IS A DUPLICATION OF PAGE 80.)

recruiting people in Bakersfield to work in the machines in order to avert the adverse effects of a sack crew strike which might follow the harvest to Bakersfield.[80]

Significantly, Paul Chavez admitted that he was notified that the company was no longer going to use sack crews in Bakersfield. However, he could not recall ever having any discussions with the company about that fact. He stated definitively that he never made any demands upon the respondent to cease using machine crews in Bakersfield or to use less machine crews and more sack crews in this area, or protesting in any way the company's use of machines versus sack crews.

During the course of negotiations while Paul Chavez was representing the Union, he did not inform the company that the Union was on strike and/or present it with a series of demands. Nor did he inform the company that the UFW had terminated its work action or that it was not on strike against the company.[81]

/

/

/

---

80. Reference is made in this regard to Richard Chavez' statement, in the prior discussion of the June 10 and 11 negotiations.

81. As noted earlier, Richard Chavez, who had attended negotiating sessions on June 10 and 11, threatened the continuation in Bakersfield of strike activities directed against respondent unless agreement was reached on harvest rates. No resolution of this issue occurred. He further admitted that the activities during the 1979 melon harvest constituted an "unsanctioned strike," that is, a strike which the Union's Board of Directors had not voted to provide for strike benefits. Furthermore, there was evidence that the company's Bakersfield operations were the scene of some vandalism at the time.

Chavez was informed at the June 25 negotiating meeting that there would be no bus transportation for sack crew workers from the Imperial Valley to Bakersfield. The inference is clear that the company made him aware thereby that it would not hire or take sack crews to Bakersfield from that location where they customarily came.

He was also informed that anyone who lost their job as a result of the strike in the melons should notify the company that they wanted to work, and if they had in fact been replaced because they were an economic striker, then the company would put them on a preferential hiring list. Although maintaining that there were workers ready and willing to return to work in Bakersfield for the melon harvest, Paul did not submit any list of such people to the respondent. As noted above, he also neglected to formally protest hiring procedures for the Bakersfield melon harvest.

c. Analysis and Conclusions

It is concluded that respondent did not violate the Act by ceasing to use sack crews for its Bakersfield melon harvest. This conclusion is based on the theory that the Union, after notification, waived its right to bargain about the "change," if such was a change at all. Further, the evidence shows that the Union, previous to the "change," agreed that respondent would have the "management right" to alter its operations as it did, and thus in some sense there was bargaining on the issue.

The evidence clearly and unmistakeably points to the conclusion that respondent did not unilaterally "replace... employees with machines." For at least twelve years prior to 1979, respondent had used "machines" (essentially, self-propelled or tractor-pulled conveyor belts) to assist in the melon harvests. It

would be a severe misconstruction of the facts to conclude that the machines, themselves, "replaced" anyone: the machines do not pick the melons, but rather help in the loading of the harvested fruit into waiting bins.[82/] What actually occurred in the 1979 Bakersfield melon harvest was that respondent altered its harvest techniques somewhat by exclusively utilizing machine crews, as opposed to a mixture of machine and sack crews. Workers were not actually "displaced" by machines, although perhaps different workers or groups of workers came to be employed.

The Union through Paul Chavez was made aware that respondent would alter its melon harvesting methods in Bakersfield to the detriment of the sack crew workers. It did nothing by way of direct communications with respondent, either at or away from the bargaining table, to signify its objection, if any, to this alteration.

The recently announced decision by this Board in O. P. Murphy Co., Inc., 7 ALRB No. 37 (Nov. 3, 1981) has limited applicability to the instant case. The Board there held that "managerial decisions to automate or mechanize are mandatory subjects of bargaining" (at p. 20). In so holding, the Board determined that, in light of the decision in First National Maintenance Corporation v. N.L.R.B., 101 S.Ct. 2573 (1981), "the fact that a management decision necessarily results in the elimination of bargaining unit jobs does not of itself mandate

---

82. Indeed, Paul Chavez himself, as discussed earlier in the negotiations section, characterized "mechanization" as the introduction of machinery which results in the displacement of workers.

bargaining over that decision. Rather, we must focus on the nature of the decision itself, the motivation of the employer in reaching its decision, the effect the decision has on the scope and direction of the business, and the burden which would be placed on the management process by requiring bargaining with the elected representative." (id).

Before analyzing this situation in light of the aforementioned factors, it must be emphasized that as noted above, I do not view this case as involving a decision to "mechanize" in the strict sense. Additionally, the decision to utilize machine crews versus sack crews did not involve the "elimination of bargaining unit jobs." No numerical comparison may be made with exactitude due to the significant reduction in the 1979 yield, and the fact that no machine crew records were introduced into evidence. However, it is clear that to some degree, the number of people needed for machine crew complements is interchangeable with the number required for machine crews, though perhaps not on a strict one-for-one basis. Whether machines or sack crews are used, the total number of employees required would remain roughly equivalent.[83/] Thus, in terms of the "nature" of the decision, respondent's determination to use machine crews versus sack crews did not eliminate unit jobs per se, nor did it "automate" certain jobs out of existence.

In terms of the "motivation of the employer in reaching

---

83. General Counsel's allegation that "approximately two hundred" employees were "replaced" is simply unsupported. The maximum number of sack crew workers employed in Bakersfield in 1978 was approximately 165.

its decision," climatic conditions contributed in no small measure to the end result. Yields were reduced and harvest exigencies did not dictate that the harvest complement be expanded precipitously to adequately handle output. Extensive, uncontroverted evidence was presented on this point. Additional motivation for the change was provided by the Imperial Valley melon strike. Respondent had lost a substantial portion of its Imperial Valley crop as a result. The Union threatened to continue the strike in Bakersfield. Respondent had been subjected to sporadic instances of vandalism in Bakersfield. Clearly the respondent may take reasonable steps to insure against economic losses predicted on the basis of labor strife. (See, e.g., Seabreeze Berry Farms, 7 ALRB No. 40 (1981); N.L.R.B. v. Mackay Radio and Telegraph, 304 U.S. 333 (1938); N.L.R.B. v. Brown, 380 U.S. 278 (1965). By utilizing machine crews to a greater extent, respondent felt it could depend more readily on the continued production of its work force, and thus harvest its melon crop with a minimum of disruption.

This decision had little, if any, impact, on the "scope and direction of the enterprise." Melons were still harvested, crews still hired for that purpose, and the essential nature of respondent's operations was not changed. The decision did not "rise to a level of 'a change not unlike opening a new line of business or going out of business entirely.'" O. P. Murphy, supra, at p. 21.

The "burden placed on management by requiring bargaining" on this issue would seem relatively slight. In so finding I am not considering the day-to-day decision-making which respondent performs regarding the relative number of sack or machine crews needed to

bring in the crop. As shown above, this decision hinges on a number of rapidly changing factors, such as availability of labor and the daily output due to weather conditions, which would not render it conducive to consultation with the representative on a moment-by-moment basis. The "burden" aspect is considering solely in light of the decision to use sack crew workers at all. It would appear that prior to the harvest itself the possibility of using one type of process as opposed to another might be discussed with the representative, particularly in the context of how that decision might ultimately effect employees. As with mechanization in general, "requiring collective bargaining about [the decision] will promote the smooth operation of labor-management relations and be conducive to labor peace...to a far greater extent than it will burden the conduct of the employer's business." (O. P. Murphy Product Co., Inc., supra at p. 2.; see also L. E. Davis v. N.L.R.B., 617 F.2d 1254 (CA 7 1980)).

Thus it is concluded that respondent was under an obligation, at least initially, to bargain about its decision to cease utilizing sack crews in toto.

Notwithstanding the foregoing, it is concluded that respondent did not violate the Act by ceasing to use sack crews in the 1979 Bakersfield harvest. This conclusion is based on the determination that the Union waived any and all rights it may have had in connection with bargaining about this issue.

This Board, in keeping with applicable N.L.R.B. precedent, has found that for a waiver to exist, evidence must show that such conduct is "clear and unequivocal." (Masaji Eto, 6 ALRB No. 20

(1980); see also N. L. Industries, Inc. v. N.L.R.B., 563 F.2d 786 (CA 8 1978)). However, the Union, after receiving adequate notice of the proposed change, must somehow demonstrate a "desire or willingness to bargain over" it. O. P. Murphy Produce Co., Inc., supra at p. 24; Globe-Union, 222 NLRB No. 173 (1967). Where a union, after receiving clear and timely notice of a proposed change, makes no protest or effort to bargain concerning it, the union waives the right to allege that the employer has acted unlawfully. I.L.G.W.U. v. N.L.R.B., 463 F.2d 907 (C.A.D.C. 1972). It is "incumbent upon a union which has notice of an employer's proposed change in terms and conditions of employment to timely request bargaining in order to preserve its rights to bargain. The Union cannot be content with merely protesting the action or filing an unfair labor practice over the matter." Citizens National Bank of Willmar, 245 NLRB NO. 47, (1979).

Union representative Paul Chavez admitted that he was informed about the respondent's discontinuing the use of sack crews by the negotiating committee members from Bakersfield. He further was made aware of the situation explicitly in the June 25 negotiations, when he was told that the company was not going to run a bus from Calexico to Bakersfield for the sack crew workers, and that he should submit a list of employees who were willing to work to be put on a preferential hiring roster. Chavez did nothing to protest; he did not submit such a list; he did not request bargaining over the matter, nor over its effects. The only manifestation of the Union's displeasure was the filing of charges four months after the change had taken place. Under applicable

precedent, this was plainly inadequate. The Union must exercise diligence in enforcing its representational rights. American Bus Lines, Inc., 164 NRLB 1055 (1966); see also O. P. Murphy, supra; National Bank of Willmar, supra.

There is another basis on which it may be found that the Union waived its right to bargain about the decision to discontinue the use of sack crews. On June 11, the Union agreed to a management rights clause which stated: "The company retains all rights of management including.... To decide the nature of equipment, machinery, methods or processes used; to introduce new equipment, machinery, or processes, and to change or discontinue existing equipment, machinery or processes,...." Thus, the Union specifically acceded to the respondent's prerogative to institute the type of change under consideration. Signing off on this clause during the height of the Imperial Valley melon harvest, when respondent was utilizing machine and sack crews, carries with it the implication that the use of melon machines was contemplated within the ambit of the provision. The agreement confers upon management the right to take unilateral action in this regard. See New York Mirror, 151 NLRB No. 843 (1963).

In Laredo Packing Company, 254 NLRB 1, (1981), the Union waived its right to bargain over a temporary discontinuance of operations resulting in lay-offs of employees where it had executed a clause reserving to the employer the right to "abolish or change operations, determine the extent to which the plant will operate, lay off employees because of legitimate reasons...." The instant clause, while significantly more narrow, confers a right upon this

employer to make the sort of managerial decision under scrutiny.

Accordingly, it is recommended that this allegation be dismissed.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

4. PARAGRAPH 29: UNILATERAL CHANGES IN METHOD OF REHIRING CREWS

a. The Section 1153(c) Allegation

General Counsel alleged that respondent took a new and different crew to Bakersfield and put them to work in its fall lettuce harvest before one of its more established or more senior crews and hence, in some manner, discriminated against this latter crew. Specifically, it was alleged that the crew of Felipe Orozco was not recalled in the order which it should have been. General Counsel failed to prove this allegation in a number of respects, not the least of which was its failure to demonstrate that the particular crew in question was engaged in protected, concerted activities and that respondent knew of such actions to such an extent as would provide the illegal motivation for discrimination. (See, e.g., Verde Produce Co., 7 ALRB No. 27 (1981); Jackson and Perkins Rose Co., 5 ALRB No. 20 (1979)). The record is devoid of any evidence that this crew in particular did anything which would prompt discriminatory treatment. The omission of proof in this regard is all the more glaring since General Counsel called no fewer than twelve employees who worked in Orozco's crew.[84/]

While failing to adduce specific evidence of Union activities, General Counsel advanced a broad contention which was somewhat racial in tone. The crew which General Counsel asserted

---

84. These included Antonio Alaniz, Ascension Rodriguez, Gregorio Alvarez, Cerillo Vibriesca, Faustino Hirales, Miguel Salgado, Baudelio Gaeta, Juan Pacheco, Francisco Roque, Francisco Santiago, Miguel Chavez, and Alberto Bravo.

took the place of Orozco's crew was a Filipino crew.[85] Throughout the hearing, General Counsel sought to convey the impression that Filipino crews were for the most part not interested in Union activities; it was the Mexican crews who were responsible for the pro-Union attitudes of the workers, while the Filipino crews did not participate in "Union activities" such as the work stoppages[86] (discussed supra). For this reason the respondent employed a Filipino crew prior to the time it put the Mexican crew of Orozco to work in Bakersfield, i.e., that the Filipino crew would be less inclined to engage in protected, concerted activities.

Company witnesses did testify that Filipino crews had less problems working in wet weather.[87] However, the fall season in Bakersfield is typically not very rainy.

Records for the Bakersfield harvest demonstrated that at least since the spring harvest of 1975 respondent had at minimum one Filipino crew working for it, as follows:

/

/

/

---

85. Filipino crews are organized along different lines than Mexican crews. The piece rate is shared differently, with the closer being included in the share, as opposed to earning a separate rate as he or she would do in the Mexican crews. People rotate around the particular job categories in the Filipino crews where they do not do so in the Mexican crews. Another feature distinguishing the Filipino crews from the Mexican crews is the food which these crews have prepared for them.

86. The evidence tends to support this contention.

87. Don Andrews specifically noted that Filipino crews, coming from the Santa Maria area, were more accustomed to working in wet fields and sleeping under barracks roofs made noisy by the rain.

Season	Filipino Crew Numbers
Fall 1975	3, 4
Spring 1976	3, 4
Fall 1976	3
Spring 1977	4, 5
Fall 1977	3, 4
Spring 1978	3, 4
Fall 1978	3, 6
Spring 1979	3
Fall 1979	3 (partially), 4

The only portion of General Counsel's proof in regard to the 1153(c) aspect of this allegation was based solely on suspicion and surmise, to wit, that if Union activities were to occur, the Filipino crew would be less likely to participate. However, apart from any reservations one might have in respect to this premise, it is clear that there was no proof demonstrating that the Orozco crew engaged in activities which would supply the requisite basis for a finding of illegal motivation. As noted by this Board in the recent case of O. P. Murphy, 7 ALRB No. 37, at p. 27, "...an employer may discriminate with respect to hiring or tenure for any reason or for no reason so long as its conduct does not tend or amount to interference with employees' section 1152 rights." No showing of interference with those rights has been made herein.

Accordingly, the section 1153(c) aspect of this allegation is dismissed.

b. The Section 1153(e) Allegation

1) General Counsel's Evidence

Felipe Orozco, stipulated by the parties to be a supervisor within the meaning of the Act, works for respondent as a foreman both in Bakersfield and Holtville. He is responsible for assembling a lettuce harvesting crew for both locations. Many of his crew members live in the Imperial Valley area, including Calexico and Mexicali. He has different crew members in Bakersfield than he does in Holtville; however, some people work in both locations. For example, in April 1978, between 14 and 16 people came from the Holtville area to work in Bakersfield and were transported by Orozco on the company bus. Orozco stated that he hires only those people whose names appear on a list that is given to him by the company.[88/] The respondent pays its foremen for a week prior to the commencement of the harvest, during which time the foremen are to contact workers and assemble crews.

In October 1979, Orozco was told by Rodriguez to assemble a harvest crew and come to Bakersfield. Although he stated that the members of this October 1979 crew were "practically the same people" as when he started working, Orozco could not remember how many people on the list in 1979 had also worked for the company in 1978. In October 1979, Orozco transported 18 workers from the Imperial Valley area. He did not do any recruiting on his own, but merely employed those workers whose names appeared on the company list.

Ruben Lusano, who began working for respondent in September

---

88. In succeeding sections will be a more thoroughgoing discussion of the use of crew hire lists.

1976, was a member of Ramon Hernandez' crew, or crew #2. In his experience, his crew and crew 1 would begin working in the Bakersfield harvest season at the same time. Usually this was towards the end of October. Later on, other crews would begin working, usually several days thereafter. In the fall and winter 1979 harvest season in Bakersfield four crews, including a crew of Filipinos, whose foreman was Victor Villafuerte, were all working by the time the fifth crew, under the direction of Felipe Orozco, began work. Lusano testified that Orozco's crew began approximately two weeks after his crew began working, but that in past seasons Felipe's crew, or crew 4, arrived approximately one week after crews 1 and 2.

Helario Aguilar testified that he had worked for Sam Andrews in 1978 and 1979 in the April and November lettuce harvests in Bakersfield. He had worked in the crew of Felipe Orozco. In October of 1979 when he went to Bakersfield to ask Orozco for work, Aguilar stated that Orozco informed him that he did not have a crew at that time, and that they were not going to bring his former crew back because it was "very problematic." Orozco also told Aguilar that since he had seniority, he could work in the crew of Bill Villamoor, in which Orozco functioned as a second or assistant at that particular time.

Antonio Alaniz, another member of the Orozco harvest crew, stated that usually the same people are in the Bakersfield crews from year to year. The crew assembles in the Shopping Bag parking lot in Calexico to be taken in the company bus to Bakersfield. Those that are chosen are people with "seniority," which, according

to Alaniz, is determined not only according to length of service but also which area, Bakersfield or the Imperial Valley, a particular employee had worked. He stated that although he missed one harvest in Bakersfield in 1976, there was no problem with his being hired for a subsequent harvest.

Normally, Alaniz stated, the crews leave for the harvest in order of their number, with crews 1 and 2 usually beginning the harvest first. Crew 3, or Bill Villamoor's crew goes next, then Felipe's crew begins to work, at the most five days after crews 1 and 2. In October 1979, however, he stated that Orozco's crew left the Calexico area approximately 10 days after the other crews had begun to work.

Alaniz testified that when his crew began working in Bakersfield in the fall of 1979 it was smaller than in previous seasons. Only about 6 trios comprised the crew, as opposed to prior seasons when 10 to 12 trios were included in the crew complement.[89/] Alaniz stated that in 1979, if someone were missing from a particular trio, unlike in the past, people were not added to fill it. In addition, on four occasions the company busses would take the crew to the fields 40 minutes later than it had taken other crews. By this time those other crews had filled forty to fifty boxes.[90/]

---

89. This statement was corroborated by other members of Orozco's crew.

90. Alaniz attempted to infer from this that his crew was being punished since less time in the fields might mean that less money could be made under the piece rate system. However, it appeared from the testimony of other witnesses, principally Ed Rodriguez and Orozco, that crews are assigned a given number of

(Footnote 90 continued----)

As another example of what Alaniz termed to be the different treatment that his crew received in the October 1979 Bakersfield harvest, Alaniz stated that the second day after the crew arrived the stitching machine with Bill Villamoor's crew broke down, and the stitcher from Orozco's crew was moved to where Villamoor's crew was working. As a consequence, the workers in Orozco's crew had to walk a long distance in order to obtain the boxes for the lettuce they were harvesting.[91]/

Alaniz stated that on the 19th of January, 1979, he was named as a crew representative, that he handed out Union buttons to people on the busses, and that he painted flags to give out to the people which they would either pin on their backs or tuck in their belts. Although Alaniz stated that the majority of the crew wore these flags, Cerillo Vibriesca, another crew member, stated that there were only one or two flags which the crew passed around to wear on different days. Alaniz stated that on occasion Orozco would ask him in reference to the flag whether "little red riding hood" had shown up yet.[92]/

(Footnote 90. continued----)

boxes to harvest. Some may complete the order faster than others. Hence the time the crews are taken to the fields would not have an impact on their earnings. Orozco explained the "late" arrival of his crew to the field by asserting that one of the company buses broke down, and it became necessary to use one bus to transport two crews in two separate trips to the fields. Those assertions were uncontroverted.

91. Orozco explained that one stitcher truck had mechanical problems; hence two crews had to use the same truck.

92. No attempt was made by General Counsel to show that this crews' actions or activities were in any way different or more visible from those of other crews and hence would provide a basis for disparate treatment of the Orozco crew.

Miguel Salgado Mejilla worked both in the lettuce and melon harvests since 1974 or 1975 for respondent. He was also a member of Felipe Orozco's lettuce crew and had gone to all of the lettuce harvests in Bakersfield since he started working for the company, except for the lettuce harvest which occurred in October 1979. At that time, Mejilla was working in a thinning crew in the Imperial Valley and, despite requests to his foreman Orozco and to Angel Avila concerning when the buses would leave for the Bakersfield harvest in October, he was finally informed by Orozco that his name was not on the list for being hired in Bakersfield. Antonio Alaniz and Baudello Carillo were members of his trio in Orozco's crew in April 1979.

When Mejilla asked Angel whether there was a place for him in the Bakersfield harvest Avila replied, according to the witness's testimony, that there was no place since he was taking too many people away from Manuel, the foreman for the thinning crew. This conversation occurred while Angel was informing workers that the harvest was about to begin in Bakersfield[93/] while the workers were in the fields thinning in the Imperial Valley.

Baudelio Carillo Gaeta worked principally in the crew of Felipe Orozco in the Bakersfield and Imperial Valley harvests. He did not go to the October 1979 Bakersfield harvest because Orozco claimed he was not on the hire list or was told so by Orozco at the Shopping Bag. At the time Gaeta was also working in thinning.

---

93. There was evidence that anumber of workers in the thinning crews also worked in the harvest.

2) Respondent's Evidence

The particular crew which General Counsel claimed was put to work before the crew of Felipe Orozco in October 1979 was crew 4, the crew of Victor Villafuerte. Respondent, through supervisor Ed Rodriguez, asserted that Villafuerte had worked for foreman Pete Baclig in prior seasons and had also worked in foreman Villamoor Garcia's crew. In addition, some of the people who worked in Villafuerte's crew had previously worked for foreman Baltazar Ruiz, who had also been in charge of a Filipino crew, while others were employed in the spring of 1978 in Pete Baclig's crew.

Ed Rodriguez testified that the number of the crew did not necessarily indicate the order in which that crew was put to work. For example, because a crew was denominated "crew 2" did not necessarily mean that it was the second crew to start working in the harvest. The number of the crew signifies, at least as far as Rodriguez was concerned, a designation which can be put on the field ticket in order that one may keep track of the number of cartons harvested by each crew. Rodriguez denied that the designation had anything to do with the seniority of the members of the crew. Since spring of 1975, on three or four occasions, crews were not put to work in their exact numerical order.

Rodriguez stated that Villafuerte's crew was hired to replace the crew of Baltazar Ruiz, which had last worked in the fall lettuce harvest of 1978. Ruiz' crew number was 6. When asked why Victor's crew was needed, Rodriguez replied, "I wanted to get a stable crew in the harvest in Bakersfield and had had problems with

anything after the first three crews in the past."[94/] The reason proffered by Rodriguez for putting Villafuerte's crew to work ahead of Orozco's crew in the fall of 1979 was that that crew, assembled and ready to start work, had another offer from another ranch. If Rodriguez did not start Villafuerte's crew, they would possibly have been lost, working at another operation.

In the fall of 1978, Rodriguez stated that Ruiz came late to the harvest with his crew as Ruiz had trouble assembling it. Therefore, Orozco's crew was started before that of Ruiz. In both the spring harvest of 1978 and the fall harvest of 1977, Pete Baclig's crew began before Felipe Orozco's. However, Orozco's crew was numbered crew 5 in those harvests, as opposed to Baclig's crew, which was crew 4.

Rodriguez also testified that a number of people who worked in Orozco's crew in the fall of 1979 were working in the thinning crews in Holtville. According to Rodriguez, that was generally where those workers were before coming to Bakersfield.

Victor Villafuerte testified that he had worked with the respondent since 1975, first as a crew member and then as a foreman's helper. Prior to the fall harvest of 1979, Villafuerte spoke to supervisor Rodriguez concerning the possibility of his being a crew foreman. Villafuerte had a crew assembled and stated, in corroboration of Rodriguez' testimony, that he might have taken his crew to work elsewhere, but was most interested in working for respondent. After a seried of phone conversations, Rodriguez agreed

---

94. Documentary evidence showed that the foreman of crew 4 was changed from year to year.

to hire Villafuerte and his crew to begin work on October 22nd. On that date, although he did not actually begin working, Villafuerte reported to Bakersfield with about 25 men for his crew.

c. Analysis and Conclusions

As can be seen from a review of the evidence, General Counsel failed to prove a "well-established" past practice on the part of respondent regarding recall of crews, particularly Orozco's. (As-H-Ne Farms 6 ALRB No. 9 (1980); see Sunnyside Nurseries, Inc., 6 ALRB No. 52 (1980); cf. N.L.R.B. v. Ralph Printing and Lithography, 433 F.2d 10958 (CA 8, 1970).) The order in which all crews were recalled, as well as the foremen who were in charge, was by no means firmly set. The evidence demonstrated that while crews 1, 2, and 3 have had fairly consistent foremen over the past three years, as Rodriguez testified, (Avila, Hernandez, and Garcia, respectively), the foreman of crew 4 has changed from year to year: Orozco was foreman of that crew only in Spring 1979 and Fall 1978; Pete Baclig was foreman in Spring 1978 and Fall 1977 (Orozco had crew 5 that season); the two prior seasons Simon Amaya was the foreman. Thus, respondent did not in reality change any established practice regarding the crew under Orozco, since the number of Orozco's crew changed from year to year.[95/] Additionally, respondent used Filipino crews in its employ for a number of seasons past, and in both Spring 1978 and Fall 1977, Orozco's crew started working after the two Filipino crews.

---

95. Interestingly, as pointed out in respondent's brief, Orozco's crew was the last crew to be recalled in five of the nine seasons prior to Fall 1979. By recalling Orozco's crew last in Fall 1979 respondent was not deviating from this practice.

Furthermore, this allegation of "unilateral" action is undercut by the Union's failure to raise the issue at the bargaining table, despite ample notice which may be inferred from the circumstances.[96/] Additionally, the management rights clause agreed to by the Union on June 11 gave the company the right to "direct and supervise all of the workers, including the right to assign and transfer employees." It may therefore be argued that the Union waived its authority, if any, in this regard (see waiver discussion supra) and respondent was under no obligation to bargain about this so-called "change."

Therefore, it is determined that respondent did not violate section 1153(e) in this particular instance, and it is recommended that this allegation be dismissed.

/

/

/

/

/

/

/

/

/

/

/

---

96. Workers that testified complained of the "late" recall of Orozco's crew. Some of them were members of the negotiating committee.

5. PARAGRAPH 39: DISCRIMINATORY REFUSAL TO PAY HOLIDAY PAY

General Counsel alleged that the respondent discriminatorily refused to pay Thanksgiving pay to employees who attended the negotiating session of November 20th. The parties stipulated that the following persons attended those negotiations, were working for respondent at the time, and did not receive their Thanksgiving holiday pay: Santiago Godinez, Eusebio Ramirez, and Ricardo Perez. These three individuals were representatives of the thinning crews in Holtville.

According to company rules as stated in its handbook, an employee must work the day before and the day after a holiday in order to be paid for that holiday. Regarding members of the thinning crew, their last day of work before the holiday was November 20th, the day on which the negotiations took place. In other job categories such as tractor driver and irrigator, the 21st was the last day of work. Thanksgiving itself fell on the 22nd that year.

Payroll clerk Naomi Stapleton testified that in order to ascertain who is eligible for holiday pay, a determination is made that the employee worked both the day before and the day after the holiday. There is also verification that the employee had the requisite number of days on the job in order to obtain seniority and be on the seniority list.[97/] If all of these requirements are met, the employee is paid for the holiday.

Stapleton admitted that the payroll office did not receive

---

97. Employees must work thirty days within a ninety-day period to establish seniority.

notification as to when negotiating sessions would take place or who would be attending those sessions in order that she might mark in her records that the person had an excused absence.[98] Stapleton further stated that if someone, for medical reasons, has an excused absence before a holiday, they are eligible for holiday pay. However, this is the only type of excused absence which a worker may have and still remain eligible for holiday pay. Ms. Stapleton noted that the foregoing constitutes company policy.

Stapleton's assertions in this regard were substantiated by the company handbook, which clearly states: "If you are absent from work due to a bona fide illness on the last work day before the holiday or on the day following a holiday you may still be entitled to holiday pay. You must, however, present a physician's note to substantiate your absence."

Robert Garcia testified that reference was made to the policy outlined in the company handbook to determine whether workers at the negotiations would be eligible for holiday pay. At the time in November 1979, Garcia was asked to interpret this policy with respect to those individuals. Garcia, Ruben and Ruby Angulo conferred together on the problem. Their conclusion was that they would follow the procedures as outlined in the company handbook: in essence, those who attended negotiations on their last scheduled day of work before the holiday would not be paid for that holiday. Garcia also noted that there had been discussions during the course of negotiations with Paul Chavez concerning the status of absences

---

98. Counsel stipulated that attendance at negotiations was an excused absence.

of workers attending negotiating sessions. In essence, those workers were to receive excused absences, i.e. they were given permission to leave work to attend negotiations, but they would not be paid on the days that they had missed.[99/]

Interestingly enough, tractor drivers who attended negotiations were paid for the Thanksgiving holiday. As noted above, they worked the day after the November 20 negotiating session. General Counsel's argument that there was discriminatory intent in not paying certain individuals who attended negotiations because of their attendance at those negotiations is seriously undermined by these facts.

Doubts concerning Garcia's credibility arose due to certain direct contradictions in his testimony on this issue. While he stated that he consulted and interpreted the company handbook regarding whether or not individuals should be paid for the Thanksgiving holiday at or around the time that the issue arose, and that his decision was conveyed to the people in the payroll department, he later stated under cross-examination that he did not become aware of certain individuals in the thinning crews not being paid for Thanksgiving until "recently," during the course of the hearing. While Garcia corroborated Naomi Stapleton's assertion that although there are many types of excused absences, the only type of excused absence for which one would remain eligible for holiday pay would be illness, Garcia was present in the hearing room when Stapleton proffered that testimony. Furthermore, Garcia was unable

---

99. These matters were agreed upon in the first negotiating session.

to differentiate between broad categories of employees or job classifications (i.e., irrigators, tractor drivers, etc.) that were not paid for the holiday in question. If, consistent with his testimony, he was requested by Rudy Angulo and Ruben Angulo to investigate whether or not individuals would be eligible for the holiday pay, it might be inferred that they would have been more specific about the job classifications of those who had not been paid.100/

Despite these serious reservations regarding Garcia's testimony, even if that testimony were wholly discounted, it remains that General Counsel has failed to establish that "but for" participation in protected activities (attendance at negotiations), certain crew representatives would have been paid for the Thanksgiving holiday. The facts clearly reveal that respondent's policy regarding holiday pay was that a worker, assuming he or she has met the seniority requirements for eligibility, must work on the last day scheduled for work before a holiday and the first day after that holiday in order to be eligible to receive holiday pay. Regarding the members of the negotiating committee, certain of those

---

100 On cross-examination, Garcia gave diametrically opposed responses:

> Q. (By Ms. Carey): Was it before of after that Thanksgiving holiday that you were discussing who would be paid?
> A. It's kind of hard to say, but I think it was before.
> ...
> ...
> ...
> Q. (By Ms. Carey): At any time before that negotiation on November 20th, to your knowledge was there any discussion of the fact that some workers who attended that negotiation session as crew representative might be ineligible for holiday pay?
> A. Not to my knowledge, no.

members who did not have their last work day before the holiday scheduled on the day of negotiations did in actuality receive holiday pay. This fact seriously undermines, if not totally eliminates, any implication of discriminatory intent in not paying certain thinning crew representatives for the holiday. Thinning crew representatives merely had their last scheduled work day on the day of negotiations, and did not therefore work that day.

The mutually corroborative assertions of Garcia and Stapleton, which were essentially uncontroverted, demonstrated that the only excused absence which would still enable a worker to receive holiday pay was a medical absence. No other exceptions had been established either by testimonial or documentary evidence. Thus, General Counsel was unable to create the inference that crew representatives were treated discriminatorily.

As noted above, the Union and company, early on during the course of negotiations, discussed leaves of absence for workers attending negotiations. The Union, when it was represented by Paul Chavez, agreed with the company on a leaves of absence article in May 1979. Although there is a provision in that article for excused absence to conduct union business, conspicuously omitted from the article is any provision in regard to conducting business prior to a scheduled holiday. Furthermore, the article clearly states that such leave shall be "without pay."

The record evidence also demonstrates that the Union did not at any time protest the actual scheduling of negotiations or bring to the company's attention that the day scheduled for a meeting was for some the last day of work prior to the holiday. The

evidence does reveal, however, that at that particular point in time both sides were anxious to schedule negotiations sessions. There is no evidence whatsoever, nor can any inference be drawn, to the effect that the company consciously scheduled the negotiations so that the employee negotiators would be deprived of their holiday pay.

A pertinent analogous situation arose in the case of Florida Steel Corporation (1980) 249 NLRB No. 18, 104 LRRM 1065. In that case, the company awarded or had in effect an "attendance bonus" plan. In brief, the plan was designed to provide incentivies for continued attendance. Four exceptions to the rules for qualifiying were noted in the provisions for the plan. These included treatment for industrial injury, appearance in court on behalf of or as requested by management, the coincidence of two company paid holidays in one week, and the exchanging of a shift with another employee with a supervisor's approval. In that case, negotiations took place during working hours. Respondent offered to negotiate evenings and weekends so that the problem regarding the attendance bonus would not arise. As in the instant situation, employees were not paid when they attended negotiations. In Florida Steel, the Union compensated these employees for their attendance. Like the present situation, the employees who attended negotiations were disqualified from receiving their attendance bonus.

The National Labor Relations Board in that case held that there was no violation made out of the NLRB equivalents to Sections 1153(a) and (c). The Board noted that attendance at negotiations was not within one of the stated exceptions for qualification for

the attendance bonus. Further, the Board found that the attendance bonus, not unlike the holiday pay, was comparable to an hourly wage, which is a benefit accruing for time spent on the job. Similarly, in this situation, the holiday pay is a benefit payable as an equivalent to a day's wage and arising from time spent on the job. As in Florida Steel, the respondent here did not adamantly insist that negotiations occur during working hours and there was no discriminatory motivation for either scheduling the negotiations themselves or in failing to pay the Thanksgiving pay to the workers so involved. Accordingly, it is recommended that the allegation regarding the refusal to pay should be dismissed.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

6. PARAGRAPH 19: SCREENS ON BUS WINDOWS

General Counsel alleged that on or about November 12, 1979, respondent unilaterally changed working conditions of its employees by putting screens on windows of buses used to transport employees, without notification to the Union.

Thinning crew workers testified that sometime in November the company affixed screens to the windows of the busses which were utilized to transport them from the customary gathering place in Calexico to the fields where they worked. Worker Guadelupe Contreras stated that the company was not on strike and that she had only seen busses with screens on them where such was the case. She did not want individuals to think that she was riding in a bus whose destination was a field harvested or cultivated by a struck company.[101/]

The screens themselves were of an unyielding metal material which formed a diamond shape pattern. The screens ran the length of the busses and covered their windows. Worker Ricardo Perez recounted a mishap which occurred when the workers were in one of the busses as it ran into an irrigation ditch. Although no one was hurt in the incident, egress from the bus was rendered difficult because the bus was tilted over on the side where the normal boarding door was located, and the door could not be opened. He stated that when the screens were not on the bus the windows could be opened wide enough so that the workers could squeeze through

---

101. Workers had, however, been engaging in a series of intermittent work stoppages as of this date, although they were not technically "on strike."

them. Workers had to leave the bus from the rear. However, the water cans for the crews were kept near the back door. When the mishap occurred, the cans had to be moved away from the door.

Rubin Angulo, thinning supervisor, testified that it was he personally who made the decision to place screens on the windows of the company busses. The supervisor stated that the rationale for placing the screens on the windows was that there was a lot of strike activity from "what they all 'Chavistas'" in and around Highline Road[102/] due to strikes involving other companies. This heightened activity occurred in late October and for a period in November. Angulo recalled that in January 1979, during the course of strike activity at Cal Coastal Farms and the Saikhon Company, both located nearby, he observed that rocks were thrown at company busses and that people in the busses needed to be protected. He noted that there were screens placed on other companies' busses. Likewise, in the melon season, Angulo had received reports of broken windshields on a few trucks and rocks being thrown. As a precaution therefore, to protect the occupants of company busses, he ordered the screens installed.

Santiago Godinez, member of the thinning crew, recalled in 1979 that the company put screens on the windows of its busses. Godinez recalled an occasion when someone threw a rock at the busses as it was traveling through Holtville on the way to the fields. The worker identified the rock thrower as someone "from the Union" whom he had seen on the picket at the Joe Maggio Company. This was the

---

102. Most of the respondent's Imperial Valley farms are located near Highline Road.

only evidence proferred by respondent regarding the immediacy of the need for such safety precautions.

Paul Chavez, Union negotiator, stated that he had been involved in negotiations with approximately twenty different companies. In none of these negotiations had the subject of screens on the windows of the busses been discussed.

Similarly, Ann Smith stated that she had negotiated by the time of the hearing, contracts with 35 different companies. However, in none of those negotiations was the physical condition of the busses, other than their cleanliness, discussed during the course of those talks. She further admitted that no one from the Sam Andrews company had ever brought to her attention the condition of the busses regarding the screens on the windows, during the course of the negotiating sessions.

Plainly, the placement of the screens on the busses involved a matter of worker safety. Angulo admitted as much. Safety provisions are, as pointed out by General Counsel, mandatory subjects of bargaining, as they constitute "terms and conditions of employment." Gulf Power Company 156 NLRB 622 (1966); Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, at 222 (1964). Thus, respondent was under an obligation to bargain regarding the installation of these "safety" screens.

Respondent argues that in order to be obligated to bargain about the placement of screen on the bus windows, the action must have a "demonstrably adverse effect on employees in the unit. Or..., the changes must result in a significant detriment to employees...." Coca-Cola Bottling Works, Inc., 186 NLRB 142, at p.

1062 (1971). These elements were provided by worker testimony to the effect that it was disturbing to them to be confused with "scabs," and they were concerned about rapid ingress and egress from the bus in the event of an accident.[103] Such worker-related complaints based on the implimentation of safety rules are exactly the type of matters susceptible to the collective bargaining process. The Union should have been given the opportunity to discuss and negotiate the installation of the screens and air its objections, if any, before the change was actually instituted.[104]

It is determined, therefore, that respondent violated Section 1153(e) by unilaterally implimenting procedures regarding worker safety (screens on bus windows) without notifying and/or bargaining with the Union.

/

/

/

/

/

/

/

/

---

103. I do not view this change under these circumstances to be "de minimis," as characterized by respondent in its brief.

104. I do not find the Union's failure to protest the installation as a waiver of their bargaining rights in this particular. The Union must receive sufficient notice in advance of the change in order to allow reasonable scope for bargaining. I.L.G.W.U. v. N.L.R.B., 463 F.2d 907 (C.A.D.C. 1972) Here, it was merely presented with a fait accompli.

7. PARAGRAPH 40: REFUSING TO PROVIDE TRANSPORTATION FROM CALEXICO TO THE FIELDS

The facts underlying this allegation are not essentially in dispute. In seasons prior to the December 1979 Imperial Valley lettuce harvest, the company ran busses from a site in Calexico, (the "Shopping Bag" market), where workers would board them to be transported to the Holtville harvest operations. However, when the lettuce season began in December of 1979, respondent discontinued this practice and instead picked workers up from a location known as "El Arbol" in the Holtville area. The company determined in the latter part of November to cease running the busses from Calexico because, according to Mr. Rodriguez, they had had problems with workers who were prevented from boarding the busses in Calexico during the summer of 1979 strike activity (see discussions, supra). Since the supermarket parking lot where workers assembled in Calexico was public property, as opposed to the Holtville gathering place which was located on private property leased by the Respondent, Respondent felt it could avert such problems during the lettuce harvest by discontinuing the use of the former pick-up site.

Respondent argues that the decision to discontinue providing bus service from Calexico was made during the course of the melon strike in June of 1979. This contention is contrary to Rodriguez' assertion above that the company decided to discontinue service in November. This assertion is also belied by the circumstances. Respondent continued to provide such service for members of its thinning crews in the Imperial Valley throughout the course of its thinning season, from October 1 to December 13. As noted in the discussion of the negotiations, Don Andrews stated to

Paul Chavez in the June 25 session that the company would discontinue bus service from Calexico because of the violence encountered there.[105] However, I specifically found that Andrews was not speaking of the subsequent lettuce harvest, in light of the fact that bus service was provided to thinning employees, but of the transportation respondent customarily provided Imperial Valley inhabitants who wished to work in the Bakersfield melon harvest.

Accordingly, it is determined that respondent did not notify or bargain about the discontinuation of bus service from Calexico until after the change was implimented.[106]

Respondent's reliance on Colace Brothers, 6 ALRB No. 56 (1980) to buttress its position is misplaced. There, the employer changed its pick-up point in the face of an on-going strike and its attendant violence. Here there was no strike in progress at the commencement of or during the Imperial Valley harvest, and no showing that respondent was subjected to any sort of violence.[107] Colace Brothers is therefore clearly inapposite.

The only remaining obstacle to finding a violation based on section 1153(e) is determining whether the bus transportation

---

105. As testimony on that issue revealed, company busses during those times were prevented from stopping at the customary pick-up point, workers were prevented from boarding them, foremen were chased and threatened and a general atmosphere of unrest and physical coercion prevaded the scene.

106. As I found the Union received no notification of the change until it was a fait accompli, the argument respondent raises in connection with a waiver over bargaining on this issue is unavailing. See ILGWU v. NLRB, supra; N.L.R.B. v. Brown-Dimkin Co., 287 F.2d 17 (C.A. 10, 1961).

107. To the contrary, when groups of replaced workers gathered, such congregations were markedly peaceful and free of confrontation.

constituted a mandatory subject (i.e., "wages" or "conditions of employment") about which respondent was obligated to bargain before instituting changes regarding it. See, generally, NLRB v. Katz, 369 U.S. 736 (1962); Montebello Rose Co., et al., 5 ALRB No. 64 (1979); As-H-Ne Farms, 6 ALRB No. 9 (1980). I find that question must be answered in the affirmative.

The N.L.R.B. has "consistently construed 'wages' broadly enough to include emoluments of value supplementary to actual wage rates that accrue to an employee from his employment relationship." Morris, Developing Labor Law, p. 401 (1971) and cases cited therein; NLRB v. Local 2265, 317 F.2d 269 270 (C.A. 6, 1963); Inland Steel Co., 77 NLRB 1, enf'd 170 F.2d 247, (C.A. 7, 1947), cert. den. 366 U.S. 960 (1949); Seafarer's Local 772 v. NLRB, (C.A.D.C. 1978), 99 L.R.R.M. 2903.

It requires no additional emphasis that, given the cost of automobile fuel and maintenance, free transportation is indeed an "emolument of value." By ceasing to provide same, lettuce harvest workers were forced to expend their own monies for transportation from border areas, where many of them lived, to respondent's fields. They also were deprived of a benefit, i.e., transportation to the worksite, which they had enjoyed in years previous.

Accordingly, it is recommended that a violation based on Section 1153(e) be found herein.

/

/

/

/

8. PARAGRAPH 33: FRED ANDREWS SPEECHES TO WORKERS

a. Facts

In October 1979, Fred Andrews addressed three distinct groups of workers on three separate occasions: tractor drivers and irrigators in Bakersfield; and thinners in the Imperial Valley. General Counsel alleged that such speeches were attempts by respondent to "bargain directly with . . . employees, bypassing and circumventing the UFW," in violation of Section 1153(e). In addition, such speeches were alleged to have contained "threats" in violation of Section 1153(a).

The speeches in Bakersfield occurred October 19, following on the heels of a series of work stoppages that week. Margarito Alvarez at the time in question was employed by respondent as a tractor driver in Bakersfield. Alvarez testified in regard to a meeting Fred Andrews had with a group of workers on October 19th in the equipment yard. Approximately 25 or 30 tractor drivers, mechanics and welders attended the meeting. Alvarez supplied the following version of the meeting. Andrews addressed himself to three articles in the proposed agreements under negotiation, which "he did not understand." The first of these was the hiring hall where Andrews allegedly stated, the Union could "send the people to go to work some other places . . . or tell them there was no work." Supervisor Delores Alvarez added that the articles Fred Andrews addressed himself to were ones that he had read in the contract, and that the supervisor had seen himself that what Andrews was talking about was true. Andrews said also that there was no need for workers to force anyone to wear buttons or carry banners.

A worker, Felipe Pulido, asked Andrews why the company was not paying as much as Garin, another grower, for work in the cotton crop. Andrews responded that the Garin Company had only between 400 and 500 acres of cotton and that was the reason that they compensated work in cotton and vegetables at the same rate. Furthermore, Andrews said (according to Alvarez) that "if things were going to be that way, he would just not plant any more cotton . . . if he did not plant any cotton, there would be less work for the people." The meeting itself lasted between 15 and 30 minutes.

Fred Andrews admitted that he spoke to his tractor drivers and to his irrigators in Bakersfield. He met initially with the tractor drivers. Andrews testified that his speech to the tractor drivers was prompted by the work stoppage which the drivers had engaged in. In his words, "I wanted to talk to them about it and see what's bugging them." Also present during the speech was supervisor Delores Alvarez and one or two other tractor foremen. Essentially Andrews asked the employees what their problem was, why they weren't working, since the company operates against deadlines and deals with "living things that need care on a daily basis." According to Andrews, the workers responded that they wanted a contract. He tried to explain that they had representatives bargaining with representatives of the company who were trying to get an agreement on a contract which covered a lot of issues.

The workers asked why it took so long; Andrews emphasized two areas in the contract where he felt that negotiations were bogging down. He wanted to explain to the workers his views on these particular contract sections in order that they would

understand what might not have been explained to them by their representatives. Andrews noted the problem of the cotton differential and the reasons why it existed. He expressed to the workers the problems competing with other growers, both in the Bakersfield area and in the world, as far as the cotton crop was concerned, and generally explained the cost of doing business in the area. A worker asked Andrews about a company known as the Garin Company which paid the same rate for work in cotton as it did for work in vegetables and melons.[108] Andrews explained that cotton was a very small part of that company's operation. Another worker asked about yet another ranch, Boswell, paying more than respondent paid. Andrews expatiated at length about the differences between the two, principally that Boswell was solely a wheat and cotton company located in an area that did not require sprinkler irrigated fields.

Another area of the negotiations that Andrews discussed was the hiring hall. Andrews stated that he was "concerned about [personal] freedom," that he wanted his workers to maintain the freedom to work where they watned to. Andrews also discussed the union security issue. He stated that it was an area creating difficulties for respondent. Andrews denied that he had mentioned a curtailment of production or the elimination of certain crops.

Despite the fact that General Counsel called as witnesses three shop employees and six Bakersfield tractor drivers other than Alvarez himself, no one was asked to substantiate Alvarez' version of Andrews speech to these employees.

---

108. This corroborates Alvarez' account to a certain extent.

Ramon Navarro, employed by respondent as an irrigator, testified regarding the meeting that same day that Fred Andrews had with the Bakersfield irrigator crews. Present, apart from Andrews and the irrigators, were supervisor Alvarez, Bob Garcia, and Frank Castro, Navarro's foreman. Navarro stated that Andrews told the irrigators he did not like the idea of his people being "moved from the company" since the Union always moved his people from ranch to ranch; "he wanted to save us from becoming slaves to the union"; and he wanted his own people working at the ranch. He further encouraged the workers to confirm what he was saying for themselves. An employee asked Andrews why the respondent did not pay the same as other companies were paying in the cotton, and mentioned a figure of $6.00 per hour. Andrews responded that "it couldn't be because it was too expensive" and he could not pay the same as he did in the vegetables. He then told the group of irrigators that he had to leave in order to speak to yet another group of workers.

Andrews spoke to the irrigators in Spanish. According to Navarro, Andrews' Spanish, while imprecise, is good enough so that he can be understood.

Another irrigator, Francisco Iniguez, also testified in reference to the Andrews' speech to this group of employees. According to Iniguez, Fred Andrews said that he could not pay the same wages as other companies which did not grow as much cotton: he had to compete with growers from Mexico and South America. Iniguez stated that Fred Andrews told the group that "instead of paying us more he would rather not plant any more because he couldn't come out of it." Iniguez also referred to Fred Andrews' mention of the Union

hiring hall, where he said that if the Union instituted this they would be able to send the workers to other ranches, and that he (Andrews) wanted the workers to work for him always or all of the time. With the hiring hall, the workers would have to follow the Union wherever they took them.

On cross-examination, Iniguez admitted that Andrews' remarks concerning the cotton were prompted by a question from one of the workers. Iniguez reiterated Andrews' statement to the effect that he wanted liberty or freedom for his workers, and that he wanted his workers to consider the situation carefully. Iniguez also recalled that Andrews told the workers that he did not want them to be slaves for the Union.[109/]

Andrews himself testified regarding this speech, that he basically reiterated his lack of understanding of why the workers had walked out and would not work when there was work to be done. He asked this group also what their problem was. Again, workers responded that they wanted a contract. As in his speech to the drivers, Andrews pointed to problems the respondent was having with particular articles in the contract: the cotton differential, the hiring hall, and the union security article. Andrews denied that he told workers that they would be slaves to the union, as Iniguez and Navarro had noted.

On October 30, Fred Andrews addressed members of the lettuce thinning crews in the Imperial Valley. Workers Antonio Zamora, Gregorio Castillo and Guadalupe Contreras each provided

---

109. As should be evident, much of the testimonies of Navarro and Iniguez was mutually corroborative.

somewhat mutually corroborative testimony concerning the statements made by Andrews. Manuel Ortiz, thinning supervisor, initially called just the crew representatives in the thinning so that they could meet with owner Andrews. The owner appeared at the fields at approximately 12:00 noon while one crew was just returning from its lunch break and another was about to begin having lunch. All the workers gathered around because, according to Contreras, they did not want to leave the crew representatives by themselves. Contreras stated that Andrews told the assembled crew members that he had heard that there had been work stoppages,[110] and he wanted to know what the workers in fact wanted. He said that if the work stoppages were due to the money issue that he could pay the workers $5 per hour, but the Union would not let him.[111] Andrews also stated that he knew he would be getting himself into trouble by speaking with the workers.[112]

One worker or a number of workers asked Andrews why he had not signed a contract. Worker Santiago Godinez and supervisor Ortiz both stated that Andrews said he wanted a contract. Andrews replied in addition, however, that there were certain clauses in the contract to which he could not agree. When asked to elaborate on these clauses, Andrews mentioned the hiring hall, and a discussion

---

110. Contreras testified that there had been a stoppage the day previous, on October 29.

111. Santiago Godinez, called as a witness for respondent, testified that Andrews said the money "is no problem. The money is ready. I want you to work and not stop. And I'm going to pay you $5 an hour."

112. Castillo, Zamora and Contreras each recalled Andrews' remark that it was like a "blow to the head" to be there talking with the workers.

ensued. Worker Ana Gallo asked if she could still take her sons to work.[113] Contreras noted that in the context of the hiring hall discussion, Andrews said he wanted his "same workers, and he wanted for us to be in agreement. He let us understand this, because if the problems continued, maybe he would not plant the same amount of harvest."

Andrews further stated that he did not like the provision in the contract dealing with the hiring hall, because he would have to accept workers from the hiring hall who were not willing to work. Zamora and Castillo testified that Andrews noted that the contract was not good for him because it was too thick and too big and that because of these problems he wasn't going to plant more lettuce this year.

Fred Andrews himself testified that approximately 90 to 100 people were present when he spoke to a group of thinning crew members in the Imperial Valley at the Baker Ranch. Ruben Angulo, the supervisor for the thinners, was present, as well as the crew bosses. Andrews stated that he spoke to the crews in response to a request from the crew conveyed to him by Angulo. Essentially, Andrews asked them what their problem was. One individual mentioned a $5.00 an hour wage level, whether it would be possible for the company to pay it, and whether the respondent could make the wage level retroactive to the first day they started thinning. Andrews replied that he did not negotiate the wage rates, but if it were

---

113 Andrews himself corroborated this testimony adding that respondent currently permitted this arrangement and wished to continue it.

possible for respondent to pay this rate, it would do so and in addition it would make the wage retroactive. At that point Andrews did not say anything further on the subject of the $5.00 wage rate other than there were certain things that the company could do, and "that was it."

There was a woman, according to Andrews, who then asked him how they could get rid of the Union and "all these headaches." Andrews replied that he did not come there to talk about that. Some workers stated that they wanted a contract, Andrews responding that he wanted one as well. Denying that he had used the words "a blow to the head" as some witnesses had testified, he admitted saying that the thing was a "headache," that he couldn't deal with the people in the field, that there were certain restrictions, and it "gives me a headache sometimes." In response to the request for a contract, Andrews pointed out the hiring hall and union security as obstacles to that eventuality, and also that the contract was very long and that there was a lot of time being devoted to discussing it. Respondent has never had any experience with a hiring hall; Andrews denied therefore saying anything to the effect that the hiring hall did not send good workers. He further denied that he was going to curtail or eliminate planting certain crops.

b. Analysis and Conclusions

Cases involving "bypassing" the certified representative generally involve attempts to either negotiate with employee committees not associated or in rivalry with the representative, or presenting proposals or attempting to set wages, hours and working conditions directly with individuals rather than with the certified

Hector Tapia, also a member of Avila's crew at the time in question, testified that he knew Jesus Torres, that Torres worked with him in the same crew in January 1980 in the Imperial Valley. Tapia denied that there was any UFW crew representative in the crew at that time. He also denied seeing Torres wear a UFW button or flag, and likewise denied that there ever was an election for crew representative for his crew around January 1980.

Similarly, Eusebio Aranda worked in crew 1, Angel Avila's crew, in the Imperial Valley in January 1980. Like Tapia, he denied that there was a Union representative in his crew at that time, or that he saw Jesus Torres wearing a Union button or a Union flag at work. Aranda also corroborated the assertions of Simon Amaya that he called Torres' attention to his poor work. Aranda himself stated that he noticed the type of work that Torres was doing, that the lettuce was being cut bare, without leaves, while in other instances the leaves themselves were sliced. Aranda stated that he never heard Amaya say anything about Torres' Union activities.

b. Analysis and Conclusions

General Counsel's brief correctly points out that resolution of this issue hinges upon a credibility determination. In light of the conflict in the testimony, I am unable to resolve the issue in General Counsel's favor. I find that Torres' testimony was inherently unreliable, and accordingly discredit it.

As pointed out above, there were several witnesses to the alleged unlawful statement, as well as to the "election" of Torres as crew representative. The failure to call them gives rise to an inference adverse to Torres' assertions. (See Evid. Code section

452; Broadmoor Lumber Company (1977) 227 NLRB 144). This Board has noted that when it is "faced with a direct conflict in the testimony...there is no additional evidence to shed light on the truth of the allegation. We therefore find that the General Counsel did not meet his burden of proof and we dismiss the allegations." (S. Kuramura, Inc. (1977) 3 ALRB 49).

Notwithstanding the foregoing, I find, as an independent basis to discredit Torres' testimony, that the alleged "threat," as he stated it, was inherently implausible. Torres did not go to Bakersfield to work in respondent's lettuce harvest; and thus did not participate in the work stops.[221/] Nor did he work in the crews that had a one-day stoppage in the Imperial Valley in January, 1980. Thus, his assertion that Amaya told him he was being disciplined because of his "participation...with the stops" can have no basis in fact. Furthermore, that Amaya would, seemingly out of the blue, bring up Torres' Union activities in the context of his being disciplined, greatly strains one's credulity.

Accordingly, it is determined that this allegation should be dismissed.

/

/

/

/

/

---

221. Parenthetically, both employee witnesses who testified contrary to Torres, Tapia and Aranda, did participate in the Bakersfield stops, were replaced and then rehired in the Imperial Valley.

5. PARAGRAPH 50: INTERFERENCE WITH EMPLOYEES MEETING WITH A UNION REPRESENTATIVE

a. Facts

General Counsel alleged that "on or about January 28 and January 30, 1980, respondent through its agent Angel Avila interfered with employees meeting with union representative Oliveiro Terrazas."

Oliveiro Terrazas testified that he worked for the respondent from June, 1968, until March, 1978. In that period, Terrazas had been separated from the company for a time; however, he had been reinstated after ALRB proceedings were instituted.[222/] Terrazas had worked as a cutter and packer of lettuce in the crew of Angel Avila.

During January, 1980, Terrazas returned to the property of respondent as a self-styled "organizer." Terrazas testified that his "co-workers asked the Union office that I be given some kind of a card to go and talk to my co-workers in the field."[223/] A David Valles at the Union office gave him a card approximately the size of a business card which contains the witness' name and the handstamp: "United Farmworkers Union, AFL-CIO, P. O. Box 1940, Calexico, California 92231." The card was placed inside a plastic holder which could be pinned on his shirt. The card is rather makeshift in appearance and contains no Union logo or signature from an

---

222. It is unclear from the record whether or not the matter proceeded through issuance of a formal complaint and hearing or whether the matter was resolved informally.

223. This hearsay cannot be used as proof that Terrazas was in fact so designated.

authorized representative.

On January 26, between seven and eight in the morning, Terrazas went to El Arbol, the gathering place of the workers and the foremen in Holtville. He briefly spoke to workers there.[224/] The following Monday, January 28th, he returned to the same location at approximately the same time. While at El Arbol, foreman Angel Avila asked Terrazas to identify himself. The witnes said that he was an organizer and that he had come to talk to his co-workers. Terrazas also produced the card described above and showed it to Avila.

Thereafter, Terrazas boarded the bus containing the workers from Crew 1, as did the foreman and Simon Amaya, another foreman. Once on the bus, Avila again spoke to Terrazas. In Terrazas words, Avila "told me that for me to be able to speak there, I needed a special permit from the company because I was on private property. And he showed me a sign that was on the outside. I told him that the company had signed a paper with the State and the Union where they would allow the free access into the field. And at that time, I took out this paper." The witness produced for the foreman a notice which arose out of a settlement between the respondent and the ALRB in 1977. The notice is one typically issued following a settlement or the finding of a violation involving Section 1153(a) of the Act which enumerates the organizational rights of agricultural employees.

According to Terrazas, Avila then showed the notice to the

---

224. There was no allegation concerning events of January 26.

workers and said that he could not leave the premises merely because Terrazas asked him to leave; that he had to "listen to whatever I said to the workers." There followed a dialogue between Avila and Terrazas about problems that some of the workers had with their holiday checks. Avila also asked Terrazas who had asked him to go there to the bus. After Terrazas named several workers Avila, according to Terrazas, yelled at them, "Is this true?" Terrazas stated that he then told Angel not to threaten the workers. Following this, he and a companion present on the scene, Rafael Ramos, left the area.

Two days later, on the 30th of January, Terrazas appeared at a field known as El Alamo. As it was raining, the members of Crew 1 present at the field waited in and around their cars, and were not working. The people then gathered to arrange for pay advances with their foreman. After Angel had finished with the advances, Terrazas began to talk to the people. Avila, according to Terrazas, intervened, saying that Terrazas was only going to lie to the people. The witness asked Avila if it was a lie that he had fired the representative of the number 1 crew. Avila told him that he had not been fired but rather had been replaced. Terrazas then told Avila to "please let me talk to the people," and requested that Avila leave. Avila responded that he had to remain there with Terrazas; Terrazas answered that "a foreman should leave there when an organizer was talking to the people." At that time, according to Terrazas, the witness was not on company property, but rather was near the highway.

Terrazas testified that he understood that there was an

access agreement in effect, allowing organizers on the property one hour before work, one hour after work and during the lunch period. He believed that the agreement had been negotiated between the Union and the company: the ALRB notice referred to above represented to him a copy of that agreement.

Terrazas receives no pay as an organizer for the Union, nor any benefits. No evidence of his representative status, save the card and his self-serving testimony, was contained in the record. Terrazas declined to say that he notified anyone from the company or the Union in advance that he was going to be at the Holtville site on the 26th of January. He merely presented his card to Amaya when he arrived on the scene. Similarly, no showing was made of advance notification for his visits of the 28th and 30th. Terrazas stated that when he went out to talk to the workers, his purpose was to tell them not to "be afraid of Angel"; that he would be there to assist them, and to give them "courage" in pressing their demands for wage increases and retroactive pay.

Terrazas was under the impression that the workers at Sam Andrews had, by this time, not received a pay increase. He was similarly unaware of the retroactive pay that certain workers had received.

On cross-examination, Terrazas' credibility was seriously undermined when he testified contrary to assertions made on direct concerning Avila's conduct on January 30. Terrazas admitted that after Avila arranged for the loans to crew members he walked away. Terrazas did not begin to speak to workers until after Avila was finished and had left. Due to the rain, there was no work that day.

The workers and Terrazas left the field about the same time. He stated that at this time, he did not have an opportunity to speak to the workers. Given these inconsistancies, it is difficult to attach credence to Terrazas account of his alleged exchange with Avila on January 30, even given Avila's corroboration that he discussed the "firing" of a worker with Terrazas (see below).

Terrazas further admitted that on the twenty-eighth he arrived nearly at the time when the buses were to depart from the fields. Avila's conduct may therefore be interpreted not so much as "interference," but as a fulfillment of his obligation as foreman to announce the beginning of the work day.

Avila testified that he saw Terrazas one Saturday in January 1980 at El Arbol.[225/] Terrazas was talking to the workers in the harvest crews as the crews were beginning to gather prior to the commencement of work. Avila saw Terrazas go towards the bus, but the foreman then got in his pickup and left to go to the field. He did not see Terrazas for the remainder of the day.

On the following Monday, Avila saw Terrazas at El Arbol, again at about 6:30 a.m. That day, Avila had received complaints that he had been distributing checks for holiday pay to people who were his "favorites" and that Terrazas was so informing his crew. Avila wished to clarify the situation in the presence of Terrazas and the whole crew. Inside the bus where all were assembled, Avila challenged Terrazas to tell him who it was that he supposedly gave the preferred checks to. When Terrazas mentioned a specific worker,

---

225. He recognized Terrazas as a former employee.

Avila explained to the others that the worker had been ill during the holidays, and would be thus entitled to his pay . Terrazas then named two other workers, but Avila virtually ignored him. The workers themselves, Francisco Vila and Heriberto Lopez, wished not to be the subject of the discussion. Terrazas and Avila were on the bus together for 15 or 20 minutes. The bus then proceeded to the fields.

The next time Avila saw Terrazas was on the following Wednesday at a field called El Alamo. Since it was raining, workers were standing around waiting to see if they would work. Workers were scheduled to receive pay advances at that time. At about 8:30 or 9:00 in the morning, there was a discussion between Terrazas and the foreman concerning a particular individual whom Terrazas accused the foreman of firing. Avila denied that he had so treated the worker. Terrazas nevertheless said that he had spoken to the Union and that they were going to file complaints against the foreman. Avila said that was fine and left.

Thus, by Avila's account, he did not in any way "interfere" with workers meeting or talking with Terrazas. On the three occasions that he noted Terrazas' presence, Avila did not prevent him from speaking with workers, insist that he leave, interrupt him, remain in the area where Terrazas was speaking, or, in general, cast aspersions on Terrazas' efforts.

Two employees who were members of Avila's crew, Eusebio Aranda and Hector Tapia, testified that they were acquainted with Terrazas. Both stated that they saw Terrazas in January 1980, but denied any knowledge that he was their crew representative, that

they, as individuals, or that the crew as a whole asked him to be their representative, or designated him as such. Neither witness stated that they saw Terrazas in January 1980 wearing a Union identification badge.

b. Analysis and Conclusions

Quite clearly, this allegation essentially rises and falls upon its facts. Viewing Terrazas' testimony in its most logical light, it appears that he felt that his presence would give "courage" or "encourage" his fellow workers to press their complaints or grievances against the company, as he had done in his prior ALRB experience. He was apparently not well-informed regarding the status of these "grievances," as well as on the issue of access, thus casting doubt on whether he occupied an official or qualified capacity with the Union.[226/]

As access proposal agreed to in February 1979[227/] by Respondent and the Union provides for advance notification to the company of the names of representatives. No company personnel were told of Terrazas' "official" status, or of his right, if any, to be on company property, or of the simple fact that he would be on their property. Avila, undoubtedly recognizing the former employee, was not obliged to treat Terrazas as anyone other than that, and could not consciously

"interfere" with "employees meeting with [a] union representative"

---

226. As noted, no one from the Union corroborated Terrazas' assertions, or substantiated General Counsel's allegation that Terrazas was in fact a "Union representative."

227. Interestingly, both the union and Respondent access proposals exchanged in November 1979 contain somewhat different wording of this provision.

whose credentials were not established.

Notwithstanding any of the foregoing, there is simply not enough evidence to show that Avila "interfered" with any meetings. Assuming, arguendo, that Terrazas' representative capacity is established, the facts reveal that his discussions with workers on the 28th were curtailed because it was time to go to work, and the foreman could not obviously leave the bus; on the 30th, Terrazas began talking to workers only after Avila left.

Furthermore, General Counsel once again failed to adduce any corroborative evidence regarding the alleged conversations Terrazas had with Avila. The legal discussion regarding the treatment of uncorroborated testimony which conflicts with that of other witnesses, contained in the preceding section on "threats" to Jesus Torres, is incorporated by reference.

The interpretations Terrazas placed on Avila's actions are not therefore entitled to preponderating weight. In addition, I find several significant inconsistencies in that testimony itself and cannot fully credit it. If, as Terrazas maintained, his co-workers had either asked him directly to be a representative or requested that the Union designate him as such, it would seem that he would have had to have some contact with crew members prior to the late January encounters with the crew, Amaya and Avila. General Counsel failed to adduce any evidence on this point, particularly from Terrazas himself. One may infer from this failure that Terrazas was less than candid regarding his "appointment" as Union "representative." This lack of candor infects the entirety of his testimony and detracts from the credence one may attach to it.

I recommend that this allegation be dismissed.

IV. SUMMARY

A. It is recommended that the following allegations be found as violative of the section of the Act indicated:

1. Section 1153(a): Paragraph 33 (Fred Andrews' speech to workers in October; 1153(e) aspect dismissed).

2. Sections 1153(a) and (e):

a. Paragraph 18: Unilateral increase of lettuce harvest piece rate;

b. Paragraph 19: Unilateral installation of screens on bus windows;

c. Paragraph 40: Unilateral discontinuation of bus transportation for Imperial Valley lettuce harvest employees.

B. It is further recommended that the following allegations be dismissed:

1. Section 1153(a):

a. Paragraph 30: Threats to discharge;

b. Paragraphs 45 and 46: Surveillance by Angel Avila;

c. Paragraph 48: Threat to discharge Jesus Torres;

d. Paragraph 50: Interference with "union representative."

2. Sections 1153(a) and (c):

a. Paragraphs 9 and 10: Discharge and refusal to rehire F. Farfan;

b. Paragraph 13: Tractor driver layoff;

c. Paragraph 27: Warning notices to Orozco's crew;

d. Paragraph 29: Change in recall method (also termed a Section 1153(e) violation);

e. Paragraph 31: Discharge of crews 1, 2, 3, and part of 5;

f. Paragraph 35: Discharges of Lopez and Medina;

g. Paragraph 36: Layoff of Pedro Abrica (also Section 1153(e) allegation);

h. Paragraph 38: Failure to layoff thinning crews;

i. Paragraph 41: Refusal to rehire;

j. Paragraph 42: Taking away seniority (also alleged as Section 1153(e) violation);

k. Paragraph 43: Changing work schedule;

l. Paragraph 44: Warning notice to G. Contreras.

3. Sections 1153(a) and (e):

a. Paragraph 14: Unilateral mechanization displacement;

b. Paragraph 16: Unilateral wage increase to shop employees;

c. Paragraph 17: Unilateral change in loan repayment;

d. Paragraph 22: Unilateral change in working conditions;

e. Paragraph 25: Unilateral granting of retroactive pay;

f. Paragraph 26: Unilateral wage increase;

g. Paragraph 39: Refusal to pay Thanksgiving pay (also alleged as a Section 1153(e) violation).

4. Sections 1153(a) and (d): Paragraph 32: "Isolation" of Francisco and Oscar Suarez.

V. RECOMMENDED ORDER

Respondent, its officers, agents and representatives shall:

1. Cease and desist from:

a. Failing or refusing to bargain in good faith or consult with the certified bargaining representatives concerning the following matters:

(1) Wage increases to its employees;

(2) Safety measures instituted ostensibly for the benefit of its workers;

(3) Transportation benefits and/or accomodations for its employees.

b. Threatening employees with a curtailment of production in the event that they, through their representative, insist on certain items in collective bargaining.

c. In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by Labor Code section 1152.

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

a. Remove the screens it has attached to the windows of buses used to transport its agricultural workers;

b. Recommence the providing of bus transportation for Imperial Valley lettuce harvest workers from a central pick-up point in Calexico to its harvest sites;

c. Sign the attached Notice to Employees and post copies of it at conspicuous places on its property for

a period of 60 days, the times and places of posting to be determined by the Regional Director, such times and places to encompass lettuce harvests in the Imperial Valley and in Bakersfield as well as melon harvests in those locations. Copies of the Notice, after translation by the Regional Director into appropriate languages, shall be furnished by Respondent in sufficient numbers for the purposes described herein. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

d. Hand out copies of the attached Notice, in appropriate languages, to all current employees who request it.

e. Mail copies of the attached Notice in all appropriate languages, within 31 days after the date of issuance of this Order, to all employees who worked during 1979 lettuce harvests in Bakersfield and the Imperial Valley, and who are no longer employed by the respondent.

f. Arrange for a representative of respondent or a Board agent to read the attached Notice in appropriate languages to the assembled employees of respondent during each of its lettuce and melon harvest seasons, for a period of one year, at each of its two harvest sites. Said reading is to take place prior to the commencement of work, following the end of the work day, or during the period when employees customarily take their lunch break.[228] The reading or

---

228. General Counsel requests that the Union be

(Footnote continued...)

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.

g. Notify the Regional Director in writing, within 31 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

---

(Footnote 228 continued)

permitted to address respondent's employees on company time to remedy one of the violations found. I find that any further expenditure of sums pursuant to this case, apart from the expense of duplicating and mailing the attached Notice, will be punitive rather than remedial in nature. This respondent was called upon to defend a spate of charges, many of which were totally groundless, while others were inadequately investigated, if at all, in the rush to include them in the complaint. Prosecution of many aspects of the complaint bordered on the frivolous, and occasioned major exes on the part of the State and the respondent. In an effort to avert further such expenses, and to avert compounding the failure of the General Counsel to exercise the appropriate discretion in deciding not to pursue certain claims, I am recommending that the reading of this Notice take place during non-work hours.

/

/

/

/

/

/

/

/

/

periodically thereafter in writing what further steps have been taken in compliance with this Order.[229/]

DATED: January 11, 1982

MATTHEW GOLDBERG
Administrative Law Officer

---

229. As per Kaplan's Fruit and Produce Co. 6 ALRB No. 36 (1980) I find the application of the make-whole remedy, prayed for by the General Counsel in the complaint and alleged by the Union in its post-hearing brief, to be singularly inappropriate. The Union here was decidedly responsible for the slow pace of negotiations presenting a more emphatic situation than in Kaplan's where the Board attached equivalent responsibility to the Union and the employer for the tempo of bargaining. Likewise, extending the Union's certification would not effectuate the policies of the Act. In the initial year after certification, the Union failed to present a complete collective bargaining proposal. The record is wholly devoid of evidence that the respondent postponed or delayed the negotiations, or sought to avoid its obligation to bargain save in the three particulars for which violations have been found. It was at all times eager to meet with the Union. Extending the certification year might be viewed as a condonation of negotiating tactics which permit a Union to avoid its responsibilities while penalizing an employer which attempts to fulfill its obligations.

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

We will do what the Board has ordered and also tell you that:

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

1. To organize themselves;

2. To form, join, or help unions;

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

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

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

Because this is true, we promise that:

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

Especially:

WE WILL NOT fail or refuse to bargain with your Union about raising your wages, changing or ending bus transportation from Calexico to our fields, putting metal screens on those buses or take any other steps which we feel involve your safety.

WE WILL NOT threaten you with less work or the decrease of certain crop production if you, through your Union, insist on certain items in your contract.

WE WILL remove the screens on the company buses, and start to provide transportation again from Calexico to our fields in the Imperial Valley.

DATED:

SAM ANDREWS & SONS

By_____
Representative Title

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

DO NOT REMOVE OR MUTILATE.

union. (See, generally, Medo Photo Supply Corp. (1944) 321 U.S. 678; AS-H-NE Farms (1980) 6 ALRB No. 9; McFarland Rose Production, et al. (1980) 6 ALRB No. 18; Masaji Eto, et al. (1980) 6 ALRB No. 20; Pacific Mushroom Farms (1981) 7 ALRB No. 28.) Underlying the finding of a section 1153(e) of Section 8(a)(5) violation in those cases is the notion that once a union is recognized as the representative of a group of employees, the employer must deal with it exclusively in matters involving their wages, hours, and terms and conditions of employment. (See, generally, N.L.R.B. v. Insurance Agents Interantional Union (1960) 361 U.S 477.)

Notwithstanding this, an employer has the right to communicate directly with his/her employees, and discuss the status of negotiations. (McFarland Rose Production, Inc., supra; Oneita Knitting Mills (1973) 205 NLRB 500; Proctor and Gamble Manufacturing Company (1966) 160 NLRB 334. As Member McCarthy observed in his dissent to the Pacific Mushroom case, supra at p. 17, the "basic distinction" between "bypassing" the representative and delineating negotiating stances to employees "is between attempting to reach a separate settlement with the [employees] . . . and keeping them informed of Company positions. In circumstances such as these, the interest in free speech must prevail over the slight possibility that the representative's position might be undermined . . ." (Citing N.L.R.B. v. General Electric Co. (2nd Cir. 1969) 418 F.2d 736.)

In the instant case, it is clear that Fred Andrews did in no way offer proposals to employees or attempt to make some sort of "separate settlement" with them. He merely outlined, in response to

worker inquiries, the problems that the company had with certain proposals proffered during negotiations: namely, the cotton differential, and hiring hall and union security articles. Likewise, his discussions regarding the $5.00 per hour thinning crew wage were nothing more than a reflection of the company's then-current wage proposal. The Union's rejection of that proposal, characterized by Andrews as their not "letting him" pay that amount, cannot be translated as an attempt by him to negotiate the wage directly with employees, or a promise to pay them a certain amount should they abandon the Union.[114]

Accordingly, I do not find that Fred Andrews' speeches to workers on October 19 and October 30 constituted violations of section 1153(e) of the Act.

Nevertheless, while an employer may communicate directly with employees regarding negotiations, he/she may not, without running afoul of section 1153(a) of the Act, express within those communications any promises of benefits or threats of reprisal. (See, generally, ALRA Section 1155; McFarland Rose Production Co., supra; Abatti Farms (1979) 5 ALRB No. 34, aff'd in part (1980) 107 Cal.App.3d 317; Gissel Packing Co. (1969) 395 U.S. 575. Although I have found the discussions surrounding the $5 per hour wage rate not to be a"promise of benefit," mutually corroborative testimonies of several witnesses which I credit establish that Andrews noted that

---

114. I specifically do not construe as such Santiago Godinez' recitation of Andrews' statement "I want you to work and not stop. I'm going to pay you $5 an hour." Godinez, called as a witness for respondent, was the only witness who supplied this version as opposed to Contreras, Zamora and Castillo who did not characterize his remarks in that manner.

production of certain crops might be limited if the Union pressed its demands too far. By couching his remarks on the negotiations in those terms, Fred Andrews overstepped the bounds of permissible conduct, and threatened employees with deleterious consequences if they, through their Union, insisted on certain items in the negotiations. As such, I find that respondent violated section 1153(a) of the Act in this particular. (See, e.g., Abatti Farms, supra; Mario Saikhon (1979) 5 ALRB No. 44.)[115]

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

---

115 Part of the difficulty in analyzing the Andrews' speech is that while he spoke in Spanish, several workers testified that his usage was somewhat imprecise. Andrews may have conveyed different impressions by his inexact use of the language.

D. THE WORK STOPS AND THEIR REPERCUSSIONS

1. PARAGRAPHS 31, 41 and 42: DISCHARGE, REFUSAL TO RE-HIRE, AND LOSS OF SENIORITY TO LETTUCE HARVEST WORKERS

a. Facts

1) The Work Stops

In the fall of 1979, respondent's workers in all classifications and in both locations engaged in a series of intermittent work stoppages. The stoppages commenced during the week of October 15 in Bakersfield with the tractor drivers,[116] irrigators, and shop and maintenance employees, and occurred on October 15, 17 and 18. Thinning crews in Holtville, as well as tractor drivers there, picked up the banner and engaged in stoppages of their own on October 29, November 2, 9, 12 and 14.[117]

Bakersfield lettuce harvest crews 1, 2, 5, and part of Crew 3 engaged in stoppages on November 2, 8, 9 and 12. The participation in these activites by the lettuce harvest crews enunciated above resulted in their being "replaced" [118] on November 13, their being refused rehire, in the main, when they applied for work in the December Imperial Valley lettuce harvest, and in the loss of their "seniority"[119] with the respondent. It is these acts

---

116. The tractor driver stoppages are treated elsewhere, principally in the discussion concerning paragraph 13 of the complaint.

117. On November 17, many members of the thinning crews also did not come to work. This gave rise to the allegation contained in Paragraph 43 of the complaint.

118. General Counsel alleged that they were actually discharged.

119. As will be seen, the loss of seniority meant not only that workers lost their right to be rehired, but also lost eligibility for certain company benefits.

which were alleged in Paragraphs 31, 41, and 42, respectively, of the complaint as violations of sections 1153(a), (c) and (e) (Paragraph 42).

All of the aforementioned stoppages assumed a similar pattern. Workers would report on a given day, work for about three to four hours, then walk off the job. As can be seen from a review of the history of the negotiations, they coincided with the resumption of bargaining on October 16 between the company and the Union. They were designed[120] to put pressure on the company to sign a collective bargaining agreement, but beyond that vague[121] object, no specific series of demands were made evident as the aim of the work actions.

Santiago Godinez, a thinning crew employee and crew representative from the Imperial Valley, was the sole witness testifying about the complicity of the Union in the stoppages. He spoke of meetings at the Union hall during the fall of 1979 conducted by Marshall Ganz, a member of the Union's Board of Directors. The work stoppages were discussed, Ganz telling the representatives that they were necessary to "let the company see that we are united with the workers from Bakersfield." Godinez added that Ganz advised representatives that the purpose of the work stops was to put pressure on the company so that they would sign a contract, and that there was no other way to do this but to stop for

---

120. The reasons for the lettuce harvest worker stoppages are discussed at greater length below.

121. The terms of the agreement were as yet unsettled.

an hour or a day. The stoppages were planned on the day before they were to take place. Ganz would also inform representatives about the stoppages in Bakersfield, while individuals titled "coordinators" by Godinez would discuss what was happening during the course of negotations.

Ann Smith stated that the Union need not approve economic action that is taken by workers in a particular situation where there is no issue of the payment of strike benefits. The Union Executive Committee "sanctions" strikes in those particular situations after there has been a strike vote taken by the membership. No evidence was presented that the Union disavowed the stoppage. Hence, it may be inferred, based on Godinez' testimony, that the Union took no small part in encouraging and organizing these work actions.

Many lettuce harvest workers testified about their participation in the stoppages. The following is a brief synopsis of some of their testimony.

Guadalupe Jiminez, employed by Sam Andrews Sons during the 1960's, recommenced working with the respondent in 1974. He worked continuously in the lettuce and melons, both in Holtville and Bakersfield, through November 1979. In January of 1979 or early February, Jiminez was elected to be a member of the negotiating committee.[122/]

122/ Jiminez stated that his foreman, Angel Avila, was present when Jiminez was elected, and that he would discuss negotiations with the worker. During one of these discussions Avila allegedly stated that the Union was only making arrangements for itself and not the workers. General Counsel sought to utilize testimony of this type as proof of respondent's animus.

During the fall lettuce harvest, meetings were held by the negotiating committee prior to each of the stoppages to discuss the stoppages and determine the time that each would take place. Jiminez noted that at the meetings the workers stated that they did not wish to go on a full-blown strike, but rather decided to halt work temporarily and return to work on the next day. He emphasized that the workers wished only to stop work for a few hours, but also wanted to work for a few hours.

After the first stoppage, which Jimenez testified was two to six days after the arrival in Bakersfield of Felipe Orozco and his crew,[123/] Jiminez was asked by his foreman to give a reason for the stoppage. Jimenez allegedly told him that the stoppage was in order to obtain a definite date for negotiations, that there had been a long time between negotiations.[124/] Avila allegedly stated at that time that he knew that the Union did not want to negotiate.

Jimenez noted that the stoppages were called for a number of reasons. However, the particular purpose of each stop, if such existed, was unclear. Among those things outlined by Jimenez which prompted the stoppages were the failure of the company to hire certain individuals in Bakersfield, that the workers wanted definite dates for negotiations, that they were protesting the firing of a particular individual which took place in April, and that the

---

123. The arrival of Orozco's crew, alleged to be "late" and hence a violation of the Act, is discussed supra. Some witnesses, as will be discussed, sought to justify the stoppages on this "late" arrival.

124. Jimenez, as a member of the negotiating committee, should have been aware that there was a session on October 16, and another session was planned for the beginning of November.

workers wanted a contract. Jimenez also noted that during the course of the stoppages he had in mind a mass firing which allegedly took place in 1974 as providing a rationale for them.

Jimenez stated further that the stoppages were organized as a protest, that the company had been guilty of certain "injustices". However, the workers needed the money and so therefore would work for several hours on the day of each stoppage rather than striking on a more formalized basis. Jimenez allegedly discussed with Avila the pay rates of the company, that other companies were paying more and that there was a problem with retroactive pay. These issues also played a part in fomenting the stoppages. Jimenez wanted something that would guarantee to the workers that they would not be fired, that wage rates would be written down and also guaranteed: in essence, he wished that a contract be signed.

Ruben Lusano, crew representative for Crew 2 working under Ramon Hernandez, also recounted his participation in the four work stoppages which took place in November 1979 in Bakersfield. He stated as the reasons for his participation in the stoppages that the company had altered the seniority system involving his co-workers;[125] that they had changed the "standards for negotiations" by increasing wages without signing a contract; that the negotiations had taken too long a time, that after 10 months no agreement had been reached.

A crew representative from Villamoor Garcia's crew (Crew 3), Felix Magana, likewise testified regarding his participation in the four work stoppages. On the date of the first work stoppage,

---

125. This again refers to the "late" arrival of Orozco's crew.

Magana explained to a group of Filipinos who comprised a portion of his crew that the workers were protesting. Among the items that he enumerated to them, according to this testimony, was that he wanted the company to fix a date for negotiating, and that the company was violating seniority rules when it started another crew which had less seniority than the crew of Felipe Orozco. He also stated that the protest was a voluntary one and that he would like their support. Magana's foreman, as he testified, approached him and told him not to go around "instigating people." Magana denied "instigating the people," telling Garcia that he was merely explaining to these workers what the protest was all about. Magana noted in addition that Garcia told him that he "should not have been" a representative.

Magana also had a series of discussions with Supervisor Ed Rodriguez on the days when stoppages occurred. In these discussions, according to his testimony, he told Rodriguez that he wanted the company to come to an agreement with the Union as soon as possible so that there would be no more problems, and that the company had acted "in bad faith" by calling a crew to work in the Bakersfield harvest "out of seniority."

On cross-examination Magana was questioned extensively concerning what he felt were the reasons for the work stoppages. He stated that at a meeting of workers before the 2nd of November, the reasons that were discussed for the stoppages were that the company had violated the seniority policy, that the workers wanted an exact date set for the company to negotiate, and wanted the company to remedy what Magana termed discriminatory or unjust practices.

Magana's testimony was shaken somewhat by his admisssion that he had not attended any negotiating sessions between April and the 7th of November, and that he knew that at previous negotiation sessions dates for succeeding sessions would be determined. Therefore, the rationale for protesting because of a lack of a negotiating date was seriously undermined since Magana himself would not be aware that a negotiating meeting date might already have been set at the session which occurred in October.[126/]

When asked about the reasons for the second stoppage in particular, Magano testified that the seniority issue was of prime importance in that stop. This problem was creating a lot of insecurity among the workers, and in order to resolve it he wanted the company to reach an agreement with the Union. Magana admitted that one of the most important, if not the most important, reasons for the stoppage was that the workers desired a contract with the company. This rationale pervaded the stoppage on the 9th, as well as the one on the 12th. Magana stated that by the stoppage on the 12th he had hoped to accomplish the reaching of an agreement with the company.

Helario Aguilar, a member of Felipe Orozco's crew, steadfastly maintained the position that the purpose behind the stoppages was that they were a protest for not hiring that crew.[127/]

---

126. As pointed out numerous times throughout this decision, this rationale for the work stoppages was not consonant with the realities of the actual negotiations schedule, which the Union had full responsibility for determining.

127. Since he worked for Orozco and was recalled "late," it is not surprising that to Aguilar, the most important reason for the stops was to protest the tardy recall of his crew.

Although admitting he participated in the meetings where the work stoppages were discussed, the only reason that he felt lay behind the work stoppages was the seniority issue.

Crew representative Antonio Alaniz, when questioned concerning the reasons for the work stoppages, cited the following: failure to hire Felipe Delgadillo;[128] the desire to obtain a better medical plan; the contention that his crew[129] was taken late to the harvest; and that certain of the Filipino workers that had arrived were employed while the Mexicans who came were denied work.[130]

Alaniz denied participating in making the decision to engage in the work stoppages. Although he stated that the desire for a contract was one of the reasons for the stoppage, he denied that it was the principal reason. By virtue of the stoppages he had hoped to accomplish the company's "taking the Mexicans back to work." However, when asked about the change in the negotiating date he stated that he was told by the Union that the company had changed the date.[131]

Alaniz also noted that he told Orozco the reasons for the

---

128. Magana also alluded the failure to hire worker Delgadillo, but did not connect this to a reason for the stops.

129. Alaniz was a member of Orozco's crew.

130. Alaniz also testified that on the day of the first stoppage, he told a supervisor named "Daniel" that the reasons for the people stopping were that the company "had changed the date of negotiating" and had "violated the seniority rights of the Mexicans as they arrived."

131. Although he attended a negotiation session in October, he could not recall what was discussed at this session. Alaniz placed the date of this negotiating meeting as October 16th.

work stoppage, to wit: the "violations" that the company was committing by not taking a "complete" crew and his wish that the company set a date for negotiations. However, Alaniz had executed a declaration which set forth that the stoppage on the second of November was due to the fact that the company had not signed a contract. He attempted to explain this seeming inconsistency by stating that on the day the declaration was written the people were very frightened because the police were at the camp trying to remove them, and also that they were threatened with arrests. Nevertheless, the date when the declaration was actually executed was on the 8th of November.

Significantly, apart from the random conversations which these employees and others had with supervisory personnel, no formal presentation of workers' demands was served on the company, either in the fields on at the bargaining table.[132/]

2) The "Replacement" of the Lettuce Harvest Workers

Following the stoppage on November 12, respondent resolved that it could no longer tolerate the actions of certain members of its lettuce harvest crews who participated in the work stops. Don Andrews stated that the final decision to replace workers who had engaged in work stoppages was made on the last day that they failed to perform their normal work. He discussed with Eddie Rodriguez the possibility of obtaining replacements, and also procured advice regarding the situation from Bob Garcia, Tom Nassif

---

132. Conspicuously absent from the testimony and negotiating notes of the participants in the negotiations was any mention of the work stops. The "late" recall of Orozco's crew was not specifically discussed.

and Don Dressler, an attorney with the Western Growers Association. Andrews had considered replacing workers when the stoppages first began. He felt the company was approaching a situation where it had to replace its workers in order to get the crop packed, since the company had already started to experience losses and customer dissatisfaction. Andrews felt that the brokers that it usually did business with were not able to obtain the products from the respondent that they needed for their businesses, and that therefore they would go elsewhere to obtain them.[133]

On the morning of November 13th in the yard at the company labor camp, the foremen, second foremen and workers were gathered. The foremen had been told by supervisor Rodriguez to wait, since no one was certain what was going to take place on that day. For their part, the workers were dressed for work and ready to go back to the fields.[134].

---

133. According to Andrews, lettuce is generally sold on the day which it is harvested. The lettuce is cut according to the orders received by the company on a given day, with the idea of not having any lettuce left over at the day's end. There are, to some measure, a degree of advanced sales, where a contracted price is agreed upon by the buyer a week or two in advance of the purchase. There is also a certain group which orders its lettuce a day or two previous to the actual harvest of that lettuce. However, 60 to 80 percent of the lettuce that is sold by the respondent is sold by about ten o'clock in the morning on the actual day of its harvest. Thus, the impact of the intermittent work stops is severely enhanced. Respondent's managers project, on the basis of field productivity and labor force capability, what the company may sell in a given day. It commits itself early that day to provide a certain volume to its customers. If workers walk out after several hours, it obviously cannot fill those orders which it has committed itself to.

134. General Counsel argues that the stop on November 12 was the "last" one. To the contrary, the evidence shows there was no indication from workers or the Union that the work stops would cease.

Antonio Alaniz and other workers stated on the day following the last work stop, despite the fact that they had gotten ready for work, the foreman arrived with checks for the crews, informing the people that the busses would come to bring them back to Calexico, that the work had ended in Bakersfield, and that the workers should give them their home addresses since, if the company needed them for the harvest in the Imperial Valley they would be called to work. Orozco, according to Alaniz, declined to tell the workers that they had been fired, but rather told them that they had been replaced.

Similarly, Florencio Valdez and the other members of his crew were told by their foreman, Angel Avila, that they had been replaced, that the company would recall the workers when it needed them, and that the workers should put their names and addresses on sheets distributed for that purpose.

Felix Magana stated that on November 13 he got ready to go to work, that the busses which usually took him to work did not arrive, and that he went with some fellow workers to a field where respondent was engaged in harvesting operations. Magana testified that he presented himself at the field in order to seek employment. When the workers arrived at the field in their cars, supervisor Rodriguez and several police officers spoke with the group. Rodriguez told the workers that they had been replaced, that they could no longer have any work. Magana asked Rodriguez if the workers would be fired, to which Rodriguez responded "No, the workers had not been fired, they had been replaced." Magana then asked Rodriguez for a layoff notice. Rodriguez responded that the

workers were not laid off, and instructing police, said that he did not wish to talk to the workers any more, that they would be arrested for trespassing in the event that they did not leave the field.

Ruben Lusano also testified that on November 13, he and his co-workers prepared to go to work. They waited at the camp for the busses which customarily brought them to the work site. At about 8:00 a.m. that morning, Lusano's foreman arrived and began distributing paychecks. "The foreman told us that there was no more work, that the workers had been replaced, and the company would call them when they were needed." He also asked each worker to write their name and address so that the company would recall the individual worker when they needed them.

Lusano and other crew representatives held a meeting that morning to discuss the situation. Two chartered busses arrived at the camp in order to transport the workers back to Calexico. Lusano spoke with Eddie Rodriguez that morning and told him that the workers were not going to move until they got some information either from a Union representative or from a state employee concerning their particular legal situation. Rodriguez responded that the busses would leave in two more hours. None of the workers took the busses on those days, and the busses left the camp between two and three o'clock.

On November 13th, Guadelupe Jiminez likewise prepared to go to work. That morning the busses which took workers to the field did not arrive at the labor camp where Jimenez was boarding. Instead, different, "fancier" busses arrived along with the foreman

Avila, who appeared with the workers' paychecks. Avila, according to Jimenez, then asked the workers to give him their names in order that they might be recalled to work when the harvest recommenced in Holtville. He also informed the workers that they had been replaced and that there would be no more work for them in Bakersfield.

On the next day,[135] the workers went to the fields in their own cars rather than on the busses to see if they were going to get work. Later that day, Eddie Rodriguez and the police arrived. Rodriguez, after being asked if he was going to give them work, informed the workers that they did not have any work, that they were replaced.

Rodriguez himself testified that he explained to the foremen on November 13 that they should take the names, social security numbers and addresses of all of the workers, put the date and hour when they signed up, and inform them that they had been replaced, that the company would call them back when needed.

The workers were somewhat reluctant to give their names and addresses since some of their representatives, fearing retaliation by the company, told them not to give the information. However, after they were apparently convinced by company personnel that the taking of the list was for purposes of calling people back to work, employees signed up on the lists.

In summary, as of November 13, 1979, respondent replaced

---

135. Several workers testified that they did not leave respondent's camp on November 13 as instructed, but instead remained for three or four days after November 13. No arrests were made, nor were workers forcibly ejected despite the presence of police officer on those days.

all of the workers in Crews 1 (Avila), 2 (Hernandez), 5 (Orozco) and some of the workers in Crew 3 [136] (Garcia). After that day, four crews worked in the lettuce harvest in Bakersfield until it ended on November 24th. These crews were under the direction of V. Garcia, Victor Villafuerte, Edwin Galapon and George Maruga.

After the walkout on November 12th, Rodriguez decided to hire these two new crews. Maruga and Galapon's crews each contained about 7 trios of new workers when they began on the 13th.[137] Maruga had been working under Garcia as a packer prior to the 13th, whereas Galapon was not employed by respondent before that time. Some additions to these crews may have been made on the following day. Foreman Garcia's crew employed 12 to 14 additional people after the 13th.

---

136. Rodriguez testified that none of the loaders and closers for Crew 1, 2 or 5 continued working after their crews stopped on November 12th. Testimony from these loaders, principally Raymond Gonzalez, was to the effect that despite their crews' stopping during the course of the various work stoppages, the loaders remained in the field and continued to load all of the boxes that had been packed until there were none remaining. Gonzales maintained that he asked for work despite the stoppages, but was not able to "bump" anyone from working with a crew that had not stopped. Previous Teamster contracts did not recognize bumping rights.

There was some question in the record as to whether or not the loaders had "participated" in the work stoppages. Technically speaking, they did not stop work with everyone else. However, the loaders would not be paid for any boxes which they did not load. The inference thus arises that the loaders, wishing to get paid for as much as they could before a stop, loaded what was available to load and then ceased working. Alternatively, since their function is an adjunct to the packers and cutters, they did not have control over the situation and consequently could not determine for themselves whether or not they would or would not stop or withhold their labor. In short, insofar as the loaders were concerned, there was no direct manifestation of their willingness to participate in the stoppages.

137. Maruga and Galapon both recruited the people needed to fill out their respective crew compliments.

3) Refusals to Rehire in Imperial Valley; Loss of Seniority

Numerous workers who participated in the work stops testified that at or near the beginning of respondent's Imperial Valley lettuce harvest season on December 3, when they attempted to secure employment for that season, they were not rehired.

The workers sought work at the Shopping Bag Market in Calexico, where crews had in the past assembled before going to work;[138/] at "El Arbol," the site in Holtville were workers assembled to be taken to the fields for the 1979 season; and at the fields themselves. They would attempt to, or actually succeed in, talking with foremen. The response that there was no work available for them was practically universal at this time.

The evidence demonstrated that the company observed a seniority policy of a sort, in that it generally hired workers who had been employed by it in prior seasons. The company seniority policy, according to Eddie Rodriguez, was explained in writing in the company personnel handbook. This booklet, prepared in mid-1978 by personnel consultant Steven Highfill and Don Andrews, sets out that employees acquire seniority after working for 30 days within a 90-day period. Rodriguez stated that the personnel booklet was prepared to replace the expired Teamsters contract which terminated in 1978.

Seniority is determined by crop, by location, and by crew. It might be possible for a workers to have separate seniority for

---

138. Respondent, as discussed supra, discontinued all bus service from this location to the field.

lettuce and melons, e.g.,[139] and also separate seniority in Bakersfield and Holtville. Although there is some interchange between Bakersfield and Holtville, not all of the individuals who work in one location are employed in the other. Generally, however, all of the foremen who work in Bakersfield also work in Holtville. It is also possible that the company could switch an individual from one crew to another, in which event the worker would acquire seniority in that crew. Crew No. 1, or Avila's crew, happened to have the most senior employees. When employees are laid off, crews are not broken up or reorganized. Breaks in seniority are caused by quitting employment or by being discharged, but seniority would not be broken for an excused leave of absence.

Rodriguez testified that ordinarily in the Imperial Valley there are four crews working in the lettuce harvest. The foreman of each crew is as follows: Angel Avila (Crew 1), Felipe Orozco (Crew 2), Villamor Garcia (Crew 3), and Victor Villafuerte (Crew 4). Each foreman has an assistant (Francisco Amaya/Crew 1; Manuel Oritz/Crew 2; Francisco Verduzco/Crew 3; Ruben Quihius/Crew 4). In 1979, the lettuce harvest began in the Imperial Valley on December 3rd with the crews of Avila and Orozco commencing the operation. Within a few days, Crew 3 was put to work, with Crew 4 being employed approximately one week later than that. An additional crew worked under the foremanship of Simon Amaya and his assistant Ramon Hernandez. This crew, Crew 5, began working after the first of the

---

139. Technically, the melon season is ordinarily not long enough for a worker to acquire seniority for the purposes of becoming eligible for certain benefits.

year, and worked for approximately 3 weeks.

For the first time in approximately eight seasons, respondent grew and harvested cabbage in the Imperial Valley. Two crews were hired. The cabbage harvest season began in mid-December and progressed over a five or six-week period. The head foreman in the cabbage was named Sammy Obai. None of the people who worked in the lettuce in Bakersfield were hired to work in the cabbage.[140/]

Rodriguez testified that he has overall responsibility for hiring and that year determined who would be foremen. He does not usually hire workers but relies principally on his foremen to perform this task. Rodriguez determines the number of crews needed for the harvest and also when the harvest is to start and when it is to finish. When the harvest season commences, Rodriguez informs each foreman personally or by telephone how many people are needed for work. Respondent prepares a list of employee names which Rodriguez stated are compiled on the basis of "seniority." If not enough workers are available, the foreman recruits employees needed to fill the crews. It is the foreman's responsibility to locate the persons named on the list and inform them that work is available.

Foremen use different methods for assembling their crews.

---

140. Several workers testified that cutting cabbage, though similar to cutting lettuce, is easier. For example, workers Felix Magana stated that cutting the cabbage was easier, since it did not have to be as well trimmed as lettuce. In terms of packing, the cabbage did not need to be sized and counted but rather that the boxes of cabbage were determined full according to their weight, not their number. General Counsel argued that those workers who were replaced in Bakersfield should have been put to work in the cabbage. The record does not indicate, however, that such workers wanted to work in the cabbage since it appears that the work is less remunerative than work in the lettuce, and the positions are not direct equivalents.

Villamoor Garcia, for example, contacts one person from his crew who lives in a given area, and has that person, in turn, notify other crew members from that area about the availability of work. Angel Avila, on the other hand, goes to the "water tank" near the Mexican border, or the Shopping Bag market in Calexico, and seeks his crew members out to inform them of work.[141]

Regarding the Imperial Valley seniority lists themselves, workers, according to company policy, are eligible for placement on the lists when they acquire seniority by working thirty days in a ninety-day period.[142] Seniority is carried from year to year.

Foremen, prior to the harvest, are generally given copies of an eligibility list.[143] For the December 1979 lettuce harvest the following priorities were established regarding eligibility for Imperial Valley employment:

> 1. Those who had Imperial Valley seniority who did not participate in the Bakersfield walk-outs (including those who had not gone to Bakersfield);
>
> 2. Those who had completed the lettuce harvest in Bakersfield (replacement crews);
>
> 3. Those who had participated in the walk-outs, who had Imperial Valley seniority, and who also placed their names on the November 13 sign-up sheets; and

---

141. Apparently, workers learn through the "grape vine" that Avila will be at a given location hiring harvest personnel.

142. Since the Bakersfield lettuce harvest is not long enough, many workers though technically not having acquired "seniority" for the purposes of receiving benefits, are generally hired back if they worked at least fifteen days in the previous season.

143. Garcia did not obtain such a list. However, Rodriguez read a list of eligible employees to Garcia over the telephone. Garcia displayed a thorough-going familiarity with those who had previously worked for him.

4. Those who did not sign the November 13 lists, and also new hires.[144]

That hiring was done in this manner and in the aforestated order for that season is essentially not in dispute, being confirmed by numerous witnesses for the General Counsel.[145] Foremen for that season were given the eligibility list for their particular crew. None of the people who had participated in the walk-outs were named on this list. Once the names on that list had been exhausted,

---

144. The eligility lists for the Imperial Valley 1979 harvest had the names of the stoppage participants deleted. In the event they were to be hired, reference would be made to the rehire lists, with the names being called in the order in which they appeared.

145. Respondent did hire a number of new employees. However, they were hired on an intermittent or casual basis. Testimony revealed that each day people appear at the fields seeking employment. They are employed on a sporadic, as-needed basis. The company classifies these employees as "floaters," "wind rowers," or "boosters." Floaters fill in as needed in the event that someone gets tired, wants the day off or is sick. Floaters are employed both as cutters and packers and as loaders. Wind rowers are paid on an hourly basis, approximately $5.00 per hour, as opposed to a lettuce harvest cutter who would earn about $15.00 per hour. Wind rowers move the cartons of lettuce one row closer to the truck which comes in to pick up the cartons as they are loaded. The reason for doing so is that when lettuce fields are wet the trucks will not be able to go through the roads made in the field. The lettuce therefore is loaded onto a trailer pulled by a tractor instead. As the tractor goes throught he fields, it runs over the lettuce. In order to save the lettuce not harvested, cartons are moved closer to the truck so that the number of trips through the fields is minimized. Wind rowers therefore are not used all of the time, but are employed particularly when the fields are wet or if there are second cuttings being performed in the field. Two or three people may wind row depending on the size of the crew.

A booster is someone who takes someone elses place temporarily, for anything from a full day to merely a couple of hours. A booster generally helps with loading, and sometimes with closing, taking the place of a worker who is tired. Boosters ordinarily would work less than a day, as opposed to floaters. A booster waits at the edge of the field and is generally put in by someone that he or she knows in the crew. The foreman is notified, then the booster is placed on the payroll.

foremen were at liberty to hire from the "preferential hiring" (November 13) lists.[146]

Respondent contends that the procedure thus outlined was in keeping with the general rule that non-strikers and permanent replacements are entitled to priority in hiring over "economic strikers," who are not entitled to replace "permanent employees."

Respondent consistently followed a similar hiring procedure for the spring 1980 Bakersfield lettuce harvest. For that harvest, Respondent had drawn up a seniority list on the instructions of Eddie Rodriguez. The list was compiled on the basis of the following criteria. The first people listed were those who worked in the spring 1979 season in Bakersfield and who had not participated in the walkouts in the fall of 1979.[147] The next group to be included on the eligibility list or seniority list would be those who had worked in the 1979 fall lettuce harvest and who had not walked out, and also those who had finished or worked in Holtville during the winter 1979-80. The next group to be included on the list were those individuals who had worked in Holtville in 1979-80, including those who had walked out in fall 1979 in Bakersfield, but who had been rehired in Holtville. Following this were people who had worked and finished the Holtville season and who had not worked in Bakersfield in either the spring or fall of 1979.

---

146. In fact, Angel Avila hired several employees from that list. In January another harvest crew was formed under Ramon Hernandez and Simon Amaya (Crew 5). Most of these workers came from the preferential hiring list.

147. The list would thus include those people who had not worked at all in Bakersfield in the fall of 1979.

Generally, these individuals would have to had worked for at least 15 days in Holtville. The next group to be considered would be those individuals who had been involved in the walkouts in Bakersfield and who had not worked at all in Holtville. These names were not to be on the eligibility list but were contained on a separate list for preferential hiring that had been used previously by the company. The lists were to be prepared for all the crews, including Crew 1 (Avila's crew), Crew 2 (Felipe Orozco's crew), Crew 3 (Villamoor Garcia), Crew 4 (Victor Villafuerte), and Crew 5 (Ramon Hernandez). Four crews were actually used in Bakersfield in the spring 1980 season.

The foremen were instructed to hire people as they appeared on the lists. If more people were needed the foremen were to hire them off the preferential hiring list. All crews were to start with approximately 8 trios or 24 people. Another list was made up for loaders using the same criteria for placement on the list as was utilized for the cutters and packers. When the list was made up, instructions were also given by Rodriguez to put down the names of those individuals who had worked 15 days or more in prior seasons.

As concerns the "loss of seniority," it is essentially undisputed that workers who participated in the stops lost their "seniority" in the sense of being among the group first considered as eligible for reemployment.[148/]

---

148. Worker Remigio Gonzalez testified that he was told by foreman Avila that he would not be hired for the Imperial Valley harvest since all the ones who were "fired" in Bakersfield "lost their seniority."

Don Andrews testified that workers who had participated in the work stops would lose seniority rights only insofar as hiring was concerned, but they would not lose other benefits, like paid vacations. Andrews' testimony is belied by the actual circumstances, i.e., that workers who did return to work in the Imperial Valley were not paid for the Christmas and New Years holidays. Andrews admitted that he had discussed the issue of vacation pay (as opposed to holiday pay) with company personnel, perhaps Bob Garcia and the payroll clerk or a foreman, and stated that these workers did receive their vacation pay. Respondent provides vacation benefits based on a formula proportional to the number of years of service with the company. For example, after four years of employment, workers earn double the starting vacation benefit. It is in this specific instance that an incident to seniority was not lost by those who took part in the work stops.

It is clear, therefore, that "seniority" was lost in that participants in the work stops lost their rehire priority status. Once they worked the requisite number of days however, they were able to reacquire that status.

/

/

/

/

/

/

/

/

b. The Work Stoppages and Their Aftermath: Legal Analysis and Conclusions

Of the multitude of issues presented by this case and the complaint, none is more central than a consideration of the work stoppages engaged in at various times by various groups of respondent's workers. Conclusions regarding the nature of such stoppages directly effect six allegations in the complaint and have a tangential relationship to three or four others.

As previously noted, the record evidence reveals that on no less than 10 separate occasions, distinct groups of respondent's employees engaged in intermittent work stoppages, that is, presenting themselves for work in the morning, working for a portion of the work day, and then walking off the job. The employees would return on the day following and would seek to resume their employment. More specifically, by way of recapitulation, during the week of October 15, 1979, there were three distinct stoppages by the tractor drivers in Bakersfield occurring on October 15, 17 and 18. Irrigators and shop employees joined in these stops. Tractor drivers in the Imperial Valley engaged in work stoppages on October 29, November 2, 9, 12 and 14. Lettuce harvest crews engaged in stoppages on November 2, 8, 9 and 12. The thinning and weeding crews in the Imperial Valley engaged in stoppages on October 29 and November 9, 12 and 14.

The facts further demonstrate that nine tractor drivers were laid off in Bakersfield on October 19, with the layoff being alleged as a violation of Sections 1153(a) and (c) in paragraph 13 of the complaint. The layoff of the Bakersfield lettuce crews was alleged as a violation of 1153(a) and (c) in paragraph 31 of the

complaint, and later the repercussions of such layoffs, including the failures and refusals to hire and loss of seniority, were alleged as two additional violations. The layoffs of two tractor drivers in the Imperial Valley, Jesus Lopez and Jesus Medina, were alleged as violations of the same sections of the act following their participation in the work stoppages in the week of November 15th. On November 17th, while technically not a work stoppage in the sense of employees arriving for work, performing their duties for several hours and then walking off the job, thinning and weeding employees in the Imperial Valley simply did not show up for work on that date in order ostensibly to appear at the inauguration of a Union office in Calexico. Further, lettuce harvesting crews engaged in a work stoppage in January 5, 1980, and received warning notices therefor. Such was alleged as a violation of Section 1153(a). The stoppages were indirectly related, according to the testimony of several witnesses, to additional allegations involving "unilateral [changes in] past practice regarding loan payments"; unilateral changes regarding screens being placed on busses; alleged threats of discharge; and "deliberate" failures to lay off thinning crews.

Upon review of the record, there can be little doubt that the root cause of the series of work stoppages in October and November was economic in nature and I so find. Although there was some testimony regarding the notion by some participants in the work stoppages that one of the reasons for such stoppages was the failure to recall the crew of Felipe Orozco in the proper order to work in the Bakersfield lettuce harvest, the overwhelming bulk of the evidence points to the conclusion that most people who engaged in

the stoppages and who testified understood that the purpose of the stoppages was to put pressure on the respondent in order that it sign a collective bargaining agreement.149/

Some witnesses testified that one of the reasons for the stoppages was to force the company to set a date for negotiations. This rationale is highly implausible for a number of reasons. Respondent earnestly attempted to get negotiations moving prior to the commencement of the Bakersfield lettuce harvest in the latter part of October. The Union, on the other hand, dragged its feet in setting negotiating dates, apparently because it was not certain who would be assigned to negotiate with the company. Although respondent attempted to set a meeting date following the negotiating session on July 30th, no Union negotiator made himself or herself available until October 16th. The Union negotiator cancelled a meeting tentatively set for August 7th. As Nassif's letter to Paul Chavez of October 2nd reveals, respondent's representative still understood, as of that date, that Chavez would remain responsible for negotiating on behalf of the Union. It was not until several days thereafter that Nassif learned of Smith's assignment to assume primary responsibility for the Union in the negotiations. Thus, although the Union may have told its workers differently, it is clear that they were in no small measure responsible for the delay in setting negotiating dates. Further delays were occasioned by the Union's "changing of the guard": Smith expressed lack of

---

149. Parenthetically, it should be noted that the stoppages engaged in by the tractor drivers in Bakersfield took place before the recall of Orozco's crew and therefore they could not use that as a rationale for their particular stoppages.

familiarilty with the status of the negotiations, and her admitted dearth of communciations with the former negotiator created a situation where a good deal of duplication took place in terms of exchanges of information and proposals. Additionally, the alleged failure to set negotiation dates could not have been a logical reason behind the work stoppages occurring on the 15th, 17th and 18th of October, since a negotiating session was held on October 16. Likewise, work stoppages occurred on the heels of the negotiating session of November 7th, said stoppages taking place on November 8, 9 and 12. Thus, little credence can be attached to this proffered rationale.

Another reason given for engaging in the work stoppages was the alleged failure of the company to recall the harvesting crew of Felipe Orozco in the proper sequence to the Bakersfield harvest. For reasons set out in another section, since I have concluded that the recall of this crew did not in any way constitute an unfair labor practice, even assuming that this was one of the reasons for the stoppages, in no way could the stoppages be thereby transmuted into an unfair labor practice strike situation. The recall of the Orozco crew was a fait accompli by the time the harvest crews engaged in the stops. If the workers were in fact protesting the recall of this crew, repeated stoppages could in no way remedy the situation, beyond perhaps getting an assurance from the company that it would not occur again in the future.[150] As noted above,

---

150. From the testimony of some workers it might be inferred that the execution of a contract would remedy the problem they believed created by respondent's arbitrary recall of its crews by formalizing the seniority system.

stoppages engaged in by the tractor drivers in Bakersfield antedated any recall of crews to that area.

In sum, therefore, and in keeping with the overwhelming bulk of testimony from employee participants, the work stoppages were prompted by economic considerations, i.e., attempts to put pressure on the respondent in the course of negotiations so that they would sign a collective bargaining agreement. Testimony by numerous workers, including those who were most active in participating in concerted activities, points to that inescapable conclusion. Among these employees were Guadalupe Jimenez and Felix Magana, who said the most important reason for the stoppages was to get a contract, and Antonio Alaniz, who signed a declaration at or near the time of the work stoppages to that effect. As was aptly pointed out in respondent's brief, more than half of the witnesses called by the General Counsel to testify concerning the work stoppages did not say anything in regard to the rationale behind the stoppages. If there were any reasons beyond those expressed for the stops, they were not adduced. Under Evidence Code Section 412, a negative inference may be drawn from a party's failure to produce evidence within its control or capability which may provide stronger or more satisfactory proof.[151/]

After the work stoppage of November 12th, the lettuce harvest workers in Bakersfield were told that they were replaced.

---

151. Guadalupe Contreras from the thinning crew testified that the purpose behind her crew's participation in the stops was to put pressure on the company to settle a contract. Similarly, tractor driver Jesus Lopez stated as a reason for the stoppages that wages were low and they wanted a contract.

This conclusion is reinforced by the testimony of a multitude of witnesses. Despite repeated attempts by General Counsel to establish the contention that the workers were discharged and not replaced, no witnesses, including those most active in Union affairs, stated that they were told anything but that they were replaced.

Both the Union and General Counsel are attempting to overturn well-established National Labor Relations Board precedent to the effect that intermittent work stoppages are not considered protected activity. The seminal case in the area of intermittent work stoppages is UAW Local 232 v. Wisconsin Employment Relations Board (1949) 336 U.S 245, also known as the Briggs-Stratton case. In that situation, the employees engaged in a series of 26 separate walkouts in order to pressure their employer. There, as in the instant case, the employer was not informed of the specific demands or particular concessions which the employees wished to exact. The United States Supreme Court held that the legislative history of Section 7 of the NLRA (the counterpart to Section 1152 of the ALRA) recognized that the right to strike was not an absolute right, but was subject to certain limitations. Further, not all concerted activities were protected. Specifically, the intermittent work stoppages which were at the basis of the Briggs-Stratton case were held not to be protected by Section 7. Although the holding in the case to the effect that a state employment relations board was not pre-empted by federal law from regulating or enjoining such activity was overruled in the case of Lodge 76 v. Wisconsin Employment Relations Committee (1976) 427 U.S. 1332, the proposition that

intermittent work stoppages or partial strikes are unprotected has remained undisturbed to this day.[152/]

The progeny of Briggs-Stratton emphasizes the continued vitality of the basic rule that intermittent work stoppages or partial strikes are considered unprotected activity. An employer is free to discipline, discharge, or as here, "replace" workers who engage in such unprotected activity. The underlying rationale behind the rule appears to stem from the notion that employees must choose between striking and not striking and cannot be free to regulate their own hours and/or conditions of employment.

In N.L.R.B. v. Local 1229, IBEW 346 U.S. 464, 33 LRRM 2183 at 2187 (1953), the Supreme Court stated: ". . . an employee cannot continue in his employment and openly or secretly refuse to do his work. He cannot collect wages for his employment, and, at the same, engage in activities to injure or destroy his employer's business." In Phelps Dodge Copper Products Corporation, 31 LRRM 1072 (1952), the National Labor Relations Board held that the company would have the right to discharge the employees in that case that engaged in a slow-down which involved a refusal on their part to work overtime or participate in incentive production. At 31 LRRM 1074, the Board, noting that the slow down or partial strike was unprotected, stated "the vice of the slow down derives in part from

---

152. The Union's reliance in its brief on the Lodge 76, case supra, to stand for the proposition that the Briggs-Stratton case was overturned en toto, demonstrates a severe misreading of the former. Plainly, the holding in Lodge 76 was that the pre-emption doctrine did apply to strike or partial strike activity, and that state employment relations boards could not regulate such activity in the face of a national labor policy directed towards those ends.

the attempted dictation through this conduct of [the employees'] own terms of employment. They are accepting compensation from their employer without giving him a regular return of work done."

In N.L.R.B. v. Kohler Company (7th Cir. 1955) 220 F.2d 3, 35 LRRM 2606, the Court noted that the employees could not insist on remaining at work under their own terms and conditions.

> We are aware of no law or logic that gives the employee the right to work upon terms solely prescribed by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations effecting their employment. (35 LRRM at 2611.)

That Court went on to state that the employees had two courses upon to them: they could "either continue to work and negotiate, or they could strike. But . . . the men attempted to do both and this they cannot do."

In Valley City Furniture Company, 110 NLRB 1589, 34 LRRM 1265 (1954), enf'd (6th Cir. 1956) 230 F.2d 947, 37 LRRM 2740, the the National Labor Relations Board stated "partial strike activity . . . is not entitled to the protection of the act. The vice in such a strike derives from two sources. First, the union sought to bring about a condition that would be neither strike no work. And, second, in doing so, the union in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is, to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives

of the act."

Similarly, in N.L.R.B. v. Blades Manufacturing Corporation (8th Cir. 1965) 344 F.2d 899, the Court of Appeals for the Eighth Circuit, overturning a Board decision which held that three separate walkouts constituted three acts of concerted activity, held that such walkouts were unprotected, particularly in light of the fact that there were indications that such actions would continue. Thus, the discharge of the 31 participants therein were not unlawful.

The Ninth Circuit in Shelley and Anderson Furniture Company v. N.L.R.B. (9th Cir. 1974) 497 F.2d 1200, 86 LRRM 2619, noted that in order to be protected under Section 7 of the NLRA, concerted activity must: (1) be a work-related complaint or grievance; (2) further a group interest; (3) seek a specific remedy or result; and (4) the activity should not be unlawful or otherwise improper. In that case, a 10 to 15 minute protest demonstration took place at the beginning of a certain work day in order to protest dilatory tactics on the part of the employer and demonstrate employee solidarily. A written notice issued at the time of the work action stated that the employees were not engaging in a strike. The court, in analyzing the employees' conduct in the case, stated that the first three elements enunciated above were satisfied. However, it noted at 86 LRRM 2620 that the courts have consistently held that employees are not entitled to the protection of Section 7 when they engage in intermittent or partial work stoppages:

> . . . concerted activities that unreasonably interfere with the employer without placing any commensurate burden on the employees are not protected . . .; concerted activities that are reasonable means of aiding the union's objectives at the negotiating table are protected. Unprotected activities . . . have generally involved

> situations where the employees have reported for work and while receiving their usual wages, have repeatedly and without warning engaged in work stoppages, slowdowns, or sit-ins. Such actions disrupt production schedules and impede the employer from using replacement or temporary employees, while the protesting employees continue to draw their wages. Thus they are unprotected because they make it impractical for the employer to operate his business properly. Generally, in order to be protected the employee must choose either to be on the job and subject to the employers' rules or to be off the job and bear the commensurate economic burden. (86 LRRM 2621; accord N.R.R.B. v. Robertson Industries (9th Cir. 1976) 93 LRRM 2529.)

Thus, it is abundantly clear that the activities engaged in by the employees of the respondent in the fall of 1979 were unprotected to the extent that the employees, with the approval and assistance of their Union, engaged in a series of intermittent work stoppages, performing services for part of a day, then walking out and expecting to resume work on the day following, all with the object of putting pressure on the respondent to sign a collective bargaining agreement as dictated by the Union. As the activities were unprotected, it follows a fortiori that the employer was at liberty to discipline or discharge the participants. See Phelps Dodge Copper Products Corporation, supra; Kohler Company, supra; N.L.R.B. v. Blades Manufacturing Corporation, supra.

However, in the instant case, the respondent did not resort to such extreme remedies, but decided rater to "replace" these employees, particularly the lettuce harvest workers. Clearly, respondent was well within its prerogatives in doing so, and could not be held accountable for any violation of the Act thereby. See Valley City Furniture Company, supra.

The Union and General Counsel, respectively, contend in this case that the work stoppages should be considered protected

activities and the company's response thereto should be deemed a violation of the law. However, their briefs contain so many factual inaccuracies and fallacious interpretations of pertinent case law that they transcend vigorous advocacy and border on the specious. A response to these contentions is therefore in order.

In the factual exposition in its brief setting forth the circumstances surrounding the work stoppages, the Union repeatedly ignores the overwhelming bulk of the evidence and attempts to ascribe as causes for the work stoppages that the workers were responding to a number of disciplinary actions taken by the company (none of which are apparent from the record); the workers' "frustration with the length of negotiations" (whereas the blame for the extended length of negotiating process could be more accurately laid at the doorstep of the Union); the implementation of a wage increase without negotiations; the "workers belief" that the company was stalling regarding the establishment of dates for negotiations; and the "company's discriminatory change in its hiring recall practice." As noted above, while some worker witnesses may have touched upon a few of the aforementioned reasons, the most oft-repeated and fundamental reason for the stoppages noted by these workers was that they wanted to force the company to sign a collective bargaining agreement with the Union, or put simply, that the reason was economic in nature.

Both the Union and the General Counsel rely upon dicta in the Lodge 76 case, supra, to support their position that the intermittent work stoppages should be deemed protected activity. In footnote 14 of that case, 92 LRRM 2881 at 2887, 2888, the Court

said: "It may be that case by case adjudication by the federal board will ultimately result in the conclusion that some partial strike activities, such as the concerted ban on overtime activities in the instant case, when unaccompanied by other aspects of conduct, such as those present in Insurance Agents [N.L.R.B. v. Insurance Agents Union, 371 U.S. 477 (1960)] or those in Briggs-Stratton [supra] (overtones of threats and violence . . . and a refusal to specify bargaining demands . . .) are 'protected' activities within the meaning of Section 7, although not so protected as to preclude the use of countervailing economic weapons by the employer." The General Counsel thus acknowledged that the employer may use "countervailing economic weapons": even under General Counsel's own analysis, respondent clearly could replace its employees legitimately, as has happened here.

The language of the footnote in Lodge 76 itself should remove any further doubt that it is inapplicable to the instant situation. Both the tractor drivers' work stoppages toward the end of October 1979 and the first work stoppage by the lettuce harvest employees which occurred on November 2nd took place in the absence of a "specific bargaining demand" to the extent that the Union had not even presented a complete bargaining proposal containing economic provisions until November 7th.

Both the General Counsel and the Union rely in no small measure upon N.L.R.B. v. Washington Aluminum Company, 370 U.S. 9 (1962), which stands for the proposition, they state, that all concerted activity is protected so long as it is not "unlawful, violent, in breach of contract, or indefensible." Clearly, the

repeated nature of the work stoppages herein renders them indefensible and thus, even under the standard enunciated in Washington Aluminum, the activities would be deemed unprotected. Even if this is not so considered, the facts in the Washington Aluminum case are fundamentally inapposite to those presented here. There, workers engaged in a one day protest to express their dissatisfaction with a condition vitally affecting their health and safety. Unlike the instant case, the stoppage was not repeated and was not based upon a desire to exert economic pressure on the employer.

The Union's discussion of N.L.R.B. v. Inusrance Agents International Union, supra, highlights its misreading of pertinent case law. The brief states that the Supreme Court "upheld the union's right to engage in [partial strike] activity." That case clearly held that the economic pressure exerted by employees therein, which included slow downs, refusing to perform certain work duties and leaving work before the end of the work day, was unprotected. Although the Court noted that the Union might resort to various forms of economic pressure, the fact that such economic pressure was unprotected was not antithetical or inconsistent with the Union's engaging in good faith negotiations. Insurance Agents further went on to delineate the proposition that the use of economic pressure was "part and parcel of the process of collective bargaining." 361 U.S. at 495. Further, under the Lodge 76 case, neither the federal labor board nor the states were empowered to choose which of those economic weapons labor or management would be

branded unlawful[153] should labor or management deploy them. Lodge 76, id. at 2887. It is not subject to question that should the Union resort to economic pressure of one form or another in the form of strike activity, then the respondent is at liberty to resort to economic pressures of its own, including replacement of striking employees (Id.; see also N.L.R.B. v. MacKay Radio and Telegraph Company (1938) 303 U.S. 333.

Both the Union and the General Counsel argue in their briefs that the case of N.L.R.B. v. Empire Gas, Inc. (10th Cir. 1977) 566 F.2d 681, 96 LRRM 3322 contains language to the effect that partial work stops, as long as they are not accompanied by violence, are protected activity. Such was not the holding of that case, but was merely dicta. The case involved the sending of letters by an employee to his fellow employees encouraging them to engage in work stoppages to protest the company's change in its system of paying commissions to them. The basic thrust of the Board decision and the decision of the Tenth Circuit was to the effect that the sending of the letters itself was protected by Section 7 and was considered concerted activity; therefore, a discharge which was caused by the employee's sending of the letters was not lawful. The court indulged in speculation as to what might have happened had the work stops actually occurred. However, since the work stops did not occur, it need not have reached the issue as to the nature of the activity which the employee sought to encourage.

Notwithstanding the foregoing, a further reason for

---

153. "Unlawful" in this context means subject to injunction or prohibition, as opposed to unprotected.

declaring the intermittent work stoppages such as those engaged in by employees of the respondent to be unprotected lies in the fundamental policy enunciated in the preamble to the ALRA, that it is the intention of the Act "to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations . . ." and to "bring certainty and a sense of fair play to a . . . potentially volatile condition in the state." It is difficult to conceive of a situation which would create greater instability than the state, through this Board, giving its sanction to unannounced, repeated, partial work stoppages which have no stated specific objectives other than the broad purpose of bringing economic pressure on an employer. Allowing farm workers to walk off their jobs repeatedly and at will and return at such times as they deem it necessary for their own personal needs, and at the same time not permitting an employer to have any sort of response by way of discharge or replacement of such workers, would foment a condition where agricultural employers could never rely upon the continued work of their employees, a condition so fundamentally necessary in agriculture to cultivate and harvest crops whose seasonal aspects dictate the availability of a stable work force. As noted by the Supreme Court in N.L.R.B. v. Local 1229 IBEW, supra, in discussing the impermissibility of allowing an employee to "collect wages for his employment, and at the same time, engage in activities to injure or destroy his employer's business": "nothing could be further from the purposes of the [the NLRA] than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting

industrial peace and stability." (33 LRRM 2183 at 2187.)

The General Counsel points to the "difference between agricultural and industry" in an effort to buttress its position regarding the status or nature of the work stops. To the contrary, differences between agriculture and industry make even more critical the short span of time that employees are actively engaged in their employment. Therefore, intermittent work stops would have a greater impact in agriculture than in industry, and thus create the need for a more stringent rule in the agricultural setting regarding the unprotected nature of such activities.[154/]

Even if one were to ignore all of the foregoing legal and policy considerations and assume for the sake of argument that the intermittent work stoppages engaged in by the respondent's employees were of a protected nature, it is clear that the respondent could lawfully replace such employees. See N.L.R.B. v. MacKay Radio and Telegraph Company, supra. This is precisely what it did with its lettuce harvest workers, and also with some of its tractor drivers. Despite the assertion by General Counsel that the company's "response to the work stops inherently discriminates against employee rights," no discrimination was made evident by the method either in which the workers were replaced or in the method in which they were rehired. When General Counsel says that "there is absolutely no justification for hiring from the [preferential hiring

---

154. Reference is also made to the heightened impact of a work stop in the lettuce industry, where the company would commit itself to a level of output by 10:00 a.m. based on the productive capability of a workforce which it assumes would complete the work day.

list] in the order in which the names are written," it mischaracterizes the nondiscriminatory nature of such a hiring arrangement. Plainly, the random aspect of this procedure could in no way give rise to any sort of discrimination. Despite numerous attempts by the General Counsel to demonstrate that the replacement and/or rehiring of the workers who engaged in the work stoppages was in some way discriminatory, no evidence was presented which pointed to the conclusion that there were groups of workers who were preferred over others in this regard.

Furthermore, General Counsel assumes a contradictory stance whereby it is expecting this hearing officer and the Board to do precisely what it argues against concerning the protected nature or unprotected nature of the work stoppages: it is asking this hearing officer and this Board to pick and choose between the various economic weapons which might be available to the participants in a labor dispute. While on the one hand, the General Counsel is attempting to give sanction to the intermittent work stoppages, on the other, it is trying to prevent this respondent from using its own economic weapons to meet the challenge presented by the stoppages. Such an attitude plainly flies in the face of the ALRA's avowed purpose of bringing a "sense of fair play" to the field of agricultural labor relations, as well as to the stated holding in the Supreme Court case of Lodge 76 v. Wisconsin Employment Relations Committee, supra.[155]/

---

155. The Board's recently ennuciated opinion in Seabreeze Berry Farms, 7 ALRB No. 40, does not alter the basic principles

(Footnote continued...)

(Footnote 155. continued)

analyzed herein. In that case, the Board, determined that "it must weigh the employer's interest in continuing to do business during an economic strike against the employees' section 1152 rights to engage in concerted activity, evaluating the consequences of the employer's conduct on employee rights in light of the policies of the Act." It recognized N.L.R.B. precedent to the extent that "economic strikers who unconditionally apply for reinstatement have a right to reinstatement until permanently replaced; thereafter they have a continuing right to preferential hiring and full reinstatement upon the departure of the permanent replacements. NLRB v. Fleetwood Trailer Co., Inc., supra, 389 U.S. 375; Laidlaw Corp. (1968) 171 NLRB 1366 [68 LRRM 1252], enf'd (7th Cir. 1969) 414 F.2d 99 [71 LRRM 3054], cert. den. (1970) 397 U.S. 920 [73 LRRM 2537]. An employer is not required to make jobs available to returning economic strikers by discharging permanent replacements whom it has hired in order to continue its business operations during the strike. NLRB v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333 [2 LRRM 610]." The Board noted that under the A.L.R.A., "an employer does not violate the Act by refusing to discharge the permanent replacements in order to rehire the strikers."

Treating the harvest worker stoppage participants as "economic strikers," for the purposes of argument, respondent herein acted fully consonant with the principles enunciated above. That it treated the replacements as permanent ones is evidenced by the fact that it offered them continuity in employment from Bakersfield to Holtville, and enabled them to acquire seniority rights.

The facts as presented by the Board in Seabreeze are somewhat analagous to the instant case, although it should be kept in mind that the stoppage participants did not unconditionally offer to return to work. Their preparation for work on November 13 did not indicate one way or the other whether the stoppages would cease.

> "[We] note that the economic strikers sought reinstatement during the same season in which the strike began and were informed by Respondent that permanent replacements had been hired. By the time the strikers made their unconditional offer to return to work, respondent had replaced all of them and there were no available openings for them. Respondent did not hire any new employees during the remainder of the harvest season. Respondent was not required to prove that it was necessary to replace the strikers for the remainder of the season, and Respondent did not violate the Act by failing or refusing to rehire the replaced economic strikers when they made their unconditional offer to return to work during the same season. There is no evidence that the replacement workers were in fact hired on a temporary basis."

Similarly, respondent herein replaced the stoppage participants and there was no evidence that replacements were hired on a temporary basis.

It is therefore concluded that the respondent did not violate the Act by replacing its lettuce harvest workers who engaged in intermittent work stoppages in 1979. As replacement of said workers was lawful, the subsequent failure to rehire them in the Imperial Valley was likewise lawful, as was the so-called denial of seniority benefits to those workers, or their loss of seniority. Given the unprotected nature of the activity which the participants in the work stoppages engaged in, the respondent could lawfully discharge or otherwise discipline these employees. See Phelps Dodge Copper Products Corporation, supra; Elk Lumber Company, 91 NLRB 333 (1950); John S. Swift Company, 124 NLRB No. 46 (1959), enf'd in part 277 F.2d 641, 46 LRRM 2090 (C.A. 7, 1960).

Further, since the respondent was free to discharge these employees, it follows that it could also lawfully impose other sanctions for this conduct which were less severe, such as laying the people off indefinitely. (See C. G. Conn v. N.L.R.B. 108 F.2d 390 (CA 7, 1939).) It could also discipline some participants while not disciplining others without being subjected to findings of discriminatory treatment. California Cotton Cooperative, 110 NLRB No. 222 (1954); O.P. Murphy and Sons, 5 ALRB No. 63 (1979).

It is axiomatic that "to establish a prima facie case of discriminatory discharge or discriminatory refusal or failure to rehire, the General Counsel must show, by a preponderance of the evidence that the employee was engaged in protected activity, that Respondent had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the discharge or failure to rehire." Jackson and Perkins Rose

Company, 5 ALRB No. 20 (1979); Verde Produce Company, 7 ALRB No. 27 (1981). The vital element of protected activity is lacking in all of the allegations concerning the treatment of the workers who engaged in the intermittent work stoppages. Therefore, no prima facie case was made out in those instances and hence no 1153(a) or (c) violations based on respondent's conduct can be established. Since the participants in the work stops were not engaged in protected activity, the respondent had ample justification for disciplining,discharging, warning, or laying them off.

Accordingly, it is recommended that Paragraphs 31, 41, and 42 be dismissed.[156]

/

/

/

/

/

/

/

/

/

/

/

/

/

---

156. The remaining allegations surrounding other groups who engaged in the stoppages are treated below. Legal arguments pertinent thereto are incorporated by reference.

2. PARAGRAPH 13: LAYOFF OF TRACTOR DRIVERS

a. General Counsel's Version

General Counsel alleged that "[O]n or about October 19, 1979, respondent laid off [nine] employees because of their membership in and support of the UFW union and because they engaged in concerted activities with other employees."

On October 15, tractor drivers employed by respondent in Bakersfield engaged in a work stoppage. When they returned to work on October 16, they found that the doors were locked to the yard where the tractor drivers and other workers congregate and obtain equipment. According to Francisco Luevalo, one of the drivers and a discriminatee, Bob Garcia arrived and told the assembled group of workers that the company was closing the ranch down for two weeks, and that it was laying people off for having "abandoned the job."157/

Following the announcement, the group went over to the front of the office, also located nearby, and remained there for some time. Later that day, after noon, Fred Andrews arrived and asked the workers if they wanted to work or not. Andrews had a discussion with Luevalo, stating in essence that he wanted the people to come back to work. Luevalo replied that the workers "wanted to have a contract"; that it had been a long time since the election.

On October 17th, the tractor drivers, after being on the job for three hours, stopped working again. The next day, the 18th, these workers left their jobs after four hours of work. On the

---

157. The ranch did not "close," obviously, since work was available the next day.

19th, the tractor drivers worked the entire day. On the next day scheduled for work, Luevalo and the other tractor drivers were informed by foreman Jesse Terrazas that for him and eight other drivers there would be a two-week layoff. According to Luevalo, there was work remaining to be done at the time of the layoff, including cutting cotton stalks, breaking up ground, discing and, in his words, "the entire preparation of the land that is begun year after year." Luevalo stated that he had not been laid off in October 1978. He also stated that there had been a layoff of tractor drivers in August 1979. The group of workers who had been laid off in August returned to work in November with this particular group that had been laid off in October.

Luevalo testified that when he returned to work in November 1979, he saw approximately 15 to 20 new people doing the tractor work who had not worked at the company before. This group included six women, some of whom were married to Respondent's foremen. At that time, the work being performed consisted of cutting stalks and discing, planting, and chiseling. Luevalo claimed that when he returned, he saw equipment at the company that he had not seen before: there were contractors performing the aforementioned tasks, operating equipment and machinery which did not belong to the company but rather which belonged to the contractors themselves.

Another tractor driver, Carlos Heredia, testified that there was no layoff in October 1978; however, there had been a layoff of tractor drivers that year in July and August. This same layoff took place in 1979 as well. Heredia testified that when he was laid off in October, he was performing a certain operation,

(squaring off rows) which involves following a piece of equipment that was constructing those rows. He did not complete this operation in the particular field in which he was working before the layoff. Heredia testified that in previous years during October the tractor drivers would clean the yard, repair or prepare chisels, discs, and other equipment prior to cutting stalks. Also in previous years, tractor drivers in October did some cutting stalks, discing and chiseling.

The tractor drivers did not all return to work in November simultaneously. Approximately four of them came back on the first day after the layoff, with the remainder reporting on the following day. Similarly to Luevalo, Heredia testified that when he returned to work there were about 15 or more new employees working at the respondent's operations, in addition to a contractor, Mario Boni. Heredia testified that in previous years contractors had usually performed work harvesting onions, garlic, carrots and picking cotton, but that in November 1979 he saw contractors also cutting cotton stalks. Heredia likewise corroborated Luevalo's assertions that there was equipment in addition to that of the respondent performing operations for the respondent.

On cross-examination, Heredia could not recall discussing the work stoppages with his fellow workers in the week prior to the layoff. He noted, however, that the representative of the tractor drivers, Ramon Navarro, told the workers that the work stop was going to take place. Heredia also stated that Felipe Pulido was the "captain" for the tractor drivers who kept the workers informed on matters involving the union, including when work stoppages were to

occur.

Tractor driver Margarito Alvarez, the nephew of company supervisor Delores Alvarez, testified that on the 15th of October 1979 there was a mass demonstration outside the company offices in Bakersfield: people carried Union flags and attempted to display their desire to have a contract signed. On that day, work proceeded until approximately noon, after which the workers gathered in front of the company offices and remained there until the late afternoon.

Alvarez stated that there was no layoff of tractor drivers in either October 1977 of 1978. To the contrary, additional people were employed during those periods. Alvarez also testified that he overheard his uncle talking about a worker, Hector Velarde. Velarde was a tractor driver who had lost his seniority, according to Alvarez, yet he continued to be employed by the company during the time in question.

Alvarez noted that the captains and the coordinators were the people who told the workers the time to start the demonstrations, or the time to leave in the event of a stoppage.

On cross-examination, Margarito Alvarez admitted that cotton was still being harvested in November, and upon further examination, that stalks were also being cut at that time. Despite his testimony that the cutting of stalks had already begun by the layoff of October 19th, in a declaration dated October 21st, the witness stated "very soon they will be needing more workers as every year when the cotton stalk cutters begin."

Tractor operator Cosme Montolla, another discriminatee, testified that in the week prior to the layoff, equipment was being

prepared at the shop for the destalking operation, i.e., the tractors were having the destalkers attached to them.

b. Respondent's Defense

Respondent's payroll records indicated that on the 19th of October, the nine tractor drivers named in the complaint were placed on layoff status. Respondent began to recall these drivers around the 7th of November. Seniority lists for these drivers revealed that they were the least senior in their job classifications. The records also reveal that the wives of three of respondent's foremen were hired on or about November 28, 1979. Despite the impression conveyed by witnesses for the General Counsel, these drivers were not hired until well after the tractor drivers alleged in the complaint as discriminatees were hired back by the respondent.

Payroll records showed that on the 19th of October, respondent employed 16 tractor operators. The next day, October 20th, it had only three working. More realistically, however, since the 20th was a Saturday, when respondent resumed its weekday operations on October 22nd, there were eight tractor drivers employed. Of the individuals who had been laid off on October 19, all were "Class II" tractor drivers.

Cotton harvesting is performed for respondent by a custom harvester. Most of the cotton fields under respondent's charge are harvested twice, with the exception of two fields amounting to 425 acres out of a total of 8,600 in Bakersfield. Cotton records demonstrated that first picking of cotton began at respondent's Bakersfield locations on October 4, 1979, with the first picking ending on November 6th. The second picking began on November 6, and

concluded on November 27. After the second pick has been completed, a tractor operation known as "stalk cutting" is performed. Respondent generally uses its own employees for stalk cutting, but has also utilized those of subcontractors in the past for this operation.

Records additionally showed that tractor work was subcontracted in the latter part of November after all the persons on layoff and alleged as discriminatees were recalled. A good portion of the subcontracted work involved stalk cutting.

Counsel stipulated that there were no tractor drivers in Class II with less seniority than Placido Lopez who were working at the respondent's during the week ending October 23, 1979. Placido Lopez, one of the named discriminatees, had the lowest seniority of any of them, as seniority is listed on the September 30, 1979, seniority list. Additionally, in the period for the week ending October 30, 1979, no Class II tractor drivers with less seniority than Guadalupe Torres, who had more seniority than any of the named discriminatees among the Class II tractor drivers, was working for the respondent.

Lionel Terrazas is a tractor foreman for the respondent employed in Bakersfield. He testified that generally speaking, the particular time of year when tractor work is busiest is when the company begins to prepare the ground for cotton replanting.

The following is a list of tractor operations involved in cotton cultivation begun after stalk-cutting:

1. Stubble discing (turning the soil; cutting remaining stalks);
2. Chiseling (digging with three-shoveled tool to a 25" depth);
3. Discing (with finishing disc);
4. Ammonia injecting;
5. Adding Treflan (herbicide) with disc;
6. Listing or furrowing out (constructing rows and planting beds).

Following the above, the field will be watered. All of the aforementioned operations are accomplished between the beginning of November, approximately, and the end of January. This encompasses, according to Terrazas, the busiest season for the tractor drivers.

There is generally a layoff when the furrowing out is completed. After furrowing out and watering, a rolling cultivator is used, following which the crop, cotton, is planted. Planting takes place about the middle of March. Following this, tractor operations resume when there is a stand; then a cultivator is brought back in the fields. Often there is no layoff between the planting and the cultivating since there is extensive acreage, and the field which was planted first is ordinarily ready for cultivation by the time planting in the last field is finished.

Final cultivation is done approximately the first of July. There is then another layoff of tractor drivers which lasts for about a month or a month and a half. Following this layoff, tractor drivers are assigned tasks involved in the planting of the lettuce, which occurs, under ordinary circumstances, in August.[158] Preparation for the lettuce work is begun in late July. After the lettuce has been planted, the yard is cleaned a bit and repair work

---

158. Tractor operations for lettuce are described elsewhere.

is done on equipment.

At the time of the layoffs in question, the drivers were, according to Terrazas, scraping and discing ends of fields, and working in the yard moving equipment. The reason proferred by Terrazas for the layoff was that the respondent was caught up in all of its work by that time. The drivers were recalled to work as soon as the company was ready to begin cutting stalks.

Terrazas was personally involved in recalling people to work. When the list of people who had been laid off was exhausted, Terrazas replaced those he could not contact with new personnel. Generally speaking, Terrazas tries to contact workers by telephone, or, if they have no telephone, he calls their friends. New people were hired to work on caterpillars, chiseling and stubble discing. Some of the equipment the new personnel worked on was equipment which had been rented. However, no new people had been hired until all those who had been laid off were recalled. Additionally, subcontractors were hired to prepare the ground in advance of the winter rains. This is necessary because tractors cannot go into the fields when they are wet or muddy.[159] According to Terrazas, in December, tractors work day and night to get all the work finished, and are exceedingly busy.

---

159. Fred Andrews corroborated this testimony, and added that at this time of year there is also a rush to complete tractor operations before cotton "pre-irrigation." This is due to the fact that respondent must use its water allotment for the year, which has already been paid for, but which is lost if not utilized by December 31. Preirrigation consists of soaking the cotton field acreage to a depth of five feet.

Terrazas utilizes a seniority list to lay off drivers or recall them, and did so with the layoff in question. The two tractor supervisors, Delorez Alvarez and "Blackie" or Albert Poisson, do not specifically order that Terrazas recall particular individuals, but merely tell him that certain work has to be performed. Terrazas determines how many men are required to do it.

Jesse Terrazas, another foreman of the tractor drivers, (hereafter referred to as Jesse) advised the Class II tractor drivers in latter October, 1979 that nine of them would be laid off. According to Jesse, he informed them at that time that there was not enough work for them at the moment, and that there would not be any work available until the company started cutting stalks and beginning field preparation. These tasks would follow the second picking of the cotton which had not yet been done. The foreman estimated that it would not be very long before they would be called back.

Jesse testified that the work prior to the layoff was "kind of slow." Some drivers were working in the yard, cleaning up, etc.; some were preparing cotton stalk shredders to go out into the fields so that they would be ready when they were needed. The machinery used for cutting the cotton stalks needed some general maintenance. Following this, the equipment was then tested in the fields by running it for a few days to make sure that everything was in order.[160] The company has a total of three shredders. It took about three to four days to get them field-ready. There were also

---

160 This was undoubtedly the stalk-cutting which Margarito Alvarez saw prior to the layoff.

"odd jobs" performed immediately prior to the layoff, discing ends of fields, and working on the spray rigs, motor graders and back hoes. The workers were essentially just standing by, "waiting for the go on the cotton."

Jesse and the other foremen made the decision to lay off a certain group. The ones that were not laid off continued doing odd jobs, cleaning the yard and helping to prepare the shredders. Jesse also stated that the layoffs were determined according to seniority.

Jesse began recalling the tractor drivers about two weeks after they were laid off. The first day of the recall coincided with the commencement of the second picking of the cotton. The second pick proceeded fairly rapidly, as the custom harvester involved in that operation had many pieces of equipment at his disposal. The drivers were called back roughly in the order of their seniority. The exact seniority order was not followed for the recall since, as Jesse testified, he would attempt to reach the drivers by telephone or by notifying a fellow worker. In the event that he was not successful, he would keep trying. Thus, some were contacted before others. One of the drivers, also alleged as a discriminatee, Jose M. Lopez, had already taken a respondent's job at the shop. The remainder of the people were all called back within two weeks.

After work resumed, more people were hired towards the end of November to drive the equipment. Specifically, three women who were actually the wives of some of the foremen were hired at that time. The women drove caterpillars, either discing or subsoiling.

Jesse testified that there was no tractor driver work

subcontracted until after respondent recalled its own tractor drivers, except for work in the cotton harvest which is always done by subcontractors. He stated further that during his tenure with the company, at that particular time of year, there has not customarily been a layoff of tractor drivers. He explained that in the fall of 1979, unusual weather and field conditions also contributed to circumstances giving rise to the layoff.[161/]

c. Analysis and Conclusions of Law

Incredibly, the General Counsel did not draw any connection or parallel between the Bakersfield tractor drivers' work stops during the week of October and the subsequent work stops of harvest employees and others in November, discussed above. General Counsel's brief does not bother to cross-refer to its legal arguments raised in connection with the latter when it treats the former. It merely assumes that the drivers engaged in "union activity,"[162/] without discussing whether the activity was protected, and argues in broad conclusionary language that the layoffs were discriminatory and motivated by "respondent's anti-union sentiment."

Nevertheless, it is clear that the repeated, intermittent walkouts of the tractor drivers in the week of October 15, 1979, were identical in nature to those in which the respondent's Bakersfield harvest employees participated. Driver Luevalo testified that the reason for the stops was that the drivers "were

---

161. This testimony was not refuted.

162. General Counsel does not refer to any specific "activity" along these lines. One can only speculate that General Counsel was referring in this connection to participation in the work stops and the attendant demonstrations at the company office.

trying to show that we were united and wanted a contract." Thus, the basis of the "protests," or work stops, was an economic one, i.e., that they were calculated to pressure the company to sign a collective bargaining agreement.[163] The fact that respondent chose to lay off the least senior of its drivers during this period while retaining others does not create an inference of discrimination. Respondent may, when confronted by unprotected[164] conduct, make example of a select few: it is not required to discipline and/or discharge on an all or none basis. (See O. P. Murphy (1979) 5 ALRB No. 63; see also, California Cotton Cooperative (1954) 110 NLRB No. 222.)

As I have found the lettuce harvest worker walk-outs to be unprotected, the tractor driver's actions must be viewed in a similar light. Respondent's actions in laying them off, even if directly attributable to the walk-outs, could in no sense be termed unlawful or discriminatory, but rather were a permissible response to such actions.

Notwithstanding any of the foregoing, Respondent argues that the layoffs were essentially the result of a lack of work. Evidence by way of stipulation points to the conclusion that those drivers laid off on October 19 were the least senior Class II

---

163. No other evidence or testimony was elicited by the General Counsel on this issue. The various rationales for the stoppages by harvest workers would obviously not apply, as the driver stops ante-dated, for example the "late" recall of the Orozco crew cited by some of the cutters, and began the day before negotiations were scheduled for October 16.

164. The unprotected nature of this conduct is discussed fully in the section regarding the "discharges" of lettuce harvest workers.

drivers in Respondent's employ. Although it is clear that new employees and subcontractors were retained in November 1979, thus creating the inference that the layoff contributed to Respondent's need to "catch up"[165] in its work, none of these were hired during the two-week layoff period.[166] Further, no new employees were hired until all those laid off had been recalled.[167]

Lionel Terrazas, tractor foreman for Respondent for five years, testified that all necessary work had been completed by the time of the layoff, and the next operation to be performed, cotton de-stalking, had to await the second picking of the cotton. Respondent's records reveal that the earliest date when cotton was second picked was November 10. Terrazas stated that similar layoffs, i.e., prior to the second cotton pick, occurred in prior years.[168]

It is concluded that General Counsel has failed to meet its burden of proof regarding this allegation. Broadly stated, to establish a violation of section 1153(c), the General Counsel must show that individuals engaged in union and/or protected activity,

---

165. The mutually corroborative testimonies of Fred Andrews and foreman Angulo concerning the urgency of completing the tractor work within a certain time frame substantially rebut this inference.

166. The testimony of Luevalo and Heredia, to the effect that new equipment and personnel were being utilized at the time they were recalled, was substantially rebutted by payroll and subcontractor records. The credibility of these witnesses thus undermined, their testimony, where it conflicts with that of other witnesses, is discredited.

167. As noted, payroll records show that the foremen's wives were not hired until November 28.

168. Luevalo and Patricio Alvarado, another driver, testified merely that there were no layoffs in October 1978.

the employer had knowledge of that activity, and that it provided the motivation for discriminating against them in regard to hiring, firing, or layoff. (See generally Jackson and Perkins Rose Company (1979) 5 ALRB No. 20.) The record is devoid of any evidence, save for Luevalo's and Margarito Alvarez' statement that the drivers "wanted a contract," of the reasons for the driver walk-outs. Thus, no "union and/or protected" activity has been shown; merely, that for three days during the week of October 15, 1979 drivers left their jobs before the day ended for undefined reasons. Further, other than vague assertions from General Counsel's witnesses concerning respondent's work load during the weeks of the layoff, respondent's version of the facts (i.e., that there was insufficient work for the drivers) remains substantially uncontroverted, and must be credited. Substantial evidence thus supports the conclusion the motivation for the layoff was a lack of work and was justifiable on economic grounds.

Accordingly, it is recommended that this allegation be dismissed.

/

/

/

/

/

/

/

/

/

3. PARAGRAPHS 35 and 36: (A) DISCRIMINATORY DISCHARGE AND REPLACEMENT OF JESUS LOPEZ AND JESUS MEDINA; (B) UNILATERAL SUBCONTRACTING: DISCRIMINATORY LAYOFF OF PEDRO ABRICA "AS A RESULT"

a. Paragraph 35

Jesus Lopez and Jesus Medina have been employed by respondent as tractor drivers at its Holtville location since June 1977. Medina demonstrated support for the Union by wearing a UFW button, passing out leaflets, and by putting a Union flag on his tractor. Lopez testified that he wore a Union button. Rudolfo or Rudy Angulo, their foremen, was averred to have noticed the buttons on the two employees and to have commented on it.

On October 29, November 2, November 9, November 12, and November 14,[169/] tractor drivers in Holtville participated in work stoppages, commencing employment on those days, working for a few hours, then walking off their jobs. Both Lopez and Medina participated in the stops, freely admitting that their rationale for doing so was grounded in economic factors, i.e., to put pressure on the company to sign a contract.

After the work stoppage which occurred on November 14th, Medina and Lopez were replaced with individuals by the names of Lowell Larson and Gary Goodsell. Lopez and Medina were performing two-row spiking that week, while two other drivers were performing

---

169. As is apparent, these stops were more or less coordinated with those occurring in Bakersfield among the lettuce harvest crews on November 2, 8, 9 and 12.

three-row spiking.[170/] Angulo explained that the operation of the three-row spiker is more difficult than the two-row spiker, since the two-row spiker has two wheels in front and two in the back, while the three-row spiker has one wheel in front, two in the back and also has cultivating knives attached on the front. Angulo stated that he picked Medina and Lopez to replace because the two-row spiking operation was behind schedule, and they were the two persons with the least amount of seniority who were performing that particular operation.

---

170. Angulo during one of the more undoubtedly enlightening points in the hearing, extensively described the tractor operations necessary to be performed on a field in order to prepare the field for lettuce planting and cultivation. The following is a capsulization of that testimony, and provides a context in which the tractor driver layoffs can be better understood:

A. Initial operations:

1. Splitting borders (knocking down dirt mounds surrounding fields which contain irrigating water);
2. Stubble Discing (like plowing; breaking up ground; removing old roots);
3. Double subsoiling (penetrating earth with tools having 36 inch shanks;
4. Repeat stubble discing to break up clods;
5. Land planing (leveling ground): twice;
6. Border reconstruction with border disc;
7. "Pull taps" (contruct three foot wide humps on either side of the border);

Flood irrigation; then

8. Repeat splitting borders;
9. Regular discing (smaller than stubble disc; kills weeds after irrigation);
10. Fertilizer spreading;
11. Repeat regular discing;
12. "Float the field" (level the field; lighter equipment used than with land planting);
13. Listing (contructing rows one foot high and 42" apart);
14. Mulching (breaking up clods; evening rows; applying herbicides);
15. Precision planting (two seed lines per row; also insecticide application);

(Footnote 170 continued----)

(Footnote 170 continued ----)

Sprinkler irrigation (not performed by tractor department).

The seven operations between initially splitting the borders and then reconstructing them and flooding the field will take about eight days for a 70 acre plot. The estimate is based on operations being performed over a 20 hour shift, which is normal for the company. In total, all of the aforementioned operations from border busting to the start of sprinkling on a 70 acre plot would take about two weeks.

B. After primary sprinkling:

1. Ditch construction for rubber irrigation pipes;
2. Tap construction (depending on ranch topography).

C. Sprinkling: 36 hours total; initial sprinkling 18 hours; dry-out period; sprinkling again for 6-10 hours.

D. Sprinklers removed; field furrow irrigated.

E. Thinning after stand of lettuce appears; then

1. Ditches knocked down;
2. Beds "rolled" (tractors pull heavy metal cylinder four rows wide to seal top of bed and moisture therein).
3. Rear-mounted four-row cultivation and fertilizer application.
4. Spiking (pulling rear-mounted tool bar with 2½ foot shovels which penetrate furrows and loosen dirt);
   (a) Two-row spiking; then
   (b) Three-row spiking (tractor also has front-mounted cultivator with side knives cultivating the sides of the furrow below the seed line);
5. Side dressing (pulling shanks along furrow sides while applying fertilizer and pulling furrowing out shovel, which gathers loose dirt from the spiking, puts it on the side of the bed, and leaves a furrow for water);
6. Ditch construction with motor grader: also taps pulled.

Then second watering. Between the first and second watering about five weeks elapse.

The aforementioned usually constitutes all of the operations necessary for cultivating lettuce. At times however, fertilizer has to be reapplied to the field, the ditches knocked down, and light spiking performed. After this, side dressing and furrowing out are done.

Angulo stated that the period in which the work stoppages occurred was particularly critical since it was the time during which spiking had to be done in order to get the field side dressed and ready for water. Angulo testified that he had started getting behind in his tractor work approximately 10 days or a week before the 14th or 15th of November. In order to alleviate this problem, Angulo subcontracted some tractor work. Specifically, on November 8th, an outside contractor was brought in to perform spiking. By Angulo's estimate, the retention of this contractor solved the problem for a few weeks.

Angulo testified that the work stoppages contributed in no small measure to his getting behind in the tractor work, occurring as they did during a critical period in the lettuce cultivation. The vagaries of the weather, lack of equipment or equipment shortages (since equipment is often exchanged between Bakersfield and Holtville) also create problems in completing tractor work on schedule. In the past, when the tractor operations have gotten behind, it was necessary for the respondent, according to Angulo, to obtain outside help in custom tractor work. Respondent has been doing so for at least 8 to 10 years.

Angulo noted that one individual whom he retained during this period, Filiberto Valenciano, was very active in Union activities during this period but remained working. Angulo also admitted that he saw Lopez and Medina involved in Union activities of a sort which included the wearing of a Union button.

After Goodsell and Larsen were hired, five other drivers were also retained on the 14th or 15th of November. These people

were trainees who were riding and operating tractors in conjunction with Larson and Goodsell. Another driver, Baltazar Garcia, was hired on the 12th of November on a temporary basis to operate a four-row cultivator. Lopez and Medina had never operated a four-row cultivator since, in the estimation of Mr. Angulo, they did not possess the necessary skills. Parenthetically, it is noteworthy that Garcia did not participate in any work stops.

Angulo explained that he hired the five trainees because he was uncertain of the eventual outcome of the walkouts, i.e., whether they would evolve into a full-blown strike. By his own estimate, he had to be prepared in order that the crop could be put in on time. The trainees only worked for a limited number of days since, following this period, there were no more walkouts and the trainees were deemed not needed. Medina and Lopez were also rehired after the work load increased.[171]

However, Angulo continued to subcontract tractor work during that time. Lopez and Medina were temporarily replaced since Angulo believed he was too far behind on a number of fields. For example, the field that Lopez and Medina were working on, the Tucker Ranch, was already a week to 10 days late by the 14th of November. The plants had started to turn yellow, and according to Angulo, the field eventually generated a very poor crop, with the lettuce being small.

---

171. The parties stipulated that Medina was rehired on December 28 and Lopez on December 29 after Goodsell and Larson were laid off. Thus, Medina and Lopez were not discharged as alleged, but were merely laid off.

b. Paragraph 36 (Pedro Abrica; Unilateral Subcontracting)

Abrica testified that he was a tractor driver for respondent since January, 1979. Abrica claimed to have worn a Union button which said, "We Want a Contract" in addition to participating in the work stops. Abrica was laid off for about two weeks in December, 1979. He admitted that he was the most recently hired driver (apart from Goodsell, Larson, Garcia and the other trainees) and that he had never done any precision spiking in the lettuce. Abrica further admitted that there was no more caterpiller work when he was laid off, only spiking.

Angulo characterized Pedro Abrica merely as a caterpillar operator. Angulo recalled him from layoff simply because Abrica was needed to perform caterpillar work. Angulo steadfastly denied any knowledge that Abrica had engaged in any Union activities, that he ever saw him wear a Union button or possessing a Union flag. Abrica had performed work other than that on the caterpillar such as splitting borders and chopping lettuce (i.e. discing the crop) which, in Angulo's estimation, did not require much skill and which did not alter Abrica's basic job classification as a caterpillar operator.

Documentary evidence admitted pursuant to stipulation demonstrated that respondent expended the following sums for subcontracted tractor work in the Imperial Valley in the following relevant time periods:

October 1977	$ 2,064.00
November 1977	24,305.25
TOTAL	$ 26,369.25

October 1978		$ 3,715.00
November 1978		1,290.00
December 1978		43,358.70
	TOTAL	$ 48,363.70

October 1979		$ 2,690.00
November 1979		10,239.50
December 1979		8,425.50
	TOTAL	$ 21,355.00

Angulo stated that subcontracting in 1979 took place in the Imperial Valley involving tractor operations for the lettuce, carrot and wheat crops. As noted above, Angulo justified the 1979 subcontracting on the basis that he was "behind" in the tractor work. Angulo arranged for a Walter Britschsi to supply equipment and personnel to perform spiking work in the lettuce. The work was performed over four different fields comprising a total of 280 acres.

The operation performed by Britschsi is termed "four-row" spiking, since the equipment pulled by the tractor operates over four rows. Each field has spiking performed on it twice. One driver with a four-row spiker can complete 50 acres of this work in one day. Resondent does not possess the equipment to perform the four-row spiking operation. It has two and three-row spikers only. When the task is performed utilizing the company's own equipment, two two-row spikers operate next to one another, and are followed by two three-row spikers, the first of these preceding the second by a few hours. Thus, there are in essence three spiking operations in

each field. When a four-row spiker is employed, there are two such operations. Obviously, utilizing a four-row spiker will curtail the amount of time needed to perform the full spiking operation in comparison with the time it would take respondent, with its own equipment, to perform the task. It would appear that being behind schedule in the spiking work would amply justify the use of this technique.

Furrowing-out shovel work was also preformed in part by a separate company, Growers Agricultural Service, which was contacted around the 15th or 20th of November, according to Angulo. In addition to furrowing out, Angulo also requested that the company perform "side dressing" on certain fields, which entails the application of fertilizer in the furrows. Growers Agricultural Service provided the driver. Furrowing out and side dressing can be done in one operation. Growers Ag Service did this operation on one 70-acre parcel which took its worker one day and a half to perform. This company also worked on two other 70-acre parcels for the respondent. Angulo further recalled that Britschsi and Growers Ag Service were used for work on the Baker Ranch and also to perform operations on the company carrot crop.

Some of the tractor work customarily subcontracted by the respondent in prior years was heavy tractor and caterpillar work, and included spiking and side-dressing. Although Angulo could not initially remember exactly whether these functions had been subcontracted in 1978, he later recalled that respondent had sufficient personnel and equipment to perform the spiking in that year. In 1979, respondent worked about two or three hundred more

acres than it did in 1978.

As noted above, respondent hired about four drivers for one day of work on November 14. Each drove a company tractor. Goodsell and Larson, hired for the spiking operation, worked for about three weeks.

Angulo stated that the respondent has a seniority policy applicable to tractor drivers. Seniority is established from the date when an individual starts working: layoffs are determined according to seniority, i.e., to date of hire rather than the number of days worked. In addition, there are two separate classifications for tractor drivers; Class I and Class II. In the Imperial Valley, the company has four Class I tractor drivers. Class I tractor work is more highly skilled than that performed by Class II drivers. Generally, a Class I tractor driver perfoms precision planting. Class II drivers can perform several different operations in the broad category of "heavy tractor work." This work includes caterpillar work as well as wheel tractor operating.

c. Conclusions

As I have held that the participation in the work stoppage is to be considered unprotected activity (see discussion, supra), the layoff of drivers, Medina and Lopez, was by no means unlawful. Even if an argument might be constructed that the layoff was somehow discriminatory in the sense that they were laid off out of seniority (other Class II tractor drivers in Holtville, Antonio Ceballos and Pedro Abrica, were not laid off during this time), since those drivers had engaged in unprotected activity the respondent was at liberty to discipline or not discipline them as it saw fit.

Plainly, respondent provided ample business justification for doing as it did, since it was getting behind in its tractor work and needed reliable workers to perform operations at a critical time. Further, the fact that the drivers were subsequently rehired militates against a finding of an all-pervasive discriminatory scheme.

Regarding Pedro Abrica, the evidence is scanty regarding his participation in Union activities. Abrica, however, did engage in work stoppages; but such actions are, once again, regarded as unprotected. The company provided ample and credible business justification for his layoff which was not refuted, in that Abrica did not possess the range of skills which the company required during that time period and for which his services would be necessary. Simply stated, he was laid off because the company ran out of work for him to do. Abrica did very little wheel tractor work and has never done any spiking or cultivating. The companies which performed the subcontracted tractor work did not perform any caterpillar operations. Thus the subcontracting and Abrica's layoff had little, if anything, to do with one another.

Regarding the Section 1153(e) aspect of the allegation (unilateral subcontracting), the evidence clearly points to the fact that such subcontracting was merely a continuation of past practice. General Counsel did not refute this. Subcontracting of tractor work in general had been discussed on numberous occasions with the Union during the course of negotiations (see negotiations discussions, supra), and was done with the knowledge and acquiescence of the Union. Furthermore, even assuming that the particular type of

tractor work (spiking) which respondent subcontracted in 1979 had not been subcontracted before,[172] the disruptions in tractor work attributable to the work stops provided ample business justification for the subcontracting of certain tasks. An analogy might be made to a situation involving the lack of an employer's duty to bargain regarding the method which it uses to procure strike replacements. (See Colace Brothers, Inc., 6 ALRB No. 56 (1980).)[173] Similarly, in order to rectify problems created by work stoppages, such as falling behind schedule, respondent could lawfully accelerate procedures through the use of subcontractors.[174]

/

/

/

/

/

/

/

/

---

172. This appears to be the basic thrust of General Counsel's argument regarding a "unilateral change."

173. There is case law which indicates that the duty to bargain is suspended during periods when a union engages in unprotected activity. See Phelps Dodge Copper Products Corp., 101 NLRB 360, 31 LRRM 1072 (1952); Kohler Co., 128 NLRB 1062, 46 LRRM 1389 (1960); see also Admiral Packing Company, et al., 7 ALRB No. 43 (1981), p. 12, fn. 4.

174. The suggestion made by General Counsel regarding the application of Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) is clearly erroneous. No proof was adduced that respondent's subcontracting permanently eliminated unit work.

4. PARAGRAPH 17: CHANGES IN LOAN REPAYMENT PROGRAM

There is in effect at respondent's operations a payroll advance program. Generally, any foreman or supervisor may approve the furnishing of a pay advance to a particular worker. The person who receives such an advance signs a "payroll advance form." The loan or payroll advance agreement contains language to the effect that the worker promises to pay a certain sum by having deducted a stated amount each week from his/her check. General Counsel alleged that respondent unilaterally changed its past practice regarding repayment for these advances or "loans."

In the normal course of events, the payroll period for respondent's Bakersfield employees ends on a Tuesday; their paychecks are delivered on Friday. On October 15th, 1979, employees at respondent's Bakersfield operation engaged in a work stoppage.[175/] Ceasing work at noon, between 30 and 50 employees carried flags and picketed the offices for about three and one-half hours. On the day following, the 16th of October, no work was scheduled.

During the week in question the payroll was computed on Tuesday night, the 15th. The checks were prepared and ready for distribution on Wednesday the 16th since the company was uncertain whether workers would return to work at all.

Employee Vicente Cardenas had received a $200.00 advance as of September 14th. Twenty-five dollars per week for repayment

---

175. Evidence showed that shop employees including welders and mechanics, tractor drivers, and irrigators participated in the stop.

was deducted from his check for each week following, with the exception of the check which he received on October 16th, from which $100.00 was deducted. Cardenas had participated in the work stop of October 15.

Testimony revealed that all workers who had payroll advances as of that date had deducted the entire amount of their outstanding balance from the check which they received on the 16th. Shop employee Ignacio Saragoza and welder Miguel Sanchez both testified that as of the October 15 work stoppage, they had requested and obtained payroll advances, and that the entire amounts they owed, respectively, were deducted from the checks they received that week. These employees also had taken part in the work stop.

Interestingly, records show, insofar as Mr. Cardenas was concerned, that he was re-advanced $75 on the 23rd of October. Respondent therefore did not terminate its payroll advance program at any time after the 16th. It has remained in full force and effect since that date.

Uncontroverted evidence showed that in the event an employee is terminated, quits or is laid off, the entire amount of any outstanding advance he/she has deducted from his/her check. Accordingly, it may be inferred that in the week of October 15th, when respondent's workers engaged in work stoppages, respondent was faced with the uncertainty of whether or not its employees would engage in a full-blown strike, or whether their action would be purely temporary. Consequently, respondent followed its past practice when employees do not return to work and have a payroll advance outstanding: it deducted the total amount owed from the

last check received before the worker left respondent's employ.

In this particular case, although workers returned to work after October 15th, the payroll checks were prepared on the night in which they engaged in a work stoppage. It might accordingly be inferred that once respondent set forces in motion to deduct advances from these checks, matters could not be reversed. The fact that the workers would return and not engage in a strike could not have been known to respondent at the time.

More importantly, the evidence demonstrated that by so doing respondent was not departing from its past practice. Although denominated "loans" by the General Counsel, the sums advanced by the respondent were not loans in the strictest sense. They were rather advances against monies that might be earned in the future and which respondent could recoup from wages earned.[176/] Faced with the possibility of a strike, respondent sought to recover the outstanding advances. Finally,the payroll advance program was not eliminated and remained in effect for respondent's employees to avail themselves of. In reality, no "change," as such took place. It is therefore recommended that this allegation be dismissed.[177/]

---

176. Strengthening this assertion was evidence that harvest workers, who were seasonal, could only obtain advances against monies that they had already earned, but for which they had not yet been paid. Workers such as shop employees generally work year-round and hence are not considered seasonal. Hence, respondent has a policy of advancing them sums in the expectation that future earnings will enable it to recoup the advance.

177. General Counsel argues in its brief that the recall of advances was somehow in "retaliation" against workers engaging in "protected concerted activities." It should be observed that this conduct was not alleged as a violation of section 1153(c), as the language above seems to suggest. Discussed elsewhere is the finding that such activities were not in fact "protected."

5. PARAGRAPH 30: THREATS BY FELIPE OROZCO

General Counsel alleged that "on or about November 12, 1979, respondent through...Orozco threatened to discharge its employees because they had engaged in concerted activity."

Antonio Alaniz, lettuce harvest worker and representative for the crew of Felipe Orozco, testified that his crew engaged in a work stoppage on November 2, 1979.[178/] On that day, when the people walked out of the field at approximately 9:30 in the morning, foreman Orozco asked Alaniz what was going on and what was the reason for the stoppage. Alaniz replied that Orozco knew the reasons Orozco responded that Alaniz was doing something "real bad" by stopping the people. Alaniz answered that he was not stopping the people, that the people were protesting. Orozco then said, according to Alaniz, "Get out of the field, work is over. The company had already marked the people from the melon season. The crew was more 'burnt out' than the others." Whereupon Orozco allegedly challenged Alaniz to a fight.

Alaniz was unable to explain what Orozco meant by characterizing the crew as "more 'burnt out'..." He further admitted that he had not worked in the melon season. Accordingly, it appears illogical that Orozco would discuss Alaniz' situation in that context.

The foregoing was the sole testimony presented by General Counsel on this issue. No corroboration was provided for Alaniz'

---

178. The work stoppages are discussed at length above.

assertions.[179]

Orozco recalled that on November 2, 1979 there was a work stoppage in Bakersfield. On that day, after about three hours of cutting, a member of his crew by the name of Antonio Alaniz told him that the workers were going to stop. Alaniz then told the people to walk out of the field. Orozco asked Alaniz why hadn't he warned the foreman they were going to stop, since too many boxes had been made by that time. Alaniz responded that it was a work stoppage, and that they were not going to fill the boxes. Orozco then asked Alaniz why they were engaging in the stoppage. Alaniz responded, according to Orozco's testimony, that the work stoppages were to pressure the company into signing a contract because they are making "damn fools out of themselves. It has taken too long, and they don't want to sign."

The allegation must be dismissed for a number of reasons. Initially, as the respondent was at liberty to discharge those who engaged in work stoppages, (U.A.W. Local 232 v. Wisconsin Employment Relations, 336 U.S. 245 (1949); see also discussion supra and cases cited therein) any "threats to discharge" such individuals would perforce not restrain or coerce them. It would merely constitute an accurate statement of the legal consequences for participating in unprotected conduct.

Notwithstanding this, where there exists a direct conflict in the testimony, and General Counsel provides no corroboration or guidance as to whom to believe, General Counsel has not sustained

---

179. Indeed, General Counsel did not see fit to address this allegation in its brief.

its burden of proof (S. Kuramura, 3 ALRB No 49 (1977). There is no way to determine which evidence preponderates, and the allegation should be dismissed on this basis.

There exists yet another ground on which to dismiss. Assuming arguendo, that Alaniz' account in accurate, no threat is contained therein. Alaniz himself stopped working, and also asked his crew to stop. Work was in fact "over" that day: that is clearly what Alaniz sought to accomplish by encouraging the stoppage. Orozco gave no indication what impact the conduct might have on Alaniz' tenure solely by asking him to "leave the field."[180] Surely, if he had finished work that day, there would be no reason for him to remain in the field.

As such, it is recommended that this allegation be dismissed.

/

/

/

/

/

/

/

/

/

/

/

---

180. In fact, Alaniz returned to work the next day.

6. PARAGRAPH 27: JANUARY 7 WARNING NOTICES

a. Facts

General Counsel alleged that on or about January 7, 1980, respondent issued warning notices to employees in the crews of Ramon Hernandez and Felipe Orozco for having engaged in "protected concerted activity on January 5, 1980." In brief, certain members of these crews walked out after four hours of work on a Saturday, January 5, 1980, despite that fact that work had not been completed. Those that walked out received disciplinary notices while those who continued to work did not.

Employee Faustino Hirales, a member of Felipe Orozco's crew, stated that he had received a warning notice on January 7th. On the previous Saturday, he and other members of his crew had walked out of the fields after they had worked for four hours. On the 4th, the day previous, he told Felipe that they were only going to work for four hours on Saturday. He also informed foreman Rafael Ramos of this possibility.

On direct examination the reason proffered for Hirales' insisting on working only four hours was that the workers were all tired. On the actual day of the stoppage, Eddie Rodriguez, Rafael Ramos and Juan Heraz[181/] arrived after the workers had ceased working and Rodriguez told them that the company paid them and that they had to do the work. Hirales stated that he informed Rodriguez that if the company wanted more work to be done they should hire the

---

181. Ramos was a company supervisor; Heraz was a time-keeper.

people from Bakersfield.[182] Upon his return to work on the 7th, Hirales received a warning notice from the company.

On cross-examination Hirales noted that he was not only protesting the fact that the company was continually increasing the hours on Saturday that they were required to work, but that also they were protesting to see whether the company would rehire the people from Bakersfield.[183] However, Hirales did not convey the latter reason to either Orozco or Ramos on the day of the stoppage. He added, almost as an afterthought, that the protest was not just because of the long hours or the failure to rehire the Bakersfield workers, but also due to the fact that the company did not run the busses from Calexico anymore.

Hirales admitted that despite the fact that he was a Union representative he never discussed the problem of the increased working hours with the Union itself. He attempted to tie in the fact that the workers were working longer hours with the assertion that the people in Bakersfield were not rehired in the Imperial Valley. However, he stated that the number of employees was roughly the same in the Imperial Valley that year as it had been in years previous, as was the number of fields in which the crews worked.

Worker Gorgonio Lopez testified that the people walked out on January 4 to "protest" the company's failure to rehire many of the people who had worked the previous season in Bakersfied. Lopez

---

182. Much of Hendandez' crew at that time contained workers who had participated in the Bakersfield work stoppages, and who were not hired in the Imperial Valley when the season first began.

183. As noted above, many of these workers had already been re-hired.

acknowledged that he had been told that work on Saturday was mandatory, and that it was compensated at a premium overtime rate for all work done after four hours. Lopez had a conversation with supervisor Rodriguez on Saturday, January 5, and alluded to the fact that there was no contract signed as a reason for the stoppage.

Felipe Orozco testified that in the years he has been a foreman in the Imperial Valley there has been work on Saturdays during the course of the lettuce harvest. Generally speaking, the work lasts about four, but no more than five hours. The exact amount of time worked on a Saturday is determined by the orders which the company receives and which it is required to fill. If the orders have not been filled at the end of four hours of work on a Saturday, the crews keep working until the orders are completed.

After four hours on Saturday workers get paid time and one-half or an overtime premium.[184] Respondent attempts to require only four hours work on Saturdays but at times this is not possible. Orozco testified that prior to the 1978-79 season respondent's employees would work up to eight hours on Saturdays to fill the orders. Crew records for Orozco's crew also showed that his crews did in fact work on Saturdays.

Orozco himself recalled that on January 5th, a work stoppage occurred. Those that engaged in the work stoppage were given warning notices by foremen. Orozco described the events as follows:

---

184 Interestingly, the management rights clause agreed upon by the company and the Union on June 11, 1979, stated that management retains the right to "determine when overtime shall be worked and whether to require overtime."

> We began to work that day, and some of the people worked four hours. And those that stopped didn't. When the four hours were up, we called them for a lunch break because we still did not know how much longer we would work, because there were still some boxes. At the most we only worked about a half hour more. But they didn't want to go in and work any more.

Those that left told Orozco that "it was a law that only four hours were to be worked on a Saturday." Orozco responded by telling them that they would usually only work four hours, but if they worked over the four hours they would get paid time and a half, as the company did when workers worked more than eight hours during the regular work week. Conspicuously absent from Orozco's recitation was any reference to reasons expressed to him for the "protest" other than the one noted above.

Counsel stipulated as to testimony of foreman Ramon Hernandez to the effect that on January 5, 1980, approximately seven of the members of his crew stopped work before orders were completed and that the balance worked approximately one hour more. Those that stopped did so after four hours of work, before the order was filled. In addition, Hernandez' crew had worked previously on Saturdays until orders were finished, totalling generally between three and five hours.

b. Analysis and Conclusions

Faustino Hirales' testimony demonstrates that the "protest" took place merely because he was "tired." The other reasons which he stated cannot be given as much credence: from this witness at least, they were not the initial rationale he proferred and were provided almost as an after-thought.

Respondent in its brief places much emphasis on its interpretation that the reasons for the protest were not communicated to the company and therefore the "concerted" and/or protected nature of same has not been established. It is unnecessary to treat the issue in this light. Rather, reference is made to the legal analysis set forth regarding the "protests" or intermittent work stops by the Bakersfield lettuce harvest crews. In deciding that such activity was not "protected," the N.L.R.B. and the courts have uniformly held that employees are not at liberty to set their own hours of work or conditions of employment. (See, e.g. Phelps Dodge Copper Products Corporation, supra; N.L.R.B. v. Kohler Company, supra.

As I have concluded that the walkouts were not protected activity within the meaning of the Act, the walkout of employees on January 5, 1980 was similarly unprotected and hence the issuance of warning notices on January 7th to the members of those crews could in no sense be deemed unlawful. This is particularly so in light of the fact that over the course of negotiations respondent and Union attempted to arrive at some sort of accomodation regarding work hours on Saturdays,[185] the company stating that although it would try not to keep workers more than four hours, at times this was not possible. The company issued warning notices at that time to workers who ceased work prematurely, and no protest to this action was heard from the Union. Furthermore, in a prior case involving this same respondent, this Board upheld the discharge of an

---

185 This discussion took place in one of the meetings in April.

individual who had refused to work overtime. Sam Andrews' Sons, 5 ALRB No. 68 (1979). As the refusal to work the additional hours would have provided a legitimate ground for discharge, it follows that the mere issuance of warning notices for similar conduct can in no sense be termed unlawful or discriminatory (see discussion and cases cited in the section on the work stops, supra).

It is therefore recommended that this allegation be dismissed.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

E. THINNING CREW PROBLEMS

1. PARAGRAPH 38: FAILURE TO LAY THINNING CREWS OFF

a. Facts

General Counsel alleged that "beginning on or about the month of November, 1979 and continuing throughout the 1979 thinning season, respondent has deliberately failed to lay off crews as it has done in the past, thereby reducing the hours and amount of work normally available to crews 1 and 2, because of its employee's union activities and support and because of their protected concerted activities."

Workers in the thinning crews (principally Antonio Zamora, Gregorio Castillo and Guadalupe Conteras) stated that they had less work for the company in 1979 season than they had in the previous year. The 1979 season ended approximately December 13th, whereas in the previous year the season went from October 2nd to the 5th of January. In 1979, five thinning crews were employed by the respondent; in 1978, three crews plus one crew on an emergency basis was utilized. The workers testified that for the most part in 1978 the thinning crews worked "full" weeks, or weeks that consisted of six day of employment. In 1979, work was not on a regular basis but was more sporadic, the workers being employed for a few days in each week, but seldom for an entire six-day week. When the 1979 season concluded, four crews were left employed; however, the previous year only two remained at the end of the season. Contreras stated that the thinning during the 1979 season was also different in the respect that the crews were required to work in recently irrigated fields where the lettuce had not grown to the height before it was thinned that it had in the previous years.

Antonio Zamora testified that the planting of the lettuce in 1979 differed from that in the previous year in that the planting had not been staggered by the company. Accordingly, the plants would reach a certain height all at the same time, thus giving rise to the inference that thinning was required to be accomplished within a more concentrated period.

The amount of lettuce acreage in the Imperial Valley remained roughly equvalent over the two seasons. In 1978, slightly more than 2,000 acres of lettuce were planted. In 1979, respondent planted 1,856 acres of lettuce, and 456 acres of cabbage.

Significantly, no evidence of specific "union activities and support" unique to the thinning crews was adduced, save for evidence of their participation in work stoppages on October 29, November 9, 12, 14, and arguably on November 17. There was no showing that the decision not to lay crews off (the so-called "deliberate failure") was made after any particular "activities" on the part of the thinning personnel.

Testimony adduced by respondent demonstrated that it was supervisor Rubin Angulo's responsibility to determine when thinning crews were to be laid off. During the 1979-80 season, there were four thinning and weeding crews supervised by four men, Jose Lopez, Salvador Alonzo, "Tacho" or Eustacio Duran and Reynaldo Avila. Crews 1, 2 and 3 were crews that were used most of the time, while Crew 4, Reynaldo Avila's crew, was used sporadically. Richard Graeser, a farmer in the Holtville area, is the primary employer of that particular crew. Additionally, the crew of the labor contractor Jose Estrada was used for a few days during the season.

His crew had been used for at least the last five or six years by the respondent; however, the Graeser or Avila crew had not been. Angulo stated that workers had been complaining about labor contractors. When the Graeser crew became available it was put directly on the company payroll, while the use of the Estrada crew, according to Angulo, was being phased out.

The duration of the weeding and thinning season in 1979-80 differed from that of 1978-79. The principal reason for this, as Angulo testified, was the weather. The lettuce was planted at about the same time in both seasons. However, planting at the same time does not mean that the crop will be harvested at the same time. The weather may make as much as a week or two weeks' difference in the date when the crop is ready for harvest.

The variety of seed used in the planting also has an effect on when the lettuce is to be harvested. The varieties of lettuce that were planted for these two seasons were generally about the same, although some varieties may have been planted to a greater extent than others. Different varieties are utilized because of anticipated weather conditions or climates and also anticipated market conditions. Some varieties are mid-winter varieties, while others are considered spring varieties. If the company believes market conditions in a particular month are going to be better than other months, those varieties are planted accordingly. This factor would also have an impact on when the lettuce is thinned.

Scheduling was also affected by the work stoppages engaged in by the crews. When the company started to get behind, according to Angulo, the crews of Estrada and Reynaldo Avila began to be used.

Because of the uncertainty created by the stoppages, Angulo wanted to keep the crews working "full steam ahead."[186/] Angulo noted that thinning and hoeing would have been scheduled differently had the work stoppages not taken place. This different scheduling would have taken the form of a layoff of a crew towards the end of the season which would have resulted in a reduction of the work force by about 20 percent.

An additional factor in the schedule of the weeding and thinning was the earthquake which occured in the Imperial Valley in October 1979. As a result of the quake, the Highline Canal was inoperative for five days, meaning that there was no water for irrigation during that period. At that time, the planting operation was underway. Since there was no water, the recently planted fields could not be irrigated. When the water came back on, a large block was watered at once, meaning that certain parts of the crop would come up simultaneously, while others would be blank. When in the course of the thinning season that particular block was to have been thinned, there was a slight delay because of the earlier postponement of the irrigating. After the delay, about 200 acres had to be thinned at once.

b. Analysis and Conclusions

This allegation must be dismissed for lack of evidence. While General Counsel's theory on this issue is somewhat unclear, it appears to be arguing that for discriminatory reasons, respondent

---

186. This explanation does not exactly comport with Angulo's rationale for scheduling work on the day of the inauguration of the UFW office. (See discussion, infra.)

provided less work for certain "more senior" crews. Initially, it should be noted that no documentary proof was adduced that the crews actually worked less total hours or earned less money in 1979 than they had in 1978. Furthermore, there was no showing that the composition of Crews 1 and 2 was in fact "more senior," and thus arguably less vulnerable to layoff. On these grounds alone, ample basis exists for dismissal.

General Counsel argues that testimony established that in 1979 the thinning season ran from October 1 to December 14. Three regular crews were working on the last day. In 1978, the season ran from October 2 to January 5, 1979, at which time only one crew was working. Therefore, it cannot be determined exactly who suffered any detriment from this change. If it were contended that the "most senior" crew did not get to work the additional weeks, it would only be at the expense of their fellow workers who would be laid off. This latter group would then have reduced "hours and amount of work." The vague testimony supplied by several workers that they "regularly" worked six-day weeks in 1978, as opposed to four or five-day weeks in 1979, is no substitute for concrete documentary proof.[187] Likewise, no proof was made of the number of hours worked in a given week. Thus, even assuming that workers may have worked fewer days in 1979, there has been no showing that they worked fewer

---

187. The parties did stipulate, however, that thinning crews worked twelve Saturdays in 1978, as opposed to six Saturdays in 1979. However, the total number of Saturdays worked would not necessarily indicate the availability of work, as crews did not necessarily work every day each week.

total hours.[188]

The most fatal omission leading to the dismissal of this allegation is the failure to adduce any proof of the nature and extent of thinning crew protected concerted activity.[189] A prima facie case has simply not been established.[190] Even if the argument were advanced that the thinning crews' participation in work stoppages was the basis for "discrimination," I have determined that such intermittent stoppages are not protected activity (See discussion, supra). Respondent can therefore lawfully "fail to lay off crews" without being subject to charges of this nature.

Notwithstanding any of the foregoing, Angulo's testimony regarding cultural, climatic, and geological vagaries necessitating scheduling adjustments was wholly uncontroverted, as were his statements in connection with the problems created by the work stops and the use of the labor contractors crew. These explanations for the deployment of thinning crews were inherently plausible and deserving of credence, particularly in the absence of any proof that crews which respondent "fail[ed] to lay off" were any more or less active in Union matters than crews allegedly deprived of work.

It is recommended that this allegation be dismissed.

---

188. Respondent cogently argues in its brief that Avila's crew worked for 17 days or 128.5 hours in 1979-80, while Estrada's was employed for 16 days or 115 hours that year. The previous year, Estrada worked 20 days for a total of 221 hours. Thus, the maximum amount of work lost by the addition of Avila's crew was 22.5 hours. The stoppages alone would account for these hours.

189. Even in its brief, General Counsel neglects to refer specifically to any acts supporting a finding on this issue.

190. Conclusions regarding burden of proof, noted elsewhere, are incorporated herein by reference.

2. PARAGRAPH 43: RESCHEDULING OF WORK; RETALIATORY WARNING NOTICES

General Counsel alleged that respondent purposefully revised its work schedule for thinning crews. The purpose was to have work conflict with a scheduled and publicized Union march. "When many employees attended the inauguration thereby missing work on November 17, respondent retaliated by giving them written warning notices." These actions were alleged to be violations of section 1153(c), and derivatively, section 1153(a).

The pleading of this allegation contains languge dictating proof which was not offered. Assuming, arguendo, that respondent issued warning notices for all those who missed work on Saturday November 17, and that attendance at the march was "protected concerted activity",[191] there was no showing that those who missed work actually attended the march,[192] respondent knew of their attendance, and "but for" that attendance it issued them tickets. All of these causational elements were lacking in General Counsel's presentation. Simply stated, no evidence was presented that the type of absence (Union business)[193] was excused in the past. Accordingly, the 1153(c) aspect of this allegation is dismissed.

Turning to General Counsel's presentation of the facts, Ana Gallo, a member of the thinning crew working under foreman Jose

---

191. General Counsel's brief does not cite to any cases standing for this proposition.

192. Richardo Perez, a thinning crew employee, testified vaguely that "others" in his crew went to the march and received warnings.

193. I am further assuming for the sake of argument here that attendance at a social or quasi-social function sponsored by the Union may be considered "Union" business.

Lopez, testified that she was notified of a march sponsored by the UFW which was to take place on the 17th, a Saturday, during the thinning season. Flyers advertising the march were passed out by one of her co-workers in the presence of company foremen. Gallo stated that supervisor Ortiz told the crew, on Thursday, the 15th, that there would be no work on the next day, Friday, because there was no ground adequately prepared. There would be work on Saturday, the day of the march. Gallo initially stated that she asked Ortiz why they were going to work on Saturday, to which Oritz responded that he did not know anything, that those that wanted to work could come to work and those that didn't could go to their march. Later on, in the course of her testimony, Gallo said that on that Thursday she told her foreman, Jose Lopez, that she would be absent on the day of the march.

Gallo did, in fact, attend the march on that Saturday and returned to work the following Monday. On that day her foreman gave her a "ticket" or disciplinary notice which she initially would not accept. When questioned by General Counsel, Gallo stated that the conversation concerning the ticket merely consisted of her asking Lopez what the ticket was. Lopez responded that it was because she refused to come to work on the Saturday previous. Gallo replied that she would not sign the ticket. Later that day, however, Gallo did accept the notice and gave it to her crew representative, Santiago Godinez.

However, at a later point in her testimony she stated that she did in fact inform her foreman that she would be absent from work on the day of the march, but did not tell Godinez that the

reasons given for the warning, as stated on its face, were not true. After originally testifying that she did not protest to her foreman that the ticket was "contrary to fact," she provided the details of an exchange between her and her foreman in which she insisted that she had notified the foreman, that she could not understand what the ticket was for, to which Lopez responded that he received orders to give her a ticket.

Gallo's testimony over all was somewhat colored by her selective recall concerning certain events, and her failure to supply, on initial examination, certain details which were later added during the course of her testimony. It appeared that this witness seemed to grasp the importance of such details as she testified, and proferred them as she felt they were necessary.[194/] I was unable to attach a full measure of credence to her testimony, and have serious reservations whether she did in fact tell Jose Lopez that she would not be present on the 17th.

Ricardo Perez, another thinning crew employee, and the crew representative for his crew, testified that his foreman, Salvador "El Tigre" was present when leaflets announcing the march were distributed. Perez attended the march. When he returned to work on Monday, November 19, he received a warning notice. Perez, however, admitted that he did not tell his foreman that he would be absent on

---

194. For example, in her testimony regarding fellow worker Contreras' confrontation with supervisor Ortiz regarding "short" paychecks discussed infra, she neglected to mention the strong words used by Contreras, who admitted same.

November 17.[195]

Supervisor Rubin Angulo is responsible for scheduling thinning work, and determines which particular days of the week that task is to be performed. Individual thinning foremen, such as Lopez, do not decide this matter. It was Angulo, therefore, who decided that the thinning work be performed on the seventeenth, not on the Friday previous.

Angulo offered the following reasons for the scheduling. On November 12, there was a stoppage (November 12th being the previous Monday); on November 13 the people came back to work; on the 14th, however, they stopped again; on the 15th, a Thursday, employees resumed working. On the night of November 15th, Angulo decided to have the people work on Saturday rather than Friday and that he was not "aware really of the inauguration." When the crews finished that Thursday, he determined that the lettuce was too small to thin and that they should wait until Saturday to resume operations. Additionally, Angulo stated that thinning and weeding operations are occasionally done on Saturday. While work is generally performed Monday through Friday, there are times during the week when this work is suspended.

The factors that go into the determination as to when work will be done and when it will not be done hinge primarily upon the weather, since the weather effects the growth of the plant. If the weather is warm, the plant grows more rapidly. Conversely, if cool,

---

195. Perez attended negotiations on Thursday, November 15. Since there was no work scheduled for Friday, November 16, he had no communication with respondent's supervisors until he returned to work the following Monday.

the process is slowed. Additionally, rain may also delay the thinning operation.

Angulo stated that when the temperature is at the 80 degree and above level at that particular time of year, lettuce grows approximately 1 or 2 inches in 24 hours. Anticipating such growth upon hearing the weather forecast, he scheduled the work to resume on Saturday. Temperatures had been cooler earlier in the week, and in Angulo's opinion the lettuce would have been too small to thin that Friday: plants would have been lost and generally an inadequate job would have resulted. Improper timing in the thinning operation has a severe impact on the yield. When a field is thinned and the lettuce is too young, the lettuce eventually produced is of the smaller or 30 head per carton variety, as opposed to the 24 head per carton standard size.

The other factor involved in determining the days on which thinning or weeding crews will work is the company planting schedule. The company plants according to when it thinks market conditions will be optimal and the highest price will be received for the harvest. If it predicts that market conditions will be at a certain level at a certain time, planting is grouped so that the harvest coincides with that time.

The parties stipulated that in the 1979-80 season, thinning crews worked on six Saturdays. In the 1978-79 season, thinning crews worked 12 Saturdays in that season for the period between September and December.

Angulo also noted that he had heard rumors that there was to be another stoppage on the following Monday. He feared that the

company would get further behind since there had been already two stoppages in the week in question.

Insofar as those people who were required to work on Saturday, November 17th and did not report, as alleged in the complaint, these workers received warning notices.

Angulo's assertion that he was not "aware" of the inauguration was somewhat dubious. Even if he did not know of the leaflets that were distributed that week, it may be inferred that the event itself assumed proportions large enough so that it would be noticed in a community such as that in the Imperial Valley. This is particularly so where workers at a particular company such as respondent are represented by the Union. Similarly, Angulo's concern for the immediacy of thinning requirements due to the work stops is belied by his own schedule: there was no work on Friday, November 16, nor was there work on Wednesday, November 21.

Nevertheless, although the foregoing renders suspect respondent's rescheduling of thinning to coincide with a Union social function, "a suspicion alone is insufficient to establish a violation." Tex-Cal Land Management, Inc., 5 ALRB No. 29 (1979). It is indisputable that respondent had scheduled thinning work on Saturdays in the past. No specific objection during the course of bargaining was raised regarding the problem of work conflicting with the inauguration, despite the fact that there were bargaining sessions on November 15, two days before the march and November 20, three days after. Respondent's prerogative to schedule work for that Saturday was thus not questioned.

Notwithstanding the foregoing, Section 1152 guarantees

agricultural employees the rights to "self-organization... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." As noted by respondent in its brief, criteria for defining "protected, concerted activity" were set forth in Shelley and Anderson Furniture Manufacturing Company, 497 F.2d 1200 (CA 9 1974). The court stated that in order for activity to be "protected":

> (1) there must be a work-related complaint or grievance;
> (2) the concerted activity must further some group interest;
> (3) a specific remedy or result must be sought through that activity;
> (4) the activity should not be unlawful or otherwise improper.

Plainly, attendance at a Union open-house or social function is not "work-related"; nor does it further some group interest; nor is there some "specific remedy...sought" through that attendance. Nor can it be said that the function itself constituted a "Union" meeting and hence protected in the sense that it was a group effort to solve a work-related problem. cf. Polynesian Cultural Center v. N.L.R.B., 582 F.2d 467 (CA 9 1978). Since attendance at the function was not "protected activity," "interference" with that attendance could not be said to be violative of Section 1153(a), even if proof were sufficient to conclude that respondent intentionally rescheduled work to conflict with a Union social function.

It is recommended that this allegation be dismissed.

/

/

/

3. PARAGRAPH 22: UNILATERAL CHANGE RE FIELD WAITING TIME

General Counsel alleged that "on or about December 14, 1979, respondent, through its agent Manuel Ortiz, unilaterally changed working conditions...by refusing to pay its employees for two hours of field waiting time, a change in past practice..."

On the last day of employment in December 1979, crews arrived for work at approximately 6:15 a.m. They were not allowed to enter the fields due to frost, and their foreman forestalled the commencement of work on that occasion until after the frost had melted. Thinning crew members Guadalupe Contreras and Bernardino Rodriguez both testified that on previous occasions, when the foreman had made the crews wait for frost to melt, crews had been compensated for the time that they had waited. There was also testimony to the effect that on occasion if the foreman knew in advance that there was going to be frost, he would tell the crew to arrive at the fields at a later time than usual. This notification did not occur on the day previous to the one in question.

The crews were paid that day for only six and one-half hours of work, as opposed to eight hours. At 2:30 on that day, worker Rodriguez informed supervisor Manuel Ortiz that he was going to stop working at that moment. Ortiz asked him, "Are you the foreman?" Rodriguez responded no, but that he was the alternate crew representative. He subsequently voiced a complaint for the failure of the company to compensate the employees for the full eight hours.

The import of the testimony of respondent's witnesses was directly opposite to that of those for the General Counsel. In brief, each consistently testified that respondent has never paid

its employees for time spent waiting for frost to melt.

Background concerning this allegation was supplied by Rubin Angulo, farming supervisor for the company for at least twelve years. Essentially, his responsibilities involve the overall supervision of the growing and cultivating of the various crops which respondent produces. His position is equivalent to that of his counterpart in the harvesting operation, Ed Rodriguez. Foremen in the thinning and weeding report to him. Angulo stated that during the thinning operations if there is frost or ice on the plants the thinning operation cannot be performed. Thinning in the Imperial Valley is done in October and November, and generally there are not that many days when frost appears.

Thinning, as opposed to weeding, is done according to when the crop is watered. When the plants are two to three inches tall, usually about 30 days after the first watering, they are ready to be thinned. A field of lettuce is thinned only once during the season. Weeding, on the other hand, is an operation that is performed after cultivation, that is, after a tractor goes through the field and discs out the weeds growing in the side of the furrows. The tractor then spikes[196] the field and the weeding crew follows it, removing the weeds in and around the plants.

Frost or ice prevents a weeding or thinning crew from performing their job. This is so for the simple reason that if a plant has frost on it, any tool or hand that touches it will turn

---

196. As described by Angulo, spiking is an operation where a tool twenty inches longs is pulled behind a tractor. The tool pierces the ground to a depth of 4 to 5 inches, stirs up the soil and makes a row in order that the water may run through.

the plant black and hence damage it irreparably. Contrary to assertions made by General Counsel's witnesses, during the thinning period in the Imperial Valley, one is not ordinarily able to predict on the day before whether there is going to be frost or ice the following morning: the weather varies significantly enough as to make a pattern difficult to discern.

Thinning and weeding crews begin to perform their operation at around 6:00 a.m. If there is frost or ice on the plants when the crew comes in at this time, the company practice, according to Angulo, is to have the crews wait until the ice thaws, although the waiting period may be one to two hours. There is a company policy concerning payment for the time that workers must wait under these circumstances. According to Angulo, this policy is enunciated in the company handbook under the heading "call time." Specifically, Angulo referred to language in the company handbook which states that the "call time policy will not apply where work done for Sam Andrews Sons is delayed or cannot be carried out because of rain, frost...or other causes beyond the control of the company." Further, Angulo testified that in the twelve years that he has been a farm supervisor for the company, the thinning and weeding crews have never been paid "waiting time" for the time between when they are called initially to work, and the time that they are allowed to enter the field after frost or ice has thawed.

Reviewing company thinning crew records, Angulo pointed out that on the 14th of December, 1979, there was frost: the record indicates a starting time for work as 8:00 a.m. Crews were paid for 7 hours of work that day. The previous year, on the 21st of

December, 1978, work began at 8:00 a.m. and completed by 2:30. Workers were paid for six hours then, since one-half hour of that time was for their lunch period. Angulo testified that this record indicates that the crew "probably came to work at six in the morning and, due to frost, they had to wait until 8:00 a.m." Similarly, records indicate that on January 2, 1979, work started at 8:00 a.m., and was completed by 2:30, workers being paid for six hours. On the 4th of January, 1979, work started at 7:40 a.m., stopped at 3:10, and workers were paid for seven hours of work. Angulo stated that on each of these occasions there had been frost, and on none of them were workers paid for the time between which they came to the field and the time when they actually commenced working.

Angulo further testified that at the end of the day on the 14th of December, 1979, he received a call from Manuel Ortiz, a thinning supervisor, who reported to him that when he, Ortiz, started to pay the people towards the end of the day, they began to complain to him that they were not getting paid for their full eight hours. Angulo stated that he told this foreman that the company rule had been that waiting time due to ice or frost had never been compensated. Angulo's understanding was confirmed that day with a phone call he placed to Don Andrews.

Manuel Ortiz likewise recalled one occasion in 1979 when the crew arrived at the field and had to wait before going in due to ice or frost. They waited for approximately one hour. Ortiz stated that the crew is not paid for the time that they wait, but only for the time that they work. This has been the company's policy all the years that he has worked for the company.

Another worker in the thinning, Eva Lara, testified that over the 12 years that she has been working in such capacity for respondent, she has not been paid for the time spent when waiting for ice to melt in the fields.

Valente Garcia testified that he has worked in the thinning of lettuce in Holtville with respondent for the past six years. In his experience the busses would generally leave Calexico, at least in 1978, at 4:30 or 5:00 a.m. They would arrive at the field at 6:00 a.m. or slightly thereafter. Work would begin at daylight. Garcia could recall approximately two occasions when crews had to wait for the commencement of work because of ice on the lettuce. On one of these the crew waited for an hour and one-half and then went to work. Garcia testified that he did not get paid for the time spent waiting outside the field. In previous years there were also occasions on which Garcia waited before commencing work due to ice on the lettuce. During the entire six years he has been employed by the respondent he has never been paid waiting time in the field because of ice.

Similarly, Luis Rodriguez has been working for respondent for the past 15 years in the thinning. Rodriguez noted a number of instances when he and his crew members had to wait outside the field prior to the commencement of work due to the presence of ice. He stated that he has never been paid for such waiting time.

Yolanda Zamora, a thinning crew member, was called by respondent to testify on matters other than the waiting or standby time issue. When questioned by this hearing officer, she candidly stated, with presumably no preparation, that she would not get paid

for waiting outside the field when there was frost or ice, but would get paid only for the hours that she actually worked.

One part of the confusion arising from this allegation is created by a conflict between respondent's purported company policy regarding "standby time," as ennuciated in its company handbook, and the actual practice that it observes concerning compensating employees for such time. Another part was the outgrowth of the misuse of the terms "standby time" and "call time."

Angulo, by his own definition, categorized standby time as "when they come to the field and it's raining, or we just keep the people there waiting, waiting, waiting, and we work them for an hour and then we got to send them home. Then we got to pay them for all of it. That's standby." When asked for his understanding of what call time was, Angulo stated "call time is if we call somebody to come to work, and there is no work and we told them to come to work. And we send them back home and it is not an act of God." Thus, Angulo's personal understanding comports with the language of the company handbook. Despite his testimony that people were never paid when they had to wait for frost, it seems that the company policy as outlined in its booklet (see below) lends support to General Counsel's theory that workers should have been paid on the particular morning that they had to wait for the frost to melt.

On further examination, however, Angulo clarified his interpretation of the standby and call time compensation policies as the company has practiced them. Essentially, for him standby time means that workers <u>begin working</u>, then are requested to stop and standby while there is rain, equipment failure, etc., after which

time they return to work. Angulo stated that the workers were never paid from the time that they boarded the busses in Calexico.

A plain reading of both the call time and also the standby time provisions in the company handbook gives rise to the interpretation that "call time" applies when employees are requested to report and no work is actually performed that day, or start work and then are sent home before the end of the day. Under the heading "Call Time," it states "[workers] will be paid from the time they report until released and will be paid a minimum of two hours for each call, when no work is provided,... In the event that the employees begin work, they will be paid a minimum of four hours." Under "Standy Time," on the other hand, it states "any employee requested to stand by will be paid for all time standing by at the hourly rate."

Thus, there appears to be a conflict between the language of the employee handbook and the practice of the company as testified to by its various foremen, supervisors, and employees. The situation under scrutiny in the instant case appears to be more aptly characterized by the term "standby time," where employees are called to report at a specific time but are told to wait for a certain period, after which they work for the rest of the day. Call time, on the other hand, appears clearly to apply to situations where employees are released early on a given day either having performed no work or having performed a certain minimal amount. While the "call time" provision contains an "Act of God" exception such as frost which can deny employees compensation, the "standby time" section does not. Here, although technically told to "stand

by" due to an Act of God, thinners were not paid, as if it were "call time."

The conflict can only be resolved by giving credence to the mutually corroborative testimonies of respondent's witnesses.[197/] It would be inherently illogical to totally disbelieve assertions by diverse witnesses on this issue.[198/] These witnesses, workers and supervisors alike, established the fact that, the wording of the company handbook notwithstanding, in their experience, the practice of the company is not to pay employees for waiting at the edge of the fields while ice melts.

It is therefore concluded that the refusal by respondent to pay two hours waiting time on December 14, 1979,[199/] to employees was not a unilateral change but was a continuation of past practice. Accordingly, this allegation should be dismissed.

/

/

/

---

197. Ms. Zamora's spontaneous responses were probably the most convincing evidence on the point.

198. As was the case with much of General Counsel's brief, argument on this issue was couched in terms of disbelieving the four or five witnesses who testified for the respondent, and crediting General Counsel's version of the facts. Such blind adherence to a rule dictated by neither logic nor circumstance, i.e., that witnesses for respondent should be per se discredited, diminished greatly the persuasive force of the brief. General Counsel's witnesses were no less vague in supplying the particulars of the company's policy re: waiting time for frost. Unlike respondent, General Counsel did not produce any documentary evidence in support of its position.

199. Perhaps the situation on that date is best characterized as neither "standby time" nor "call time."

4. PARAGRAPH 44: WARNING NOTICE TO GUADALUPE CONTRERAS

Thinning employee Guadalupe Contreras testified that on one day following a thinning worker stoppage,[200] the workers had received less pay than they were entitled. According to her calculations, the workers had worked for four hours, yet they were only paid for three and one-half. Contreras voiced her complaints to thinning supervisor Manuel Ortiz, testifying as follows concerning the conversation: after she asked Ortiz why they had only been paid for three and one-half hours, Ortiz responded that she should be the least likely to complain, because when the company gave the people an extra 10, 15 or 30 minutes of pay, the people would not say anything. Contreras replied that in all the years she had worked for the company she had never had such luck. Ortiz then stated, "Don't play the fool." Contreras openly admitted that at that point she replied to Ortiz that the only one "who played the fool around here is you, because as a supervisor you have to know what time we leave and what time we come in." Ortiz informed her that she had a big mouth, that the women in the crews spoke more than the men, and that if she were a man perhaps he could fight with her. Contreras said: "You are a man but you are an old man; even if I am a woman, I am younger and perhaps we will be even." Ortiz finally replied that Contreras was acting "real smart," that her years with the company were not going to do her any good. Contreras replied that she thought that she would be with the company longer than Ortiz.

---

200. The stoppage in question occurred on October 29.

The next day, Contreras received a warning notice for insubordination, based essentially on her insulting a supervisor.

As previously noted, Manuel Ortiz is a supervisor of the weeding and thinning crews for respondent. He has worked for the company for sixteen years, and is a man who was 70 years of age by the time of the hearing. He has known Guadalupe Contreras for all of the 10 or 11 years that she has worked for respondent. Ortiz testified that it is the foreman, not he, who is responsible for keeping time for the crews. The foreman of Contreras' crew, crew #1, was Jose Lopez. Ortiz stated that despite Contreras' good work record, on the occasion under scrutiny he felt compelled to give her a warning notice because she insulted her supervisor. The insult took place in front of the crew. The Spanish word that she used is this connection which offended Ortiz is "pendejo."

Ortiz described the incident giving rise to the issuance of the warning notice as follows: Ortiz was called by Ms. Contreras and another worker, Juan Castillo, to the bus which contained thinning crew #1. There were about 40 other workers on the bus at the time. Both Contreras and Castillo were complaining about 20 mintues that they felt that they had worked that they should have been paid for, but which had not been included in their pay. Ortiz informed them that he would have them paid the following day, and told the workers "not to get smart" because he had always given them the extra time at the end of the day. Contreras attempted, according to Ortiz, to dispute that the supervisor had given the workers the extra time, that he always had said this but it was not

true. Contreras then told Ortiz not to be an ass.[201] Ortiz testified that Contreras said she had a son who would fight him. Naturally, Ortiz stated that Contreras was angry when she spoke with him.

On the following day, the crew was paid for the extra 20 minutes, as promised. Ortiz stated that it was his practice to pay the crew for a full day even though they might finish a field with 15 minutes or so before the actual end of the work day, and then be allowed to go home. Thinning crew workers are paid in cash, which the foreman distributes in envelopes near the end of the day. Two or three hours earlier, Ortiz goes to the office with a list of those to be paid, obtains the pay envelopes, and then gives these to the foreman. In the event of there being additional work to be performed beyond 8 hours,[202] Ortiz would ask workers to remain if they wished. The extra time would be compensated on the following day. However, the workers would not be paid in money but in time, i.e. they would get additional time for lunch or would be released early. Ortiz stated that on those occasions when he paid the workers for more than the actual time that they spent in the fields, he would not attempt to recover the time on the day following.

As noted above, on the day before Contreras complained about the short paycheck, her crew had engaged in a work stoppage. According to Ortiz, the people did not all leave at once: there was

---

201. The actual word she used, "pendejo," can be translated as "stupid, dummy, stupid ass, asshole."

202. In the examples Ortiz used, the work would not be for longer than ten or fifteen minutes.

a ten minute gap or interval between the time the first person stopped and the last person walked out of the field. He did not write down the time for each individual at the exact minutes that they stopped. The foreman, Jose Lopez, however, wrote down the time as being three and one-half hours, which Ortiz reported to the office. The thinning crews were not paid on the day of the walk-out itself, but were paid on the following day. Ortiz stated that there was no time for him to go to the office to get their money.

Although Ortiz appeared to be a bit confused in his testimony as to when Contreras complained of the short paychecks and when the work stoppage actually occurred, I did not feel it affected his overall credibility. Based on his demeanor, I fully credit his version of the incident. Notwithstanding this determination, Contreras admitted that she insulted Ortiz, providing him with sufficient justification for issuing a warning notice for insubordination. I find no causal connection between her complaints about the "short" paychecks and the issuance of the notice, other than it was this discussion which provided the framework for Contreras' insults. No evidence was adduced that the notice was discriminatory in the sense that respondent never issued notices for insubordination, i.e., that "but-for" Contreras' complaints about the shortage, she would not have received the notice.

Accordingly, it is recommended that this allegation be dismissed.

/

/

F. MISCELLANEOUS VIOLATIONS

1. PARAGRAPHS 9 AND 10: DISCRIMINATORY DISCHARGE AND REFUSAL TO RE-HIRE FELIPE FARFAN BANDERA[203]

a. Facts

General Counsel alleged that on or about October 3, 1979, irrigator Felipe Farfan Bandera was discriminatorily discharged and refused rehire because of his support and membership in the UFW and also because he had previously filed charges with the ALRB.

Farfan, who was hired initially in 1978, stated that he attended Union meetings and also passed out Union pamphlets in the latter part of December, 1978 and in the beginning of January, 1979. He obtained these from crew representatives who attended meetings on behalf of the irrigators. Farfan passed the leaflets out principally at the main entrance of the Santiago Ranch before workers went in to work. Foremen were also present at those times. On one such occasion, about 15 minutes after Farfan gave the leaflets out, Juan Perez, the foreman who hired him initially, asked Farfan what he was distributing. According to the employee, when Farfan responded, the foreman said that he could not pass the flyers out.[204]

Counsel stipulated that respondent's management was aware of Farfan's Union activities and that he had filed an unfair labor practice charge.

---

203. These particular allegations were somewhat isolated, as they bore little or no relation to the general course of events, occurring in the latter half of the year 1979, which form the basis of allegations for the bulk of this case.

204. Interestingly, when called to testify, Perez did not refute this.

In the latter part of August 1979, Farfan spent thirty days in jail for failing to pay for two drunk driving tickets incurred the previous year. Farfan stated that he attempted to contact respondent by making a telephone call from the Kern County Jail to let them know that he would not be available to work. Unfortunately, he was unable to reach anyone. He told his wife, Laura Madrigal, to notify the company immediately that he had been arrested.

When Farfan was released from prison, he went to see supervisor Bob Garcia to ask for his job back. According to Farfan, Garcia told him that he could not return to work since he was "causing a lot of problems in the company." Garcia also referred to the fact that the irrigator had lost his seniority and that if he wanted to begin working at the respondent again, he would have to start with new seniority. On several occasions thereafter, Farfan spoke to Bob Garcia in an attempt to regain his employment. However, he was not rehired.

On cross-examination, Farfan admitted that he had other opportunities apart from the first day of his incarceration to make phone calls in order to contact the company. Farfan was incarcerated on the 28th of August. He did not report back to the company until the 2nd or 3rd of October, several days after his release.

Laura Madrigal testified that she told one of Felipe's fellow workers, nicknamed "Gato," to tell the company that Felipe would not be coming to work. "Gato" usually picked Felipe up and drove him to the work site. Madrigal stated that she herself

attempted to reach the company by telephone, first calling around noon on the day after Felipe was arrested. Receiving no response, she tried again later that same day and a secretary answered the phone. Madrigal testified that she told the secretary about Farfan being arrested.

Madrigal went to the company offices after Farfan's court appearance, which according to her, was approximately one week after he had been arrested. She asked to speak to one of the "bosses," and was referred to a man she described as bald-headed and tall. Madrigal testified further that the man told he that Felipe was going to get his job back, and that she later reported this to Felipe. At the hearing, Madrigal visually identified Don Andrews at the hearing as the one she "thought" she had spoken to.[205]

John Perez, irrigation foreman, testified concerning Felipe Farfan and his attitude on the job. According to Perez, Farfan had many problems with attendance. On the average, he would miss 5 or 6 days out of a month. Perez spoke to Farfan frequently about missing work. Farfan would give a variety of explanations why he would be unable to show up. The worker received one oral and one written warning for absenteeism.[206] In addition, Farfan received a warning for not obeying orders. Perez also related that foreman Cornelio

---

205. Don Andrews roughly fits Madrigal's verbal description.

206. Records which were introduced demonstrated that Farfan did in fact have serious problems with attendance: with rare exception, hardly a week went by during the course of 1979 that he was not absent one day or more. Nevertheless, given the extent of those problems, it appears somewhat anomalous that Farfan should have received so few warning notices.

Galvan had expressed to him additional disciplinary problems he had encountered with Farfan.

Bob Garcia, who characterized his position as that of an administrative assistant whose responsibilities included personnel, testified that in late February 1979 or early March, he and John Perez reviewed Farfan's attendance problems. At the time it was decided that despite his shortcomings in that regard Farfan would be given an opportunity to continue to work. Garcia testified further that he had discussed the matter with Farfan sometime in March concerning his problem with absences; that the problems had to be alleviated; that he was to be given another chance; that if he were to be absent on a given occasion, he would have to call the foreman and give 24-hours notice; but that if his problems continued, he would be terminated.

Frank Castro testified that he occupies a position roughly equivalent to that of Perez. When Perez went on vacation in 1979 from the end of August to mid-September, he filled in for him. Castro was Farfan's immediate supervisor when Farfan failed to report for work in late August 1979. The employee's last day was a Friday; however, the supervisor did not learn that he was absent from work until the middle of the following week. The way in which he found out about Farfan's not being present was that his wife appeared at the offices and asked for his check.

Castro testified that when he first learned that Farfan was in jail, he went over to Garcia's office to discuss the problem of Farfan's absence. The two of them decided that the employee would be terminated because, in the words of this supervisor, "We can't have

every employee spend 20 or 30 days in jail, and when he gets out, still have his job back."

Garcia corroborated Castro's testimony to the extent that it was he and Castro who decided to terminate Farfan. The reason proferred by Garcia for the termination was that Farfan was absent and that at the beginning of his absence the company was unaware of the rationale for it. Perez did not participate in this decision since he was on vacation.

Cathy Carlson, responsible for keeping irrigator payroll records in Bakersfield, testified that in August 1979 she received a phone call from a woman who said that her husband, Felipe Farfan, was in jail, and that she was concerned about his losing his seniority. Carlson recommended that the woman talk to Bob Garcia. The woman also stated that she wanted Farfan's check, which Carlson prepared for her. When she came into the offices several days later, Carlson called in the irrigation foreman, Frank Castro. Carlson therefore corroborated Castro's testimony that Madrigal had spoken with him.

Carlson did not state whether Madrigal had actually spoken to Garcia, or that she relayed the eariler telephone message to a foreman that the employee would be unable to report. It would seem logical that if employees are obligated to notify the office when absent, it would not suffice for office personnel to keep that information to themselves: the employee's foreman or supervisor should also be notified. This is particularly so in a job category such as irrigator, where if a person would be absent another would

be required to fill in for him.[207]

The record evidence proffered by Respondent's witness was muddied by conflicting accounts. Perez went on vacation from the end of August to mid-September 1979. He stated he became aware that Farfan was no longer at work when an employee told him that Farfan was in jail. The foreman testified he actually learned of this about 5 to 7 days after Farfan was no longer at work. If Perez was on vacation until mid-September, he would logically find out about Farfan's absence more than five to seven days after Farfan failed to report, since Farfan was arrested on August 28. The only way in which this testimony makes sense is that Perez was either confused about the dates, or was told about Farfan while on vacation. Perez failed to testify affirmatively to the latter.

Other conflicts in Perez' testimony indicate its lack of trustworthiness. He stated that right after he returned from his vacation, he discussed Farfan's employment with Frank Castro and Bob Garcia. During the course of this discussion, Perez testified it was decided to let Farfan go. The reason proferred by Perez was that Farfan's performance was deemed unsatisfactory, due principally to his absenteeism. Thus, Perez' testimony directly conflicts with that of Castro and Garcia, to the effect that Perez had any input into the decision to terminate Farfan, and that the reason for the termination was his absenteeism, not his failure to notify the company of his absence.

---

207. Underscoring this point, Perez testified that he became aware of Farfan's attendance problems when Farfan's immediate supervisor, Miguel Guerra, would contact him to request another worker to substitute for Farfan.

Two or three weeks later, Perez stated, another conversation on the subject of Farfan's tenure was held between Garcia, Perez and Castro. Farfan appeared during the course of the conversation and said to Garcia that he just wanted to talk to him about some checks of his that he thought had been cashed or forged.

Garcia corroborated this account and placed the date of the conversation on October 5. After trying to sort out Farfan's problems with the checks, according to Garcia, Farfan mentioned that he had notified the company the day that he had been arrested, that his wife had come and told someone that he would be in jail for 30 days, and that as far as he was concerned he had a valid excuse and should be granted a leave of absence. Garcia responded that leaves of absence were given for reasonable circumstances, such as medical emergencies or family illnesses, and that the company did not feel that the leave was proper under these circumstances. Garcia also noted Farfan was repeatedly absent from work.

Castro also testified concerning this conversation. According to this witness, the three checked Farfan's record for absenteeism at that time. If the decision had previously been made to terminate Mr. Farfan, it seems rather illogical that three supervisors continued to spend time to support the decision. This assertion is therefore suspect. Castro also stated that Farfan was formally notified on that day that he had been terminated.

b. Analysis and Conclusions

Despite the difficulties presented by the testimony of respondent's witnesses, such as the lack of credence which I can attach to Perez' presentation, and which I fully discount, it

remains that General Counsel has failed to prove by a preponderance of the evidence that Farfan's discharge and the refusal to re-hire him were unlawfully motivated and discriminatory. In brief, I was disturbed by the shifting reasons offered for the discharge (failure to notify or absenteeism) which in other circumstances might give rise to an inference of unlawful motive (see Sacramento Nursery Growers, (1977) 3 ALRB No. 94; Kitayama Brothers Nursery (1978) 4 ALRB No. 85). Troublesome also was the attempt by respondent to disguise the fact that Farfan, through Madrigal, had told the office that he was in jail and presumably unavailable for work.[208/] As outlined above, I found that a strong inference was created that Carlson disseminated this information to the appropriate supervisor. Hence one reason proferred for the discharge, that Farfan did not notify the company of his absence, smacks of a pretext, and similarly creates a inference of discrimination. (Kitayama Brothers Nursery, supra).

Nevertheless, it remains that mere suspicion or speculation based on inference are not adequate substitutes for substantial evidence on which a finding may be supported. (See Rod McLellan Company (1977) 3 ALRB No. 71; Lu-Ette Farms (1977) 3 ALRB No. 38.)

General Counsel barely made out a prima facie case. "The mere fact that an employee is or was participating in union activities does not insulate him from discharge for misconduct or give him immunity from ordinary employment decisions." (Royal Packing Co. v. ALRB (1980) 101 Cal.App.3d 826.) Although Farfan's

---

208. Carlson admitted that Madrigal had called her and hence corroborated Madrigal's testimony.

protected activity was shown, and some evidence of unlawful motive might be inferred, the current state of the law dictates that [W]here the employer was motivated by both valid or invalid reasons, a rule of causation is indispensable... 'the General Counsel must at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one.'... The magnitude of the impermissible ground is immaterial...as long as it was the 'but for' cause of the discharge.'" (Royal Packing, supra, quoting from Waterbury Community Antenna v. NLRB (2nd Cir. 1978) 507 F.2d 901; Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721; Wright Line Inc. (1980) 251 NLRB No. 150; see also Nishi Greenhouse, 7 ALRB No. 18 (1981)).

Here, General Counsel failed to rebut respondent's contention that Farfan's attendance record was highly suspect. Nor did it adduce any evidence that respondent condoned similar attendance problems with other employees so as to create an inference that Farfan was singled out for disparate treatment. Thus the "substantiality" of respondent's "business justification" was unquestioned. Further, given the amount of time which had elapsed between Farfan's activities and his discharge the causal connection between the activities and the discharge becomes so attenuated as to become virtually non-existent. (cf. Foster Poultry Farms (1980) 6 ALRB No. 15.)

On the basis of this record, I cannot conclude that Farfan would not have been discharged "but for" his having engaged in protected activities. Farfan's deficiencies in attendance, coupled

with a precipitous thirty-day absence which the company did not excuse, provides an ample basis for his termination and the subsequent refusal to re-hire him.

Accordingly, it is recommended that these allegations (Paragraphs 9 and 10) be dismissed.[209]

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

---

209. Strangely, General Counsel did not present any argumant in its brief on these allegations. Attaching the most charitable interpretation to this omission, it is not surprising that in a case of this magnitude that something should "fall through a crack."

2. PARAGRAPH 32: RETALIATORY "ISOLATION" OF EMPLOYEES

General Counsel alleged that "respondent through its agent...Rendon isolated employees Oscar Suarez and Francisco Suarez because of their union sympathies and activities and because they filed an unfair labor practice charge against respondent...."

Oscar and Francisco Suarez testified that they were members of sprinkler crews[210/] under foreman Amador Rendon in the fall of 1979. Oscar sought to convey the impression that he generally worked laying irrigation tubes for irrigation, and moving equipment such as tractors. He stated additionally that he wore a Union button every day while at work.

Oscar Suarez testified that on one particular morning in October 1979, he and his brother Francisco were waiting to be assigned to their job for the day by their foreman, Amador Rendon. Francisco, at that particular time, handed to Rendon a copy of a charge which had been filed with the ALRB which involved these particular workers. According to Oscar, when Rendon received the charge he assigned the two brothers to make water stops at the Axler Ranch.

A water stop is constructed across an eight foot wide ditch or "cheque." Its purpose is to slow down the flow of water coming from the irrigation canal to insure that the water goes in between the rows of the lettuce which is being grown at the field. The "levantes" or water stops are placed approximately every 15 rows. They are about eight inches high and are constructed with a shovel

---

210. As will later be seen, neither Oscar nor Francisco was technically in that job classification.

as the water flows into the field.The workers have no control over the flow of the water coming into the field and therefore must work ahead of that flow. Oscar testified that he worked all day long on the day in question without taking a break, since not being able to control the flow of water in the field, he simply could not let it run unchecked.

Oscar testified that the only help he and his brother received that day was from two workers from a thinning crew, that these workers worked at the Axler field for about one-half hour and made three water stops. They did not finish the work, and the Suarez brothers had to construct the rest of the levantes.

Oscar admitted that he had done this particular type of job before. However, he had worked with four or five other people while performing this task.

On cross-examination, Oscar Suarez admitted that he worked with a shovel every day. He further admitted that on the day in question, his father, an irrigator, also was working at the Axler field where the two brothers were sent. Oscar also admitted that there were other days in which it was essential to keep the work moving and no breaks could be taken.

Oscar maintained that the day in question was unique because workers usually had assistance when building water stops. However, on that day, only the two Suarez brothers were sent and according to him "they should have sent more people to help us." Oscar stated that following that day he had not been assigned to perform that work and resumed working with others.

Oscar Suarez' ability to recollect events was called into

question when he could not testify concerning the months that certain operations took place, such as planting, or the time periods that he spent performing particular tasks in connection with certain crops. For example, he could not recall how long it takes or how many months he works in placing sprinklers for the lettuce.

Oscar's brother Francisco testified that during the season in question he wore a UFW flag which was noted by the foreman. According to Francisco, when Rendon was handed the charge, he appeared to be a little irritated and told the two brothers to "go over to the Axler." Francisco admitted that when he worked building the levantes that day he was assisted by an irrigator named Pedro. However, Pedro only made about four water stops and then had to return to his function of taking care of the water, controlling its flow. Francisco also noted that at about 11 o'clock he received added assistance, but these people made only three water stops and left at noon. The two people who assisted him were from the thinning crew.

On cross-examination Francisco elaborated on the circumstances of his serving the charge on Rendon. Francisco stated that he signed the charge and gave it to the foreman. The foreman took it, folded it, and then asked Francisco: "What is this for?" Francisco responded: "Here it is for you to sign and for you to go to the state." Thereupon Rendon, according to Francisco, put the paper in his pocket.

Francisco stated that there were four people total working at the Axler field on the day in question, not including those from the thinning crew. A worker named Jose Garcia was present in addition to Francisco's father Julio. Francisco admitted that at times Amador Rendon would send one group of sprinklers

to one field and another group to yet another field, but he would send five or six men if he was "really hurried." Rendon himself would decide how many people to send. Suarez agreed that Rendon sometimes might send five people and sometimes might send two to a field.

Francisco stated that the day following the one in question he was with members of his sprinkler crew and his brother, placing sprinklers in the fields. He was alone or "isolated" with his brother only on one day. He then contradicted himself by admitting that after that particular day the two brothers were assigned to work alone several times, while in days previous he and his brother were also assigned to work, as a pair, by themselves.

Amador Rendon, irrigator foreman, testified that he had two crews under him, an irrigator crew and the other a shoveling and general work crew.[211/] The former has 16 to 18 members while there are 8 to 10 workers in the latter. It is this latter crew to which Francisco and Oscar Suarez belonged. Rendon testified that he would send members of this crew out to various ranches and would not ordinarily send them out as a group.

Rendon stated that he had assigned Francisco and Oscar Suarez to perform the task of making water stops an average of two or three days per week in September, October and November 1979. In September and October, when not making water stops, the Suarezes

---

211. The general field crew is responsible for particular field jobs such as spraying herbicides on weeds, weeding ditch banks, cleaning out ditches with a shovel, preparing fields for row irrigation or making water stops. If needed, they will also go out and lay out sprinklers. Sprinkler crew members might also perform shovel work, but they are often not utilized in this capacity.

were assigned to sprinkler work. In November, they were additionally assigned to cleaning out ditches. On the morning in question, some of the general field crew was sent to the Alamo Ranch for sprinkler work. A few others were sent to clean out ditches at the Layton Ranch. Additionally, Rendon testified that he sent two irrigators and four other shovelers[212] to work at the Axler ranch with the Suarez brothers.

Rendon stated that he assigned the Suarez brothers about three to five mintues after he had received the charge that they gave him. He also stated that he was not surprised or annoyed by the charge. Naturally, it would be difficult for him to have a particularized reaction due to the fact that he was uncertain what the charge was concerned with, since he could not understand the writing it contained. Rendon stated that he sent the two irrigators out to the field early in the morning and asked Jose Rea[213] about 8:30 a.m. to send four additional shovelers there to assist them. On cross-examination, Rendon stated that while he was at several ranches during the day, he arrived at the Axler ranch at about 8:30 in the morning. Rea was there at the time, as well as the four shovelers that Rendon had requested to be assigned there.

Rendon further testified that the Suarez brothers, when assigned to clean out ditches, would at times be working solely with one another. The Suarez brothers would also be assigned to sprinkler work, which is generally performed by groups of three

---

212. Rendon was undoubtedly referring to the thinning crew members sent to assist the brothers later in the morning.

213. Rea was an irrigation foreman at the time.

individuals who would work together. When water stops are being built, even when there are more than two people assigned to the task, the people are grouped only during the time that they are working at the edge of the fields. However, when they spread out over the fields they would be "isolated."

Jose Rea recalled an incident when his crew worked through the lunch period. It occurred on October 30, 1979, at the Sharp Ranch. Francisco and Oscar Suarez, although not in Rea's crew[214/] were in the group that worked through the lunch hour that day. The charge served on Rendon on October 31 concerned this particular incident.

On the morning in question Rea first saw Francisco and Oscar Suarez at the Axler Ranch between 7:00 and 8:00 a.m. doing shovel work and preparing a field for row irrigation. At that time there were two other men in field who were irrigators, one of them being Julio Suarez, the father of the two brothers, and the other being Jose Garcia. Rendon subsequently called Rea on the company radio and requested that Rea bring four additional men from a thinning crew to assist in the work at the field. According to Rea, these men were brought to the field between 8 and 8:30 in the morning and remained working at the Axler Ranch for most of the day. Rea testified that the additional four helped the irrigators and Francisco and Oscar Suarez prepare the field, making water stops for the row irrigation.

Rea testified that at about 9:00 or 9:30 that morning,

---

214. Rea also considered them to be members of the general field crew.

Rendon presented him with a piece of paper and asked him to translate it. It was the charge that the Suarezes had given him. The paper was written in English which Rendon could not read or understand. Rea, interestingly enough, testified that Rendon knew what the paper was, from which may be inferred that he knew it was a charge from the ALRB, but that he did not know what the charge was about. Obviously, and contrary to the allegation under consideration, Rendon could not retaliate for something that he had no knowledge of.

Rea testified on direct examination that as a general rule the members of his crew do not work "together." The general field crew performs its duty either individually, by couples, or working together at most by threes.

Rea testified that the Suarez brothers made water stops in other fields before the 31st of October. However, eight people are usually sent out to make stops in a field of 70 acres, a task which the group of eight can perform in one day.

Under normal circumstances, Rendon would receive an order from Rudy Angulo that a particular field was to be completed by a particular time. Usually a pair of men[215/] would work in each cheque or road in the field: an individual is never sent by himself to do this kind of work. The two work in close proximity to make the stop. However, if, for example, six or eight people are assigned to work in a 70 acre field, each pair is sufficiently separated from

---

215. Rea noted that about fifty percent of the time two men work together in one road; the remainder of the time more than two are so employed.

the other pair, about 200 feet apart by Rea's estimate.

Significantly, Rea stated that after October 31st, Oscar and Francisco Suarez were assigned to make water stops approximately five times or more.

Despite some difficulties presented by inconsistencies in Rendon's testimony,[216] the issue presented here is not strictly, as General Counsel suggests, one of credibility.[217] It is clear, through the testimonies of Rea and Rendon as well as through that of Francisco Suarez, that the Suarez brothers had been assigned to this same task under the same circumstances both before and after the incident in question. Although the work was arduous, it appears that it was part of the Suarez' normal work duties.

It is difficult to attach any discriminatory or particularized significance to the term "isolated" when used in connection with irrigation work. The work is perforce carried out over vast expanses of acreage. The two Suarezes, who customarily rode to the job together, also worked together as a pair. Whether they laid out sprinkler pipe, cleaned out ditches, or, as here, contructed "levantes," the pair would generally be separated over this acreage from other members of their crew for parts if not all of the day.

---

216. Rendon contradicted himself regarding the time he went to the Axler field that day, as well as the number of workers that he saw while there.

217. In its brief, the contention is made that the four thinners sent to assist were at the field for only one-half hour, as Francisco and Oscar testified, thus leaving them isolated, and that respondent's witnesses, who testified that the Suarez brothers had assistance for a longer period, should not be credited.

General Counsel has thus failed to prove that the Suarez' assignment on the day they served a charge on Rendon was any different, and hence carried discriminatory ramifications, from the tasks they performed both before and after that date. Accordingly, it is recommended that this allegation is dismissed.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

3. PARAGRAPHS 45 AND 46: SURVEILLANCE OF UNION ACTIVITIES

General Counsel alleged that on two separate occasions foreman Angel Avila engaged in "surveillance" of union activities.

Worker Gorgonio Lopez, a cutter formerly in the crew of Angel Avila, testified that on one morning in January 1980, he presented a petition to the members of Avila's crew or crew #1. Lopez was accompanied by former loader Ramon Gonzales. At that time, Lopez was a member of the crew of Simon Amaya and Ramon Hernandez, or crew #5, which was working in the same field that day as crew #1. Lopez stated that as he was presenting the petition to a member of the crew, the foreman arrived and immediately gave the order to go to work. According to the witness, Avila also asked the worker to whom Lopez gave the petition whether the worker signed it and if the worker knew what he was signing. Lopez stated that as he was circulating the petition among the crew Avila followed him to another crew member, asking that worker "What happened with you - are you going to sign that paper? Do you know, have you seen it? What are these people doing threeatening the people?" Lopez countered by telling Angel that he was not demanding or forcing anything on the people; that Avila was the one who was threatening them since he was yelling. He further told Avila that that was the reason that they had a charge against him. Upon the urging of a crew member, Lopez gave Avila a copy of the charge. Avila did not wish to accept it, saying "I know that you can throw me into jail, but I'm not going to allow anyone to come into the field." Another worker, Ramon, then read the charge aloud to Avila, and the crew began to work.

Lopez testified that later in the day he presented the petition to some workers at a store where they customarily gathered after work. At that time, five of the workers signed the petition.

Under cross-examination, Lopez stated that he had not yet had the opportunity to speak with the first worker. He merely handed him the petition when Avila arrived and began to "yell" at the worker with the petition after he gave the order to start working. Lopez stated that the recipient of the petition was a worker named Moreno. A second individual to whom the petition was handed to was named Magallon.

Lopez added that some of the workers were gathering up their boxes from the stitcher when the petition was being passed around. Lopez further noted that the crew generally starts to cut all at once when the order is given, although some people like to prepare themselves for the start of work by laying their boxes out.

Lopez' story was essentially consistent when reiterated on cross-examination, although he was a bit uncertain as to the exact distances between himself and foreman Avila when certain instructions regarding the paper were given by Avila. Consequently, I find that his account of events that morning was basically credible. It is apparent that the petition was being circulated at or near the time of the commencement of work. I do not infer, therefore, that Avila's order to start was premature or aimed at stifling the dissemination of the paper.

On another morning in January, 1980, Felix Magana, former crew representative for Villamoor Garcia's crew, Remejio Gonzalez, formerly of Avila's crew, and a Celestino _____, a Union organizer, visited Avila's crew.

Magana passed around a petition which, according to testimony, requested that the company set a date for negotiations and negotiate in good faith so that there would be "no more problems." Magana addressed Avila's crew, saying that he was not going to explain the petition since it was written in English and Spanish, except that he would explain it for those who were unable to read. Magana testified that some members of the crew signed the petition.

Magana visited another group of workers in another part of the field, whereupon Avila stated that the workers should not sign anything until it was explained to them what the petition was about. Magana more or less repeated his previous statements regarding the explanation of the petition and that the petition was purely voluntarily. As Magana went to speak with yet another group of workers, he had an additional exchange with Avila, who by this time,according to Magana, became angry. Avila spoke rapidly, telling the people that the Union was just getting "you into difficulties." Avila and Magana also argued about the discontinuation of the policy of not picking workers up in Calexico but rather having them travel to a location in Holtville. Avila defended same by claiming that the policy was designed to save the workers gasoline. Magana admitted that no one prevented him from passing around the petition.

Foreman Angel Avila himself noted that on several occasions during the lettuce harvest in January 1980, when he arrived at the field, he saw Felix Magana, Celestino _____, a "man from the Union," and Remejio Gonzalez talking with workers before work

commenced. Avila would drive by in his pickup to more or less visually note the people that were working in his crew, park his pickup, put on his work clothes and get prepared generally for work. He would return to where the people were gathered and tell them to begin working. Avila stated that he would usually arrive at a field at about 20 minutes before work began. Avila's initial tasks each day included assigning crews to the particular rows that they were to be working in, and insuring the proper type of lettuce was being cut. Avila stated that he must provide instructions to his workers every morning because the quality of the lettuce in each particular field may vary.

Avila noted that after the crews went into the fields to begin working the three people visiting went in with them. According to the foreman, "When I saw that they were taking the time away from the people and slowing them down, I believe I told one of them that I didn't think that they should be there, because it was already during working hours and the men and workers were already working." Avila asserted that he made these remarks to Celestino between 30 and 45 minutes after the workers had entered the field. When Avila told him that he had to leave but that he could come back during the lunch hour if he wanted to talk to the workers, Celestino got angry and began to say obscene words to the foreman, threatening to "put a suit against me, because I did not permit him to talk to the workers, because I didn't let him be there." After this exchange, the three left the fields.

Avila admitted that he noticed that the three had a paper with them, and that he announced to his crew that they had a right

to read the paper and understand whatever it was that the three people wanted them to sign. "If it was their wish to sign it, go ahead and sign it, but if they did not want to sign it they did not have to."

On another occasion in January 1980, Avila saw Gorgonio Lopez and Ramon Gonzales at a lettuce field. As Avila was organizing the trios to go in to work, Ramon and Gogonio arrived. Avila testified that they showed up about 10 or 15 minutes after work had actually started. Ramon Gonzales had a paper which he told Avila was a complaint against him. When Avila told him that he should take those papers to the office, Gonzales took the paper and placed it in Avila's pickup truck. While this was occurring, Lopez had been talking to the workers. Avila could see that he had a piece of paper with him. Avila reminded Lopez that it was work time, and that he should not be in the fields. According to the foreman, the two were at the work site for about 40 to 50 minutes after work had commenced. After Gonzales and Lopez left the field, some workers asked Avila about this piece of paper. Avila reiterated statements he had made on a previous occasion, that they might sign it if they felt it was to their benefit. If not, they did not have to sign it.

On the first of these occsions when the three who included Magana were at the field, Avila stated he was close by to them for approximately two or three minutes. Avila would tell them to leave several times but they would ignore him.

Avila's testimony concerning these "petition" incidents was fairly consistent despite detailed cross-examination. For example,

asked to repeat statements he made to the workers on those occasions, he reiterated for the most part those that he had proferred during his direct examination. In addition, the central features of Avila's account, such as the words he used regarding the petition or petitions, that Avila would take time each morning to instruct the crews, and that the groups who passed the petitions around went into the fields and remained with the crews after work had started, were fully corroborated by employees Hector Tapia and Eusebio Aranda. Accordingly, I find Avila's account of these incidents reliable, and credit it fully.

Notwithstanding the minor conflicts between testimony adduced by the General Counsel and testimony adduced by respondent, I find that General Counsel has failed to prove, as alleged, that Avila was engaged in surveillance on the two mornings in question. Under Tomooka Brothers, (1976) 2 ALRB No. 52, General Counsel has the burden of showing that respondent, through its supervisor Avila, was consciously engaging in an act of surveillance, i.e., observing employees engaged in protected, concerted activities, such as talking with organizers, and was present at or near those employees for that purpose.

It is not subject to dispute that Avila was on the premises pursuant to his duties or that at least when Magana was involved there was no evidence that Avila was following him or others around, watching them. The "willful" element necessary to establish a violation based on surveillance (see Dan Tudor and Sons v. A.L.R.B., 102 C.A. 3d 805 (1980)) was simply not present here, nor was there a "justifiable impression" (Id.) that Avila's presence was solely due

to an attempt to watch his crew members engage in protected activity. Credited testimony supports the conclusion that the two groups circulating the petition were doing so in the fields after work had actually commenced.[218] Organizing activities even when carried out under the aegis of the access regulation are not to take place during work time (Reg. section 20900(c)(3)). Avila's patience in allowing the groups to remain as long as they did was undoubtedly sorely tested, as he attempted to perform his supervisorial obligation to oversee his crew and start them working.

Accordingly, it is recommended that these allegations be dismissed.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

---

218. Neither Lopez nor Magana testified to the contrary.

4. PARAGRAPH 48: THREATS TO DISCHARGE

a. Facts

Jesus Torres Mendoza worked in the 1979-80 Imperial Valley lettuce harvest as a member of Angel Avila's crew. Simon Amaya worked as Angel's second, or assistant, when he was not supervising another crew.

Torres claimed that near the end of December he was selected by his crew to be the representative for the Union. He averred that both Avila and Amaya were present when the selection took place. General Counsel neglected to call any witnesses to corroborate either the fact of Torres' selection or the presence of supervisors at the time.

Some time in January, Torres was reprimanded by Amaya for not cutting lettuce properly. The worker acknowledged that on that day he was not doing a correct job. According to him, Amaya told him in essence, that for poor work, he could be fired. Torres allegedly responded "...you can fire me whenever you want to." Amaya allegedly then replied: "It isn't exclusively because of your work. It's because you are participating very much with the stops and the Union and all of that." Torres claimed that a few days prior to this incident, he passed out Union leaflets in Amaya's presence. Torres also averred that when he gave Amaya a copy of the charge referring to the "threat," Amaya tore it up and threw it to the ground, all in the presence of other witnesses.

Despite Torres' testimony to the effect that several persons were percipient to the "threat" and the service of the charge, none were called by General Counsel to corroborate Torres'

assertions.

Simon Amaya, a foreman in the lettuce harvest, testified that he knew of a man in his crew by the name of Jesus Mendoza, not Jesus Torres.[219] Amaya was unaware that Torres was a Union crew representative and was uncertain whether or not he had seen Mr. Torres wearing any Union symbols at work. According to Amaya, Torres had problems with cutting lettuce, in that he would cut the lettuce below the proper place. The foreman called his attention to this on several occasions.

On one particular day, January 24th, Amaya recalled that Torres was doing a particularly bad job. Specifically, Amaya stated that contrary to practice and instructions, Torres would remove too many extra leaves on the head of lettuce, or would cut it wholly without the extra leaves. Amaya told him to "straighten up or we would see what we would have to do." He explained to him that he would have to do better work, and that if his problems continued, a foreman higher up would have to be consulted.[220] Torres responded that he was going to go to the Union. According to Amaya, he addressed the foreman in a profane manner and told him that after they left work they would go somewhere and "see what was going to happen."

Contrary to Torres' testimony, Amaya denied that he had seen Torres demonstrating Union support or that he was reprimanding him for that reason.

---

219. The workers' name is actually Jesus Torres Mendoza.

220. Amaya explained that he himself did not have authority to fire someone, even though he might give out warning notices.

Hector Tapia, also a member of Avila's crew at the time in question, testified that he knew Jesus Torres, that Torres worked with him in the same crew in January 1980 in the Imperial Valley. Tapia denied that there was any UFW crew representative in the crew at that time. He also denied seeing Torres wear a UFW button or flag, and likewise denied that there ever was an election for crew representative for his crew around January 1980.

Similarly, Eusebio Aranda worked in crew 1, Angel Avila's crew, in the Imperial Valley in January 1980. Like Tapia, he denied that there was a Union representative in his crew at that time, or that he saw Jesus Torres wearing a Union button or a Union flag at work. Aranda also corroborated the assertions of Simon Amaya that he called Torres' attention to his poor work. Aranda himself stated that he noticed the type of work that Torres was doing, that the lettuce was being cut bare, without leaves, while in other instance the leaves themselves were sliced. Aranda stated that he never heard Amaya say anything about Torres' Union activities.

b. Analysis and Conclusions

General Counsel's brief correctly points out that resolution of this issue hinges upon a credibility determination. In light of the conflict in the testimony, I am unable to resolve the issue in General Counsel's favor. I find that Torres' testimony was inherently unreliable, and accordingly discredit it.

As pointed out above, there were several witnesses to the alleged unlawful statement, as well as to the "election" of Torres as crew representative. The failure to call them gives rise to an inference adverse to Torres' assertions. (See Evid. Code section

452; Broadmoor Lumber Company (1977) 227 NLRB 144). This Board has noted that when it is "faced with a direct conflict in the testimony...there is no additional evidence to shed light on the truth of the allegation. We therefore find that the General Counsel did not meet his burden of proof and we dismiss the allegations." (S. Kuramura, Inc. (1977) 3 ALRB 49).

Notwithstanding the foregoing, I find, as an independent basis to discredit Torres' testimony, that the alleged "threat," as he stated it, was inherently implausible. Torres did not go to Bakersfield to work in respondent's lettuce harvest; and thus did not participate in the work stops.[221] Nor did he work in the crews that had a one-day stoppage in the Imperial Valley in January, 1980. Thus, his assertion that Amaya told him he was being disciplined because of his "participation...with the stops" can have no basis in fact. Furthermore, that Amaya would, seemingly out of the blue, bring up Torres' Union activities in the context of his being disciplined, greatly strains one's credulity.

Accordingly, it is determined that this allegation should be dismissed.

/

/

/

/

/

---

221. Parenthetically, both employee witnesses who testified contrary to Torres, Tapia and Aranda, did participate in the Bakersfield stops, were replaced and then rehired in the Imperial Valley.

5. PARAGRAPH 50: INTERFERENCE WITH EMPLOYEES MEETING WITH A UNION REPRESENTATIVE

a. Facts

General Counsel alleged that "on or about January 28 and January 30, 1980, respondent through its agent Angel Avila interfered with employees meeting with union representative Oliveiro Terrazas."

Oliveiro Terrazas testified that he worked for the respondent from June, 1968, until March, 1978. In that period, Terrazas had been separated from the company for a time; however, he had been reinstated after ALRB proceedings were instituted.[222/] Terrazas had worked as a cutter and packer of lettuce in the crew of Angel Avila.

During January, 1980, Terrazas returned to the property of respondent as a self-styled "organizer." Terrazas testified that his "co-workers asked the Union office that I be given some kind of a card to go and talk to my co-workers in the field."[223/] A David Valles at the Union office gave him a card approximately the size of a business card which contains the witness' name and the handstamp: "United Farmworkers Union, AFL-CIO, P. O. Box 1940, Calexico, California 92231." The card was placed inside a plastic holder which could be pinned on his shirt. The card is rather makeshift in appearance and contains no Union logo or signature from an

---

222. It is unclear from the record whether or not the matter proceeded through issuance of a formal complaint and hearing or whether the matter was resolved informally.

223. This hearsay cannot be used as proof that Terrazas was in fact so designated.

authorized representative.

On January 26, between seven and eight in the morning, Terrazas went to El Arbol, the gathering place of the workers and the foremen in Holtville. He briefly spoke to workers there.[224/] The following Monday, January 28th, he returned to the same location at approximately the same time. While at El Arbol, foreman Angel Avila asked Terrazas to identify himself. The witnes said that he was an organizer and that he had come to talk to his co-workers. Terrazas also produced the card described above and showed it to Avila.

Thereafter, Terrazas boarded the bus containing the workers from Crew 1, as did the foreman and Simon Amaya, another foreman. Once on the bus, Avila again spoke to Terrazas. In Terrazas words, Avila "told me that for me to be able to speak there, I needed a special permit from the company because I was on private property. And he showed me a sign that was on the outside. I told him that the company had signed a paper with the State and the Union where they would allow the free access into the field. And at that time, I took out this paper." The witness produced for the foreman a notice which arose out of a settlement between the respondent and the ALRB in 1977. The notice is one typically issued following a settlement or the finding of a violation involving Section 1153(a) of the Act which enumerates the organizational rights of agricultural employees.

According to Terrazas, Avila then showed the notice to the

---

224. There was no allegation concerning events of January 26.

workers and said that he could not leave the premises merely because Terrazas asked him to leave; that he had to "listen to whatever I said to the workers." There followed a dialogue between Avila and Terrazas about problems that some of the workers had with their holiday checks. Avila also asked Terrazas who had asked him to go there to the bus. After Terrazas named several workers Avila, according to Terrazas, yelled at them, "Is this true?" Terrazas stated that he then told Angel not to threaten the workers. Following this, he and a companion present on the scene, Rafael Ramos, left the area.

Two days later, on the 30th of January, Terrazas appeared at a field known as El Alamo. As it was raining, the members of Crew 1 present at the field waited in and around their cars, and were not working. The people then gathered to arrange for pay advances with their foreman. After Angel had finished with the advances, Terrazas began to talk to the people. Avila, according to Terrazas, intervened, saying that Terrazas was only going to lie to the people. The witness asked Avila if it was a lie that he had fired the representative of the number 1 crew. Avila told him that he had not been fired but rather had been replaced. Terrazas then told Avila to "please let me talk to the people," and requested that Avila leave. Avila responded that he had to remain there with Terrazas; Terrazas answered that "a foreman should leave there when an organizer was talking to the people." At that time, according to Terrazas, the witness was not on company property, but rather was near the highway.

Terrazas testified that he understood that there was an

access agreement in effect, allowing organizers on the property one hour before work, one hour after work and during the lunch period. He believed that the agreement had been negotiated between the Union and the company: the ALRB notice referred to above represented to him a copy of that agreement.

Terrazas receives no pay as an organizer for the Union, nor any benefits. No evidence of his representative status, save the card and his self-serving testimony, was contained in the record. Terrazas declined to say that he notified anyone from the company or the Union in advance that he was going to be at the Holtville site on the 26th of January. He merely presented his card to Amaya when he arrived on the scene. Similarly, no showing was made of advance notification for his visits of the 28th and 30th. Terrazas stated that when he went out to talk to the workers, his purpose was to tell them not to "be afraid of Angel"; that he would be there to assist them, and to give them "courage" in pressing their demands for wage increases and retroactive pay.

Terrazas was under the impression that the workers at Sam Andrews had, by this time, not received a pay increase. He was similarly unaware of the retroactive pay that certain workers had received.

On cross-examination, Terrazas' credibility was seriously undermined when he testified contrary to assertions made on direct concerning Avila's conduct on January 30. Terrazas admitted that after Avila arranged for the loans to crew members he walked away. Terrazas did not begin to speak to workers until after Avila was finished and had left. Due to the rain, there was no work that day.

The workers and Terrazas left the field about the same time. He stated that at this time, he did not have an opportunity to speak to the workers. Given these inconsistancies, it is difficult to attach credence to Terrazas account of his alleged exchange with Avila on January 30, even given Avila's corroboration that he discussed the "firing" of a worker with Terrazas (see below).

Terrazas further admitted that on the twenty-eighth he arrived nearly at the time when the buses were to depart from the fields. Avila's conduct may therefore be interpreted not so much as "interference," but as a fulfillment of his obligation as foreman to announce the beginning of the work day.

Avila testified that he saw Terrazas one Saturday in January 1980 at El Arbol.[225/] Terrazas was talking to the workers in the harvest crews as the crews were beginning to gather prior to the commencement of work. Avila saw Terrazas go towards the bus, but the foreman then got in his pickup and left to go to the field. He did not see Terrazas for the remainder of the day.

On the following Monday, Avila saw Terrazas at El Arbol, again at about 6:30 a.m. That day, Avila had received complaints that he had been distributing checks for holiday pay to people who were his "favorites" and that Terrazas was so informing his crew. Avila wished to clarify the situation in the presence of Terrazas and the whole crew. Inside the bus where all were assembled, Avila challenged Terrazas to tell him who it was that he supposedly gave the preferred checks to. When Terrazas mentioned a specific worker,

---

225. He recognized Terrazas as a former employee.

Avila explained to the others that the worker had been ill during the holidays, and would be thus entitled to his pay . Terrazas then named two other workers, but Avila virtually ignored him. The workers themselves, Francisco Vila and Heriberto Lopez, wished not to be the subject of the discussion. Terrazas and Avila were on the bus together for 15 or 20 minutes. The bus then proceeded to the fields.

The next time Avila saw Terrazas was on the following Wednesday at a field called El Alamo. Since it was raining, workers were standing around waiting to see if they would work. Workers were scheduled to receive pay advances at that time. At about 8:30 or 9:00 in the morning, there was a discussion between Terrazas and the foreman concerning a particular individual whom Terrazas accused the foreman of firing. Avila denied that he had so treated the worker. Terrazas nevertheless said that he had spoken to the Union and that they were going to file complaints against the foreman. Avila said that was fine and left.

Thus, by Avila's account, he did not in any way "interfere" with workers meeting or talking with Terrazas. On the three occasions that he noted Terrazas' presence, Avila did not prevent him from speaking with workers, insist that he leave, interrupt him, remain in the area where Terrazas was speaking, or, in general, cast aspersions on Terrazas' efforts.

Two employees who were members of Avila's crew, Eusebio Aranda and Hector Tapia, testified that they were acquainted with Terrazas. Both stated that they saw Terrazas in January 1980, but denied any knowledge that he was their crew representative, that

they, as individuals, or that the crew as a whole asked him to be their representative, or designated him as such. Neither witness stated that they saw Terrazas in January 1980 wearing a Union identification badge.

b. Analysis and Conclusions

Quite clearly, this allegation essentially rises and falls upon its facts. Viewing Terrazas' testimony in its most logical light, it appears that he felt that his presence would give "courage" or "encourage" his fellow workers to press their complaints or grievances against the company, as he had done in his prior ALRB experience. He was apparently not well-informed regarding the status of these "grievances," as well as on the issue of access, thus casting doubt on whether he occupied an official or qualified capacity with the Union.[226/]

As access proposal agreed to in February 1979[227/] by Respondent and the Union provides for advance notification to the company of the names of representatives. No company personnel were told of Terrazas' "official" status, or of his right, if any, to be on company property, or of the simple fact that he would be on their property. Avila, undoubtedly recognizing the former employee, was not obliged to treat Terrazas as anyone other than that, and could not consciously

"interfere" with "employees meeting with [a] union representative"

---

226. As noted, no one from the Union corroborated Terrazas' assertions, or substantiated General Counsel's allegation that Terrazas was in fact a "Union representative."

227. Interestingly, both the union and Respondent access proposals exchanged in November 1979 contain somewhat different wording of this provision.

whose credentials were not established.

Notwithstanding any of the foregoing, there is simply not enough evidence to show that Avila "interfered" with any meetings. Assuming, arguendo, that Terrazas' representative capacity is established, the facts reveal that his discussions with workers on the 28th were curtailed because it was time to go to work, and the foreman could not obviously leave the bus; on the 30th, Terrazas began talking to workers only after Avila left.

Furthermore, General Counsel once again failed to adduce any corroborative evidence regarding the alleged conversacions Terrazas had with Avila. The legal discussion regarding che treatment of uncorroborated testimony which conflicts with that of other witnesses, contained in the preceding section on "threats" to Jesus Torres, is incorporated by reference.

The interpretations Terrazas placed on Avila's actions are not therefore entitled to preponderating weight. In addition, I find several significant inconsistencies in that testimony itself and cannot fully credit it. If, as Terrazas maintained, his co-workers had either asked him directly to be a representative or requested that the Union designate him as such, it would seem that he would have had to have some contact with crew members prior to the late January encounters with the crew, Amaya and Avila. General Counsel failed to adduce any evidence on this point, particularly from Terrazas himself. One may infer from this failure that Terrazas was less than candid regarding his "appointment" as Union "representative." This lack of candor infects the entirety of his testimony and detracts from the credence one may attach to it.

I recommend that this allegation be dismissed.

IV. SUMMARY

A. It is recommended that the following allegations be found as violative of the section of the Act indicated:

1. Section 1153(a): Paragraph 33 (Fred Andrews' speech to workers in October; 1153(e) aspect dismissed).

2. Sections 1153(a) and (e):

a. Paragraph 18: Unilateral increase of lettuce harvest piece rate;

b. Paragraph 19: Unilateral installation of screens on bus windows;

c. Paragraph 40: Unilateral discontinuation of bus transportation for Imperial Valley lettuce harvest employees.

B. It is further recommended that the following allegations be dismissed:

1. Section 1153(a):

a. Paragraph 30: Threats to discharge;

b. Paragraphs 45 and 46: Surveillance by Angel Avila;

c. Paragraph 48: Threat to discharge Jesus Torres;

d. Paragraph 50: Interference with "union representative."

2. Sections 1153(a) and (c):

a. Paragraphs 9 and 10: Discharge and refusal to rehire F. Farfan;

b. Paragraph 13: Tractor driver layoff;

c. Paragraph 27: Warning notices to Orozco's crew;

d. Paragraph 29: Change in recall method (also termed a Section 1153(e) violation);

e. Paragraph 31: Discharge of crews 1, 2, 3, and part of 5;

f. Paragraph 35: Discharges of Lopez and Medina;

g. Paragraph 36: Layoff of Pedro Abrica (also Section 1153(e) allegation);

h. Paragraph 38: Failure to layoff thinning crews;

i. Paragraph 41: Refusal to rehire;

j. Paragraph 42: Taking away seniority (also alleged as Section 1153(e) violation);

k. Paragraph 43: Changing work schedule;

l. Paragraph 44: Warning notice to G. Contreras.

3. Sections 1153(a) and (e):

a. Paragraph 14: Unilateral mechanization displacement;

b. Paragraph 16: Unilateral wage increase to shop employees;

c. Paragraph 17: Unilateral change in loan repayment;

d. Paragraph 22: Unilateral change in working conditions;

e. Paragraph 25: Unilateral granting of retroactive pay;

f. Paragraph 26: Unilateral wage increase;

g. Paragraph 39: Refusal to pay Thanksgiving pay (also alleged as a Section 1153(e) violation).

4. Sections 1153(a) and (d): Paragraph 32: "Isolation" of Francisco and Oscar Suarez.

V. RECOMMENDED ORDER

Respondent, its officers, agents and representatives shall:

1. Cease and desist from:

a. Failing or refusing to bargain in good faith or consult with the certified bargaining representatives concerning the following matters:

(1) Wage increases to its employees;

(2) Safety measures instituted ostensibly for the benefit of its workers;

(3) Transportation benefits and/or accomodations for its employees.

b. Threatening employees with a curtailment of production in the event that they, through their representative, insist on certain items in collective bargaining.

c. In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by Labor Code section 1152.

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

a. Remove the screens it has attached to the windows of buses used to transport its agricultural workers;

b. Recommence the providing of bus transportation for Imperial Valley lettuce harvest workers from a central pick-up point in Calexico to its harvest sites;

c. Sign the attached Notice to Employees and post copies of it at conspicuous places on its property for

a period of 60 days, the times and places of posting to be determined by the Regional Director, such times and places to encompass lettuce harvests in the Imperial Valley and in Bakersfield as well as melon harvests in those locations. Copies of the Notice, after translation by the Regional Director into appropriate languages, shall be furnished by Respondent in sufficient numbers for the purposes described herein. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

d. Hand out copies of the attached Notice, in appropriate languages, to all current employees who request it.

e. Mail copies of the attached Notice in all appropriate languages, within 31 days after the date of issuance of this Order, to all employees who worked during 1979 lettuce harvests in Bakersfield and the Imperial Valley, and who are no longer employed by the respondent.

f. Arrange for a representative of respondent or a Board agent to read the attached Notice in appropriate languages to the assembled employees of respondent during each of its lettuce and melon harvest seasons, for a period of one year, at each of its two harvest sites. Said reading is to take place prior to the commencement of work, following the end of the work day, or during the period when employees customarily take their lunch break.[228] The reading or

---

228. General Counsel requests that the Union be

(Footnote continued...)

or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent sha 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.

g. Notify the Regional Director in writing, within 31 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

---

(Footnote 228 continued)

permitted to address respondent's employees on company time to remedy one of the violations found. I find that any further expenditure of sums pursuant to this case, apart from the expense of duplicating and mailing the attached Notice, will be punitive rather than remedial in nature. This respondent was called upon to defend a spate of charges, many of which were totally groundless, while others were inadequately investigated, if at all, in the rush to include them in the complaint. Prosecution of many aspects of the complaint bordered on the frivolous, and occasioned major exes on the part of the State and the respondent. In an effort to avert further such expenses, and to avert compounding the failure of the General Counsel to exercise the appropriate discretion in deciding not to pursue certain claims, I am recommending that the reading of this Notice take place during non-work hours.

/

/

/

/

/

/

/

/

/

periodically thereafter in writing what further steps have been taken in compliance with this Order.[229]

DATED: January 11, 1982

MATTHEW GOLDBERG
Administrative Law Officer

---

229. As per Kaplan's Fruit and Produce Co. 6 ALRB No. 36 (1980) I find the application of the make-whole remedy, prayed for by the General Counsel in the complaint and alleged by the Union in its post-hearing brief, to be singularly inappropriate. The Union here was decidedly responsible for the slow pace of negotiations presenting a more emphatic situation than in Kaplan's where the Board attached equivalent responsibility to the Union and the employer for the tempo of bargaining. Likewise, extending the Union's certification would not effectuate the policies of the Act. In the initial year after certification, the Union failed to present a complete collective bargaining proposal. The record is wholly devoid of evidence that the respondent postponed or delayed the negotiations, or sought to avoid its obligation to bargain save in the three particulars for which violations have been found. It was at all times eager to meet with the Union. Extending the certification year might be viewed as a condonation of negotiating tactics which permit a Union to avoid its responsibilities while penalizing an employer which attempts to fulfill its obligations.

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

We will do what the Board has ordered and also tell you that:

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

1. To organize themselves;

2. To form, join, or help unions;

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

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

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

Because this is true, we promise that:

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

Especially:

WE WILL NOT fail or refuse to bargain with your Union about raising your wages, changing or ending bus transportation from Calexico to our fields, putting metal screens on those buses or take any other steps which we feel involve your safety.

WE WILL NOT threaten you with less work or the decrease of certain crop production if you, through your Union, insist on certain items in your contract.

WE WILL remove the screens on the company buses, and start to provide transportation again from Calexico to our fields in the Imperial Valley.

DATED:

SAM ANDREWS & SONS

By_____
Representative Title

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

DO NOT REMOVE OR MUTILATE.